

# Applying the Break: Religion and the Peremptory Challenge

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## INTRODUCTION

The foundation of the American legal system consists of rights, and those rights are brought to life by a diverse array of procedures and processes. Among these procedures is the peremptory challenge, a tool of jury selection which has been an integral component of American judicial history. However, the challenge is currently undergoing extensive examination as courts attempt to determine whether equal protection principles should shape its nature and use, and, if so, in what manner and to what extent. Ultimately, the debate regarding the proper nature and scope of the peremptory challenge is rooted in the fact that it pits two important rights against one another: the litigants' right to an impartial jury, and the excluded juror's right to be free from unlawful discrimination.

Over the past nine years, the United States Supreme Court has resolved this debate in certain isolated contexts. In its landmark holding in *Batson v. Kentucky*<sup>1</sup> and the series of opinions which followed, the Court dictated that the peremptory challenge may not be used in a racially discriminatory manner. In 1994, the Court extended its examination of the constitutional limits on the use of the peremptory challenge to the context of gender. In *J.E.B. v. Alabama ex rel. T.B.*,<sup>2</sup> the Court held that the Fourteenth Amendment's equal protection guarantee prohibits the exercise of peremptory challenges on the basis of gender.

In the wake of *J.E.B.*, questions still abound. Scholars will likely engage in theoretical debates regarding the propriety of the Court's ruling. Lower courts are left to the task of implementing the holding, though the way in which lower courts have implemented *Batson* provides ample guidance. The most critical question that must be resolved, however, is whether and to what extent the holding in *J.E.B.* should be applied in other contexts.<sup>3</sup> More specifically, now that our nation's highest court has resolved the issue of whether the

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1. 476 U.S. 79 (1986).

2. 114 S. Ct. 1419 (1994).

3. Indeed, some lower courts had already considered the applicability of *Batson* in contexts other than race even before the Supreme Court granted certiorari and rendered its decision in *J.E.B.* See, e.g., *United States v. De Gross*, 913 F.2d 1417 (9th Cir. 1990) (extending *Batson* to gender and thus ruling that the Equal Protection Clause prohibits peremptory challenges based on gender); *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988) (holding that *Batson* does not apply to gender-based peremptory challenges); *United States v. Cresta*, 825 F.2d 538 (1st Cir. 1987) (holding that *Batson* does not preclude peremptory challenges based on age), *cert. denied*, 486 U.S. 1042 (1988); *State v. Culver*, 444 N.W.2d 662 (Neb. 1989) (refusing to extend *Batson* to gender-based peremptory challenges).

Equal Protection Clause bars peremptory challenges based upon gender, lower courts will increasingly face the argument that religion-based peremptory strikes are similarly constitutionally impermissible.

This Note argues that an extension of *Batson* and *J.E.B.* to the context of religion is neither constitutionally warranted nor practically desirable. Part I includes a discussion of the nature of trial by jury and the jury selection process. Part I explains how parties go about exercising their right to trial by jury. Part II focuses on the history of the peremptory challenge and examines the functions that the peremptory challenge performs. Part II also discusses recent Supreme Court decisions which have shaped the use of the peremptory challenge and outlines the present debate over extending those decisions to other contexts. Part III explores the nature of the current issue regarding the applicability of limitations on the free, uninhibited use of the peremptory in the context of religion. Part III presents the constitutional considerations and practical implications which must be taken into account when considering whether religion-based peremptory challenges should be prohibited. This Note concludes by arguing against any proposed restrictions on the exercise of religion-based peremptory challenges by suggesting that the right to an impartial jury must prevail.

## I. THE MAKING OF A JURY

Before exploring the nature of the peremptory challenge, its functions, how it has been shaped by constitutional principles, and whether courts should prohibit peremptory challenges based upon religion, a general overview of the jury selection process and the place the peremptory challenge holds in that process is useful. Trial by jury has long been a revered right in the American judicial system. Indeed, one of the grievances that the authors of the Declaration of Independence cited was the King's insistence on depriving the colonists of this right; thus, the right to a jury trial was "among the rights of Englishmen for which the revolution was fought."<sup>4</sup> The inclusion of this right in our nation's Constitution further demonstrates its importance. The Sixth Amendment guarantees the right to an impartial jury to those charged with crimes,<sup>5</sup> while the Seventh Amendment preserves the right to a jury trial in civil cases in which such a right existed at common law.<sup>6</sup>

While jury trials form the basis of our judicial system, these trials in turn are based upon jury selection methods.<sup>7</sup> The task of seating a jury involves three basic phases.<sup>8</sup> In phase one, a list of prospective jurors is compiled.<sup>9</sup>

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4. V. HALE STARR & MARK MCCORMICK, *JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS* § 1.0 (2d ed. 1993).

5. U.S. CONST. amend. VI.

6. U.S. CONST. amend. VII.

7. See 1 ANN FAGAN GINGER, *JURY SELECTION IN CIVIL AND CRIMINAL TRIALS* §§ 1.1-2.46 (1984).

8. *Id.* § 2.1.

9. *Id.* While states may differ in how they actually form jury pools, lists of registered voters, licensed drivers, and utility customers are commonly utilized. STARR & MCCORMICK, *supra* note 4, at § 2.4. Federal law provides that the names of prospective jurors are to be chosen from actual voting lists and permits supplementation with other lists. 28 U.S.C. § 1863(b)(2) (Supp. V 1993).

In the second phase, the court excuses some of these prospective jurors for reasons such as inability to speak the English language, physical and/or mental infirmity, age, and occupation.<sup>10</sup> The group which remains, called the venire, then reports to the courthouse, where the final stage of the jury selection procedure, voir dire, takes place.

Voir dire is the primary mechanism by which the group that will ultimately hear the case is empaneled. According to one commentary, "[L]awyers have come to believe, with apparent justification, that trials are often won or lost at this stage of the trial process."<sup>11</sup> Voir dire involves a process whereby the prospective jurors are questioned so that the court and the parties can ascertain any potential biases or prejudices that may prevent the jurors from impartially receiving and weighing the evidence.<sup>12</sup> Courts assume that all jurors have the ability to be impartial and to set aside their preconceived notions; the purpose of voir dire is to test that assumption. The goal of achieving impartiality is accomplished by permitting the parties to challenge prospective jurors in one of two ways: the challenge for cause and the peremptory challenge. Through the jurors' responses during voir dire, attorneys gather the information they need to exercise intelligently these challenges.<sup>13</sup> Voir dire thus becomes a vehicle through which a party's constitutional right to a fair and impartial jury is secured.

Challenges for cause and peremptory challenges bear many similarities. A successful challenge of either type results in a juror's being excused from serving. In addition, both the challenge for cause and the peremptory challenge are creatures of statute and are available in both criminal and civil cases.<sup>14</sup>

Here, however, the similarities between the two types of challenges end. At both the state and federal level, challenges for cause are unlimited in their

10. 1 GINGER, *supra* note 7, §§ 2.31-32.

11. STARR & MCCORMICK, *supra* note 4, § 3.83. One practitioner recalls a case in which it took five weeks to select a jury, while it took only four weeks to present the evidence. Patrick A. Tuite, *Voir Dire with a Blindfold*, CHI. DAILY L. BULL., May 25, 1994, at 6.

12. See STARR & MCCORMICK, *supra* note 4, § 10.0. State and federal courts differ in the ways in which such questioning may be conducted. In the federal system, judge-conducted voir dire is prevalent. *Id.* § 10.0, at 242. In some state jurisdictions, attorneys are given the responsibility of questioning the venire. See *id.* § 10.0, at 243. Finally, in some state courts, both the trial judge and attorneys participate, with the judge initiating the process by conducting a general examination of the jurors. See *id.* § 10.0, at 246.

13. Attorneys may have at their disposal other information about each prospective juror prior to entering the courtroom. Most courts, both in the states and in the federal system, require those whose names are drawn as prospective jurors to complete a questionnaire. 2 GINGER, *supra* note 7, § 12.1. Some attorneys conduct formal investigations to gather information about prospective jurors. See 2 *id.* §§ 13.1-.20 (discussing the use of jury investigation teams made up of volunteers); ARNE WERCHICK, CIVIL JURY SELECTION § 5.2 (2d ed. 1993) (discussing the use of professional researchers in the jury selection process). *But see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-30 (1980) ("Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.").

14. *Swain v. Alabama*, 380 U.S. 202, 217 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

number.<sup>15</sup> However, challenges for cause are not automatic; the trial judge must be satisfied that the requisite showing has been made before excusing a juror for cause.<sup>16</sup> Such a challenge requires that the exercising party "show that a pervasive bias exists that violates the parties' 'right to an impartial jury.'"<sup>17</sup> The type of bias which warrants a challenge for cause may be either implied or actual.<sup>18</sup> A claim of implied bias might arise by virtue of a relationship between the prospective juror and a party, witness, or victim.<sup>19</sup> Actual bias exists when, due to a preconceived notion about the case, parties, or witnesses, a prospective juror appears unable to act impartially and without prejudice.<sup>20</sup> Even if a juror appears to be biased, however, the judge may still deny a challenge for cause and allow the juror to serve if the judge is convinced that the juror can be fair and impartial despite his apparent bias.<sup>21</sup>

On the other hand, the peremptory challenge "permits a party to excuse a juror for any reason that the party sees fit, or for no reason at all."<sup>22</sup> The nature of the peremptory challenge therefore provides a sharp contrast to that of the challenge for cause: "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."<sup>23</sup> In many instances, the grounds upon which peremptory challenges are based are those "normally thought irrelevant to legal proceedings."<sup>24</sup> Thus, in exercising this type of challenge, attorneys often rely upon suspicion, experience, stereotypes, and instinct.<sup>25</sup> State and federal statutes therefore restrict the number of peremptory challenges available to each party.<sup>26</sup> In summing up the nature of the peremptory challenge, the Supreme Court has thus described it as a challenge

15. See STARR & MCCORMICK, *supra* note 4, § 11.4.1.

16. See *id.* § 2.11.

17. *Id.* § 11.4.1 (quoting *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972)).

18. 1 GINGER, *supra* note 7, § 8.2.

19. 1 *id.*

20. 1 *id.*

21. STARR & MCCORMICK, *supra* note 4, § 11.4.1.

22. JAMES J. GOBERT & WALTER E. JORDAN, *JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY* 269 (2d ed. 1990). Of course, this definition has been modified by *Batson* and *J.E.B.* As a result of those holdings, a reason must be given for exercising peremptory challenges when a *prima facie* showing of race or gender discrimination has been made. See *infra* part II.B.1-2.

23. *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (citing *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

24. *Id.*

25. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 24 (1988).

26. For instance, federal law provides that each party in a civil case is entitled to exercise three peremptory challenges. 28 U.S.C. § 1870 (1988). In criminal cases, three peremptories may be exercised by each side if a misdemeanor is charged, while felony charges warrant ten peremptories for the defendant and six for the prosecution. FED. R. CRIM. P. 24(b). State statutes vary widely in the number of peremptory challenges they permit. 1 GINGER, *supra* note 7, § 8.5. In the State of Indiana, each party to a civil action may exercise three peremptory challenges. IND. CODE § 34-1-20.5-3(a) (1994). The number of peremptory challenges in criminal cases varies depending on the crime. If the defendant is charged with capital murder, the prosecution and defense may each exercise twenty peremptory challenges. *Id.* § 35-37-1-3(a) (1994). In cases involving noncapital murder and class A, B, or C felonies, each side may exercise ten peremptory challenges. *Id.* § 35-37-1-3(b) (1994). For all other crimes, five peremptory challenges per side are permitted. *Id.* § 35-37-1-3(c) (1994).

which may be exercised "without a reason stated, without inquiry and without being subject to the court's control."<sup>27</sup>

## II. THE LIFE OF THE PEREMPTORY CHALLENGE

In order to evaluate the propriety of precluding the exercise of religion-based peremptory challenges, it is important to understand the history of the challenge and the various functions it performs in the jury trial process. Part II.A addresses these issues and explains why some commentators view the peremptory challenge as an integral component of trial by jury. Part II.B then traces the way in which the Supreme Court has recently changed the nature of the peremptory challenge in the contexts of race and gender. Part II.B also suggests that religion will be the next juror attribute that parties will argue is an unconstitutional basis for exercising a peremptory challenge.

### *A. The History and Functions of the Peremptory Challenge*

The peremptory challenge has deep and significant historical roots. In praising its purposes and functions, both the Supreme Court and commentators have made note of the peremptory's "very old credentials."<sup>28</sup> The origin of the peremptory challenge can be traced as far back as Roman times, when, in 104 B.C., the Lex Servilia permitted each party to a dispute to call one hundred triers and to reject fifty of those summoned by the other.<sup>29</sup> The common law of England incorporated the peremptory challenge where, in criminal actions, peremptory challenges "on both sides became the settled law."<sup>30</sup> Early in the formative years of the United States, the peremptory challenge was a sanctioned and recognized aspect of trial by jury. The federal system ratified its use as early as 1790 by statutorily allowing a defendant accused of treason to exercise thirty-five peremptory challenges; defendants charged with offenses punishable by death were permitted to exercise twenty peremptory challenges.<sup>31</sup> States quickly followed suit, enacting statutes governing the number and use of peremptory challenges.<sup>32</sup> By 1965, all states had enacted statutes requiring that a certain number of peremptory challenges be given to parties in both civil and criminal cases.<sup>33</sup>

Not only has the peremptory challenge been noted for its historical use and acceptance, but its purposes and the functions it performs have caused it to be recognized by courts and commentators alike as a significant, valuable, and integral aspect of the jury selection process. Over a century ago, John Proffatt

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27. *Swain*, 380 U.S. at 220 (citations omitted).

28. *Id.* at 212. Justice White's majority opinion in *Swain* incorporates an extensive and detailed review of the history of the peremptory challenge in England and the United States. *See id.* at 212-19.

29. WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 145 (New York, James Cockcroft & Co. 1875).

30. *Swain*, 380 U.S. at 213.

31. *Id.* at 214.

32. *Id.* at 215.

33. *Id.* at 217.

described the peremptory challenge as "highly esteemed and protected in law."<sup>34</sup> While the Supreme Court has held that the right to peremptorily challenge prospective jurors is itself not one of constitutional proportions,<sup>35</sup> the peremptory challenge has been regarded as an essential means of safeguarding a right that is constitutionally recognized and protected—the right to an impartial jury.<sup>36</sup> Of course, the entire process of voir dire serves this purpose because voir dire allows the court and parties to attempt to uncover any prejudices and biases that might prevent a prospective juror from being impartial.<sup>37</sup> Nevertheless, because parties can exercise a peremptory challenge without stating a reason, it has been viewed as an especially effective and necessary mechanism through which a party's constitutional right to an impartial jury is realized. Over one hundred years ago, William Forsyth commented, "The right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial."<sup>38</sup> And it was at this same point in history, that the Supreme Court described the peremptory challenge as "essential to the fairness of trial by jury."<sup>39</sup> Although not a constitutional right, the Court found the peremptory challenge to be sufficiently important in *Swain v. Alabama*<sup>40</sup> to hold that, even absent a showing of prejudice, denial or impairment of this right would constitute reversible error.<sup>41</sup>

There are several ways in which the nature of the peremptory challenge contributes to the empaneling of an impartial jury. Allowing the free use of the challenge permits parties to "eliminate extremes of partiality on both sides."<sup>42</sup> The challenge for cause cannot be fully relied upon to eliminate such partiality because trial judges strictly construe it; generally, it is "narrowly confined to instances in which threats to impartiality are admitted or presumed from the relationships, pecuniary interests, or clear biases of a

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34. JOHN PROFFATT, A TREATISE ON TRIAL BY JURY § 155 (1877).

35. See *Stilson v. United States*, 250 U.S. 583, 586 (1919). The authors of the Sixth Amendment did consider including the right to peremptorily challenge jurors in the Constitution. This provision was eliminated, however, because the authors felt that the impartial jury guarantee included in the Sixth Amendment encompassed the right to question and challenge jurors. Barbara L. Horwitz, Comment, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 U. CIN. L. REV. 1391, 1397 (1993).

36. See Thomas A. Hett, *Batson v. Kentucky: Present Extensions and Future Applications*, 24 LOY. U. CHI. L.J. 413, 413 (1993); Robert T. Prior, *The Peremptory Challenge: A Lost Cause?*, 44 MERCER L. REV. 579, 579 (1993). The Sixth Amendment expressly secures for the criminally accused the right to an impartial jury: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI. The Supreme Court has also recognized that the Due Process Clause of the Fifth Amendment confers upon civil litigants the constitutional right to an impartial jury. See, e.g., *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.").

37. See STARR & MCCORMICK, *supra* note 4, §§ 9.0-1.1.

38. FORSYTH, *supra* note 29, at 145.

39. *Lewis v. United States*, 146 U.S. 370, 376 (1892).

40. 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

41. *Id.* at 219.

42. *Id.*

prospective juror."<sup>43</sup> Thus, in the pursuit of an impartial jury, the peremptory challenge serves as a supplement to the challenge for cause.

The peremptory challenge also functions in some instances as a substitute for the challenge for cause. During voir dire, a situation may arise in which an attorney has a legitimate concern about a prospective juror's ability to be fair and impartial; however, the attorney may not be able to precisely pinpoint and articulate this concern so as to warrant a challenge for cause.<sup>44</sup> In such a situation, the attorney can employ the peremptory challenge where the challenge for cause might not succeed in eliminating the potentially partial juror from the panel.<sup>45</sup>

In addition, an attorney may also attempt to lay the foundation for a challenge for cause through probing voir dire questioning, but the court might then deny the challenge. In the process, the attorney's effort may have engendered hostility—and thereby invited partiality—in the particular juror to whom the questions were directed. The peremptory challenge can be used in this situation to prevent this from occurring by serving as a "shield" against such failed challenges for cause. If the trial judge denies a challenge for cause against this juror after the attorney has engaged in such intensive questioning, the party who questioned the juror can excuse the juror by exercising a peremptory challenge.<sup>46</sup> When used in this manner, the peremptory challenge can shield the exercising party from any potential hostility felt by the juror as a result of the potentially intrusive, alienating, and probing nature of the questioning.<sup>47</sup> Because an attorney knows that he can peremptorily challenge a juror whom he feels his questioning has alienated, the attorney will be encouraged to put aside the hesitation he might otherwise feel to inquire vigorously and deeply into the potential biases of prospective jurors.<sup>48</sup>

Since by its nature the peremptory challenge requires no explanation, it performs other valuable functions besides helping to achieve the judicial system's goal of seating an impartial jury. For instance, the availability of the peremptory challenge encourages parties to have more confidence in and respect for the process which they have chosen to resolve their dispute. The peremptory challenge serves as a sort of "token," representing to the litigants

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43. *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981).

44. *See State v. Davis*, 504 N.W.2d 767, 770 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994). In *Davis*, the court gave as an example a situation in which a juror may express doubt about his ability to be fair but is "rehabilitated" by subsequent questioning from opposing counsel or the judge. *Id.*

45. In this respect, few would likely argue that the peremptory challenge is a perfect tool for screening partiality out of the jury system. Indeed, the exercise of a peremptory might actually result in an impartial juror being excused. Nevertheless, the importance of the right to an impartial jury justifies incurring the cost of such an occasional occurrence: "The fact that some unbiased jurors may be excused in the process is an affordable price to pay for removing doubts about a particular juror's impartiality and competence, especially when the vote of one unbiased juror can make a critical difference." *Id.*

46. *See STARR & MCCORMICK*, *supra* note 4, § 11.4.3.

47. *Id.*

48. *See Davis*, 504 N.W.2d at 770; *see also* Barbara A. Babcock, *Jury Service and Community Representation*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 460, 479 (Robert E. Litan ed., 1993) ("The peremptory challenge is the insurance that makes genuine inquiry into juror bias possible.").

that their right to an impartial jury is not a hollow guarantee and does not lie beyond their control.<sup>49</sup> Affording parties the right to exercise these challenges "demonstrates that the jury trial system is a just mode of dispute resolution because it allows the litigant to be involved in selecting an impartial jury by dismissing the jurors he or she does not like."<sup>50</sup> Blackstone recognized and praised this quality of the peremptory challenge, noting that it "allows the litigant to dismiss 'those he fears or hates the most, so that he is left with "a good opinion of the jury, the want of which might totally disconcert him."'"<sup>51</sup> The Supreme Court has also acknowledged this attribute of the peremptory challenge:

The function of the challenge is . . . to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"<sup>52</sup>

In addition, because the exercise of a peremptory challenge requires no explanation, an attorney can dismiss a juror without having to ask potentially embarrassing questions of the juror.<sup>53</sup> According to one author, the peremptory challenge, made without giving any reason, also "avoids trafficking in the core of truth in most common stereotypes . . . . [W]e have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not."<sup>54</sup> The peremptory challenge thus prevents the attorney from being required to make a generalized statement about a common stereotype of the group to which the juror belongs and upon which the attorney may have based his decision to challenge the juror.<sup>55</sup>

### *B. The Changing Face of the Peremptory Challenge*

In the short span of nine years, the United States Supreme Court has significantly altered the traditional nature of the peremptory challenge and restrained its uninhibited use. The Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits the exercise of peremptory challenges which are based upon race and gender. This Section discusses the five Court rulings which have shaped the exercise of the peremptory challenge and suggests that, because the Court has finally broken beyond the confines

49. See Prior, *supra* note 36, at 583 ("[T]he ability to remove extremes of partiality is an explicit reminder of the right to an impartial jury.").

50. STARR & MCCORMICK, *supra* note 4, § 11.4.3 (footnote omitted).

51. Babcock, *supra* note 48, at 464 (quoting Barbara A. Babcock, *Voir Dire: Preserving 'Its Wonderful Power'*, 27 STAN. L. REV. 545, 552 (1975) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*353)).

52. Swain v. Alabama, 380 U.S. 202, 219 (1965) (citation omitted) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

53. See STARR & MCCORMICK, *supra* note 4, § 11.4.3.

54. Babcock, *supra* note 51, at 553-54 (footnote omitted).

55. STARR & MCCORMICK, *supra* note 4, § 11.4.3.



of race-based challenges, parties will now argue that the Constitution precludes peremptory challenges based upon religion.

### 1. *Batson* and Its Progeny

The basic nature of the peremptory challenge in the United States was left virtually untouched for over two hundred years.<sup>56</sup> However, beginning in 1986, a series of Supreme Court decisions described by one author as a "small revolution"<sup>57</sup> altered the traditional nature of the peremptory challenge by limiting its uninhibited, unsupervised use. Following the landmark case of *Batson v. Kentucky*,<sup>58</sup> a prosecutor in a criminal case could not peremptorily challenge prospective jurors in a racially discriminatory manner.<sup>59</sup> *Batson* held that such racially discriminatory challenges are inconsistent with the defendant's equal protection rights under the Federal Constitution.<sup>60</sup>

To assist lower courts in implementing its holding, the Court articulated a test for determining when the exercise of peremptory challenges to exclude members of a particular race would be classified as constitutionally prohibited racial discrimination. To challenge the exercise of a peremptory challenge under *Batson*, the defendant must first establish a prima facie case of purposeful discrimination. To do so, the defendant must satisfy a series of requirements. He "first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."<sup>61</sup> To make this showing, the defendant may "rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"<sup>62</sup> Finally, to establish a prima facie case, the defendant must demonstrate that, based upon the previous facts and all other relevant circumstances, an inference arises "that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."<sup>63</sup> Ultimately, the Court noted, the trial judge, "experienced in supervising voir dire," must determine if the defendant has satisfied this

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56. In *Swain*, the Court did subject racially-based peremptory challenges to the mandates of the Equal Protection Clause. Specifically, the Court held that the State violated the Equal Protection Clause if it purposefully and deliberately used peremptory challenges to eliminate African-Americans from the jury. *Swain*, 380 U.S. at 203-04. However, the Court found that a successful equal protection challenge required that the "defendant . . . show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." *Id.* at 227. Thus, in theory, the decision in *Swain* meant that the use of peremptory challenges to discriminate on the basis of race was no longer without limitation. In practice, however, *Swain's* rigorous evidentiary requirement provided continued immunization of a prosecutor's peremptory strikes from constitutional scrutiny. See Prior, *supra* note 36, at 584-85. This "crippling burden of proof" was later rejected by the Court in *Batson v. Kentucky*, 476 U.S. 79, 92 (1986).

57. Marcia Coyle, *High Court May Strike Sex-Based Challenges*, NAT'L L.J., Nov. 8, 1993, at 27.  
58. 476 U.S. 79 (1986).

59. *Id.*

60. *Id.* at 84.

61. *Id.* at 96 (citation omitted).

62. *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

63. *Id.*

burden and thereby created an inference that the prosecution has engaged in purposeful discrimination.<sup>64</sup>

While the Court refused to set forth particular procedural guidelines to be used when a defendant objects to the State's challenges,<sup>65</sup> the Court did explain the procedure to be followed once the judge has determined that the defendant has made the requisite showing. A shifting of the burden occurs, requiring the State to offer a race-neutral reason for challenging African-American jurors.<sup>66</sup> It was this aspect of the holding, as the Court itself noted, that principally altered the traditional nature of the peremptory challenge: "[T]his requirement imposes a limitation in some cases on the full peremptory character of the historic challenge."<sup>67</sup> According to the Court, although the reason given "need not rise to the level justifying exercise of a challenge for cause,"<sup>68</sup> simply requiring any reason at all in this situation clashed directly with the traditional definition of a peremptory challenge.

The *Batson* Court provided further limited guidance for prosecutors regarding what would satisfy this new race-neutral requirement by articulating a reason that would *not* be deemed permissible. The Court held that the prosecutor's reason for challenging jurors of the defendant's race could not be based "on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race."<sup>69</sup> This shared identity alone, the Court observed, would not be enough to support the prosecutor's contention that a juror would be biased in favor of the defendant.<sup>70</sup> According to the Court, general assertions of good faith and lack of a discriminatory motive would also be insufficient to satisfy the race-neutral requirement.<sup>71</sup> The Court's final guideline concerning the sufficiency of the prosecutor's explanation provided that the reason had to be "related to the particular case to be tried."<sup>72</sup>

On its facts, the decision in *Batson* was a limited one, applying only to the prosecution's use of peremptory challenges in criminal cases and only when the defendant and the challenged jurors were of the same race. Beginning five years later, however, the Court lifted these limitations over the course of three holdings, though notably confining the cases it heard to those involving challenges based upon the juror's race.<sup>73</sup> In the first of these cases, *Powers*

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64. *Id.* at 97.

65. *Id.* at 99.

66. *Id.*

67. *Id.*

68. *Id.* at 97.

69. *Id.*

70. *Id.*

71. *Id.* at 98.

72. *Id.* (footnote omitted).

73. In this regard, it is interesting to note that the Supreme Court has been invited on several occasions to consider *Batson* outside the context of race. However, prior to granting the petition for certiorari in *J.E.B. v. State ex rel. T.B.*, 113 S. Ct. 2330 (1993), discussed *infra* at notes 93-121 and accompanying text, the Court had consistently rejected such invitations by refusing to grant certiorari. See, e.g., *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988) (dealing with gender-based peremptory challenges), *cert. denied*, 493 U.S. 1069 (1990); *United States v. Cresta*, 825 F.2d 538 (1st

v. *Ohio*,<sup>74</sup> the Court subtly modified the rule it had announced in *Batson*, a modification which had the effect of extending *Batson's* central holding. In *Powers*, the Court found that, under the Equal Protection Clause, the defendant and the excluded juror need not belong to the same race in order for the defendant to challenge the prosecutor's exclusion of members of a particular race through peremptory challenges.<sup>75</sup>

The holding in *Powers* affected the traditional nature and use of the peremptory challenge in two significant respects. First, the *Powers* decision signaled a shift in the Court's focus.<sup>76</sup> While the *Batson* Court had concentrated primarily on the effects of racially discriminatory peremptory challenges on the criminal defendant's rights, the *Powers* Court was concerned with such effects on the rights of the excluded juror.<sup>77</sup> By focusing on these rights, however, the Court was forced to confront the problem of standing. Accordingly, the Court in *Powers* engaged in a detailed analysis of that issue,<sup>78</sup> finally concluding that a criminal defendant does have standing to raise the equal protection claims of jurors upon whom peremptory challenges are exercised in a racially discriminatory manner.<sup>79</sup>

Second, by acknowledging such standing and allowing defendants to assert it despite the fact that they are not of the same race as the excluded jurors, the Court significantly widened the group to which the *Batson* objection became available. Thus, as a result of *Powers*, exercising of a peremptory challenge required an explanation in more cases and in a greater variety of situations. In this respect, *Powers* further limited the use of the peremptory challenge—a use which had been virtually uninhibited prior to *Batson*.

In the same year that *Powers* was decided, the Court lifted yet another of *Batson's* limitations, thereby further restraining the unbridled use of

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Cir. 1987) (dealing with age as a basis for exercising a peremptory challenge), *cert. denied*, 486 U.S. 1042 (1988); *Daniels v. State*, 581 So. 2d 536 (Ala. Crim. App. 1990) (dealing with gender-based peremptory challenges), *cert. denied*, 502 U.S. 914 (1991).

74. 499 U.S. 400 (1991).

75. *Id.* at 402.

76. This shift in focus is crucial in analyzing proposed extensions of *Batson* to attributes other than race, including a juror's religious affiliation, for it allows the discussion to center around the juror's rights, as opposed to those of the actual litigants.

77. *Powers*, 499 U.S. at 406-10. The *Batson* Court had also recognized the rights of the excluded juror, but the core of its opinion concentrated on the rights of the criminal defendant. Actually, the groundwork for *Batson's* and *Powers'* acknowledgement of the excluded juror's rights had been laid more than a century before in *Strauder v. West Virginia*, 100 U.S. 303 (1880). See Prior, *supra* note 36, at 583-84. In *Strauder*, the Court held that a statute permitting only white males to serve on juries violated the Fourteenth Amendment equal protection rights of both the defendant and the excluded juror. 100 U.S. at 309-10.

78. The Court's analysis of the standing issue in *Powers* focused on the exception to the general rule that "a litigant must assert his or her own legal rights and interests, and cannot rest a claim of relief premised on the legal rights or interests of third parties." *Powers*, 499 U.S. at 410 (citations omitted). The *Powers* Court then examined whether each of the three criteria for recognizing such an exception was satisfied in the context of a criminal defendant asserting an excluded juror's rights. First, the defendant himself must have suffered an injury-in-fact before he will be permitted to assert the interests of the excluded juror. *Id.* at 411. Second, the defendant and excluded juror must have a close relationship. *Id.* Finally, some barrier must exist which renders the excluded juror unable to assert his own interests. *Id.*

79. *Id.* at 415.

peremptory challenges. In *Edmonson v. Leesville Concrete Co.*,<sup>80</sup> the Court held that the Equal Protection Clause prohibits both parties in a civil suit from excluding jurors through the exercise of peremptory challenges which are based on the juror's race.<sup>81</sup> In so holding, the Court was forced to confront and overcome two potential roadblocks: the issues of state action and standing.

Because *Edmonson* was a civil action involving private litigants, it presented a hurdle for the Court since the Equal Protection Clause is triggered only by state action. *Edmonson* involved the claim that a *private party's* exercise of peremptory challenges should be subject to *Batson's* limitations. Thus, to find the requisite state action to bring the Equal Protection Clause into play, the Court again engaged in an intricate analysis of the issue using existing case law—an analysis similar to that which it had conducted in *Powers* on the issue of standing.<sup>82</sup> After completing this analysis, the Court concluded that private parties indeed qualify as state actors when exercising peremptory challenges and are thus subject to the dictates of the Equal Protection Clause.<sup>83</sup> Revisiting its analysis and holding in *Powers*, the Court also reasoned that a party in a civil case has standing to assert the equal protection rights of an excluded juror.<sup>84</sup> The Court rejected the argument that a *Powers* standing analysis should differ in the *Edmonson* context simply because the former was a criminal case, while the latter involved civil litigation.<sup>85</sup>

Although the *Edmonson* Court took *Batson* only one step further, the effect of the decision on the peremptory challenge was great. Following *Edmonson*, parties in civil cases were required to articulate reasons for exercising their peremptory challenges upon a *prima facie* showing of purposeful racial discrimination by their opponents.

The final extension of *Batson* which had an impact on the scope and use of the peremptory challenge occurred in *Georgia v. McCollum*.<sup>86</sup> In *McCollum*, the Court found that the constitutional limitation imposed by *Batson* on a prosecutor's racially discriminatory use of peremptory challenges was equally applicable to criminal defendants.<sup>87</sup> The Court mandated such an extension after addressing four basic issues. The Court first found that the harms undergirding the holding in *Batson* are no less present when a defendant

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80. 500 U.S. 614 (1991).

81. *Id.* at 616.

82. In finding that a private party achieves state actor status and is thus subject to the Equal Protection Clause when he uses his peremptory challenges in a racially discriminatory manner, the *Edmonson* Court utilized the analytical framework set forth in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982). In *Lugar*, the Court had held that a finding of state action required satisfaction of two requirements. First, the exercise of a right or privilege that leads to the claimed constitutional deprivation must have its source in state authority. *Id.* at 939-41. Second, it must be possible for the private party charged with state action to be fairly described as a state actor. *Id.* at 941-42.

83. *Edmonson*, 500 U.S. at 619-28.

84. *Id.* at 628-31.

85. *Id.* at 630.

86. 112 S. Ct. 2348 (1992).

87. *Id.* at 2359.

exercises peremptory challenges in a racially discriminatory way.<sup>88</sup> The Court also found that exercises of peremptory challenges by criminal defendants constitute state action; the Court rendered this holding after conducting the same analysis it had undertaken in *Edmonson*.<sup>89</sup> Next, the Court inquired into the prosecutor's standing to raise the excluded juror's claim of unconstitutional discrimination and, referring primarily to its decision in *Powers*, found that such standing did in fact exist.<sup>90</sup> Finally, the Court found that imposition of its decision did not impede the rights of the criminal defendant, including the Sixth Amendment rights to effective assistance of counsel and to an impartial jury.<sup>91</sup> *Batson* thus came full circle in *McCollum*; after *McCollum*, all parties in both criminal and civil cases were subject to *Batson's* prohibition on race-based peremptory challenges.

This series of cases changed the face of the peremptory challenge and altered its nature by requiring that a reason be given in situations where none was previously required.<sup>92</sup> *Batson* may therefore be described as an encroachment on the peremptory challenge and each of the latter three opinions as extensions of that encroachment. These cases demonstrate, however, that the Court peculiarly confined its examination to racially discriminatory use of the peremptory challenge. Once the *McCollum* Court precluded all parties in criminal and civil cases from basing their peremptory challenges on race, courts and commentators began to question the proper extent of *Batson* and how that decision was meant to and should shape the nature and use of peremptory challenges in the future. The following question captures the nature of the debate which developed following *Batson* and its progeny: What are the constitutionally permissible attributes of a juror upon which a peremptory challenge may be based?

## 2. Navigating New Territory: *J.E.B. v. Alabama ex rel. T.B.* and the Issue of Gender

Two years after deciding *McCollum*, the Court finally addressed this question and provided a somewhat limited answer. The Court's grant of certiorari in *J.E.B. v. Alabama ex rel. T.B.* represented the first occasion in which the Court accepted the invitation to examine the applicability of *Batson* in a context other than race.<sup>93</sup> Specifically, the parties in *J.E.B.* asked the

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88. *Id.* at 2353-54.

89. *Id.* at 2354-57. For an explanation of the analytical framework used by the Court on the issue of state action, see *supra* note 82.

90. *McCollum*, 112 S. Ct. at 2357. For an explanation of the analytical framework used by the Court on the issue of standing, see *supra* note 78.

91. *McCollum*, 112 S. Ct. at 2357-59.

92. As one author notes, three kinds of challenges existed following *Batson* and its progeny: the challenge for cause, the peremptory challenge, and the modified peremptory challenge for which a reason is required. Babcock, *supra* note 48, at 482.

93. As previously noted, numerous parties had invited the Court to consider the applicability of *Batson* to juror attributes other than race prior to *J.E.B.*, but the Court declined these invitations by denying their petitions for certiorari. See *supra* note 73.

Court to confront the issue of whether, in light of the reasoning and holding of *Batson*, the Equal Protection Clause precludes gender-based peremptory challenges in addition to those based on race. By a 6-3 vote,<sup>94</sup> the Supreme Court added gender to the list of juror attributes upon which parties may not constitutionally rely when exercising peremptory challenges.

*J.E.B.* began as an action involving paternity and child support.<sup>95</sup> When the case came to trial, the venire was composed of twenty-four women and twelve men.<sup>96</sup> Following successful challenges for cause, three of the jurors were excused, leaving only ten males among the thirty-three remaining prospective jurors.<sup>97</sup> The State then utilized nine of its ten peremptory challenges to remove men from the jury.<sup>98</sup> The respondent used all but one of his strikes to eliminate women from the jury.<sup>99</sup> Thus, the jury that heard the case consisted exclusively of female members.<sup>100</sup>

After the parties exercised their strikes, the respondent raised a *Batson* challenge to the State's strikes, arguing that *Batson* was applicable not only to racially-based strikes but to those based upon gender as well; the respondent's attorney argued that the Equal Protection Clause of the Fourteenth Amendment prohibits such peremptory challenges.<sup>101</sup> The trial court rejected this argument, the case proceeded to trial, and the jury entered a verdict in favor of the State, finding that the respondent was the child's father and ordering him to pay child support.<sup>102</sup> The respondent appealed the trial court's rejection of his equal protection challenge to the gender-based strikes by the State.<sup>103</sup> Based upon the Alabama Supreme Court's refusal in previous cases to extend the holding of *Batson* to strikes based upon gender, however, the state court of appeals affirmed the judgment of the trial court, and the state's supreme court subsequently denied *J.E.B.*'s petition for certiorari.<sup>104</sup> The United States Supreme Court granted certiorari,<sup>105</sup> and on November 2, 1993, heard oral arguments from the parties.<sup>106</sup>

The Court's decision in *J.E.B.* is monumental in terms of what it adds to existing constitutional and jury selection jurisprudence. The Court finally addressed the question of whether *Batson*'s equal protection guarantee extends beyond the confines of race. The Court answered this question affirmatively and held that the *Batson* equal protection analysis applies to peremptory

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94. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). Justices Stevens, O'Connor, Souter, and Ginsburg joined the Court's opinion authored by Justice Blackmun. Justice Kennedy concurred in the judgment, while Chief Justice Rehnquist and Justices Scalia and Thomas dissented. *Id.*

95. *Id.* at 1421.

96. *Id.*

97. *Id.* at 1421-22.

98. *Id.* at 1422.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *J.E.B. v. State ex rel. T.B.*, 113 S. Ct. 2330 (1993).

106. *Arguments Before the Court: Courts and Procedure*, 62 U.S.L.W. 3329 (Nov. 9, 1993).

strikes based upon gender.<sup>107</sup> Having found that the Equal Protection Clause does govern peremptory challenges based upon gender, the Court conducted the equal protection analysis applicable to gender-based classifications.<sup>108</sup> The specific question addressed by the Court was “whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant’s effort to secure a fair and impartial jury.”<sup>109</sup>

Before conducting its equal protection analysis, the Court chronicled America’s history of excluding women from jury service.<sup>110</sup> While the Court acknowledged that this history of gender discrimination differs from that experienced by racial minorities in America, the Court highlighted the ways in which the histories of gender and race discrimination are similar.<sup>111</sup> In rejecting the argument that the differing experiences of women and racial minorities warrant confinement of the application of equal protection principles to peremptory challenges based upon race,<sup>112</sup> the Court noted that, “with respect to jury service, African-Americans and women share a history of total exclusion.”<sup>113</sup>

The Court then went on to conduct an equal protection analysis of gender-based peremptory challenges. In conducting this analysis, the Court rejected the State’s assertion that gender is an accurate predictor of a juror’s attitudes.<sup>114</sup> Instead of assisting in the task of selecting an impartial jury, the Court found that reliance on gender stereotypes merely serves to “ratify and reinforce prejudicial views of the relative abilities of men and women.”<sup>115</sup> Borrowing from its earlier opinions dealing with racial discrimination in jury selection, the Court observed that discrimination based on gender, like race, harms litigants, the community, and the excluded juror.<sup>116</sup> In the end, the

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107. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1421 (1994).

108. *Id.* at 1425. Under the Supreme Court’s equal protection jurisprudence, a gender-based classification does not pass constitutional muster unless it is substantially related to the achievement of an important governmental objective. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

109. *J.E.B.*, 114 S. Ct. at 1426.

110. See *id.* at 1422-24.

111. “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.” *Id.* at 1425 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973)).

112. *Id.*

113. *Id.*

114. *Id.* at 1427. Although Justice O’Connor concurred with the Court’s opinion, she disagreed with the Court’s assertion that gender is never an accurate predictor of how a juror will view a case:

[T]hrough there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person’s gender and resulting life experience will be relevant to his or her view of the case.

*Id.* at 1432 (O’Connor, J., concurring). O’Connor agreed that for constitutional purposes, gender is irrelevant; however, she added that “to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.” *Id.* Unlike the other members of the majority, O’Connor acknowledged that “gender-based assumptions about juror attitudes” are “sometimes accurate.” *Id.*

115. *J.E.B.*, 114 S. Ct. at 1427.

116. *Id.*

Court held that the Equal Protection Clause prohibits the exercise of peremptory challenges based upon gender.<sup>117</sup>

The *J.E.B.* Court articulated a procedure for handling claims of gender-based peremptory challenges much like that which was set forth in *Batson*. The party alleging discrimination must make a prima facie case that his opponent exercised a peremptory challenge in an intentionally discriminatory way.<sup>118</sup> The party who exercised the challenge must then explain the basis for his challenge.<sup>119</sup>

### 3. Religion: The Next Potential Argument for Alteration

The decision handed down by the Court in *J.E.B.* extended *Batson's* applicability by adding gender to the list of attributes upon which a party's peremptory challenge decision may not be based. Because the express language of *J.E.B.* was not broadly-based, however, one cannot clearly determine which other attributes might be added to that list. Instead of conclusively addressing the exact scope and extent of *Batson*, the Court's language confines the holding in *J.E.B.* to the context of gender. Rather than using more sweeping language to either explicitly or implicitly resolve the question of exactly which juror attributes are constitutionally impermissible bases for exercising peremptory challenges, the Court pointedly focused on the constitutionality of gender-based challenges.<sup>120</sup> Because the Court opted to decide only the specific issue presented—whether equal protection principles prohibit gender-based peremptory challenges—lower courts must now grapple with equal protection claims by other cognizable groups and the propriety of further extensions of *Batson*.<sup>121</sup> Among the first of these will undoubtedly be claims that a juror's affiliation with a particular religion or his religiosity is a constitutionally impermissible basis upon which to exercise a peremptory challenge.

Even prior to the Court's decision in *J.E.B.*, there were several indications that, regardless of the way in which the Court ultimately ruled, religious affiliation would be one of the next attributes the Court would be asked to

117. *Id.* at 1430.

118. *Id.* at 1429.

119. *Id.* at 1429-30.

120. The Court demonstrated this focus in the various phrasings of its holding: "We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality," *id.* at 1421; "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause," *id.* at 1422; and "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender," *id.* at 1430.

121. The majority in *J.E.B.* did, however, endeavor to cut off some of these claims by announcing that its decision would not signal the death of peremptory challenges but would leave open the possibility of basing strikes on certain attributes. According to the Court, "Parties still may remove jurors whom they feel might be less acceptable than others on the panel . . . [and may also] remove from the venire any group or class of individuals normally subject to 'rational basis' review." *Id.* at 1429 (citations omitted).



address. In fact, parties had already begun to present the issue to lower courts,<sup>122</sup> and there was far from universal agreement on the constitutional propriety of religion-based peremptory challenges. Most of the courts and commentators finding that *Batson* prohibited religion-based peremptory challenges gave this specific issue only cursory attention.<sup>123</sup> Few actually conducted any detailed and meaningful analysis of the specific issue of religion.<sup>124</sup> In the year before the Court handed down its decision in *J.E.B.*, however, the Minnesota Supreme Court directly confronted the issue and, after a careful and detailed analysis, rejected the notion that an extension of *Batson* to peremptory challenges based upon religious affiliation was warranted or required.<sup>125</sup> That the Minnesota Supreme Court decided this case before

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122. For example, in the highly-publicized rape trial of William Kennedy Smith, the defense attorney argued that the prosecution's use of peremptory challenges to exclude three Jewish jurors was impermissibly based upon religion, an argument rejected by the trial judge. Wade Lambert & Stephen J. Adler, *Law: Jewish Jurors' Exclusion*, WALL ST. J., Dec. 3, 1991, at B6.

Some lower courts indirectly addressed the issue of the permissibility of basing peremptory challenges on religion when evaluating the sufficiency of a party's proffered race-neutral reason in response to a *Batson* challenge. These courts found *Batson* satisfied by race-neutral explanations which were based upon religious affiliation, implicitly suggesting that such a basis for a peremptory challenge is, in fact, permissible. *See, e.g.,* United States v. Clemmons, 892 F.2d 1153, 1157 (3d Cir. 1989) (holding that the trial court properly rejected the defendant's *Batson* challenge when the prosecutor explained that uncertainty about a juror's religious beliefs was the reason for the peremptory challenge), *cert. denied*, 496 U.S. 927 (1990); State v. Malone, 570 N.E.2d 584, 589 (Ill. App. Ct.) (upholding the trial court's assessment that fear of religious influence and a juror's statement that she did not want to serve satisfied the race-neutral requirement of *Batson*), *appeal denied*, 584 N.E.2d 135 (Ill. 1991).

Finally, one court not only recognized that peremptory challenges are sometimes based on religion, but also suggested that such a basis is appropriate and necessary. *See* State v. Antwine, 743 S.W.2d 51, 64 (Mo. 1987) (en banc), *cert. denied*, 486 U.S. 1017 (1988); *see also* State v. Hlavaty, 871 S.W.2d 600, 604 (Mo. Ct. App. 1994) (noting that "[t]he exercise of peremptory challenges requires a subjective evaluation by counsel based upon a multitude of legitimate considerations, such as . . . religion").

Some state courts have used provisions of their state constitutions to strike down religion-based peremptory challenges. *See, e.g.,* People v. Fudge, 875 P.2d 36, 47 (Cal. 1994) (en banc) (holding that the use of peremptory challenges to exclude a group of citizens distinguished on religious grounds is precluded by article I, section 16 of the California Constitution); State v. Gilmore, 511 A.2d 1150, 1158 (N.J. 1986) (holding that various provisions of the state constitution, when read together, entitle criminal defendants to an impartial jury chosen without discrimination on the basis of religious principles).

123. *See, e.g.,* Eiland v. State, 607 A.2d 42, 58 (Md. Ct. Spec. App.) ("It is hard to imagine that [the Equal Protection Clause] should not be aimed at peremptories based upon a juror's religion."), *rev'd sub nom.* Tyler v. State, 623 A.2d 648 (Md. 1993); Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying United States v. De Gross to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 MINN. L. REV. 689, 691, 694 (1993) (asserting that "future decisions should extend the protection which *De Gross* provides for gender-based peremptories to any group which warrants intermediate or strict scrutiny under traditional equal protection principles," and later citing religion as such a group) (footnotes omitted).

124. For example, the specific issue of the constitutional permissibility of using religious affiliation as the basis for a peremptory challenge was not presented to the Supreme Court of Hawaii in State v. Levinson, 795 P.2d 845 (Haw. 1990). The court nevertheless resolved that issue in its holding. Although Levinson actually involved a *Batson* challenge to gender-based strikes, the court's holding also encompassed race, religion, and ancestry as bases which are "off limits" in exercising peremptory challenges absent a nondiscriminatory explanation. *Id.* at 850.

The Texas Court of Criminal Appeals recently handed down an opinion that gave more than lip service to the issue. That court concluded that the Equal Protection Clause of the Fourteenth Amendment prohibits peremptory challenges that are based on religion. *See* Casarez v. State, No. 1114-93, 1994 WL 695868, at \*1 (Tex. Crim. App. Dec. 14, 1994). No majority opinion was written, although there were several strong dissents in the case.

125. State v. Davis, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994).

*J.E.B.* does not lessen the persuasiveness of its argument. The rationale used by the Minnesota Supreme Court in *State v. Davis* offers useful insight into the debate left unresolved by *J.E.B.* regarding the constitutionality of religion-based peremptory challenges. What makes *Davis* more persuasive than assertions to the contrary is the fact that the opinion provides detailed and well-reasoned explanations for its holding.<sup>126</sup>

The Minnesota Supreme Court refused to extend *Batson* in *State v. Davis* and held that religion-neutral explanations for peremptory strikes allegedly exercised on the basis of religion are not required.<sup>127</sup> In *Davis*, the criminal defendant's challenge arose when, in response to his request for a race-neutral reason for peremptorily challenging an African-American juror, the prosecutor's explanation focused on the juror's religious affiliation.<sup>128</sup> Clearly relying upon a generalization regarding the belief system of those who belong to the particular faith, the prosecutor explained, "The Jehovah [sic] Witness faith is of a mind the higher powers will take care of all things necessary. In my experience Jehovah [sic] Witness are reluctant to exercise authority over their fellow human beings in this Court House."<sup>129</sup> The trial judge accepted this religion-based explanation as a race-neutral reason, held that it satisfied *Batson*, and thus allowed the prosecutor's peremptory challenge.<sup>130</sup> While the defendant raised no objection to the prosecutor's proffered race-neutral reason at trial, on appeal he asserted that the explanation was "constitutionally impermissible as religious discrimination," thus inviting the Minnesota Supreme Court to extend *Batson* to the context of religion.<sup>131</sup> However, the court's analysis of *Batson's* reasoning and context led it to reject the defendant's assertion and to affirm his conviction.<sup>132</sup>

On November 1, 1993, one day before the United States Supreme Court heard oral argument in *J.E.B.*, the defendant in *Davis* filed a petition for a writ of certiorari with the Court; however, his petition was denied after the Supreme Court rendered its decision in *J.E.B.*<sup>133</sup> Just as *J.E.B.* did not conclusively resolve the issue, the Court's denial of certiorari in *Davis* leaves the constitutional status of religion-based peremptory challenges subject to

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126. One component of the court's decision in *Davis* was subsequently contradicted and thus implicitly rejected by the United States Supreme Court in *J.E.B.* See *infra* note 160 and accompanying text. Nevertheless, other factors which were integral to the holding in *Davis* survived *J.E.B.* and support the proposition that a line can and should be drawn between peremptory challenges based upon race and gender and peremptory challenges based upon religion. See *infra* part III.B.

127. *Davis*, 504 N.W.2d at 771.

128. *Id.* at 768.

129. *Id.* (quoting from the record).

130. *Id.* at 768, 772 n.4.

131. *Id.* at 768.

132. *Id.* at 771.

133. *Davis v. Minnesota*, 114 S. Ct. 2120 (1994). Justice Thomas, joined by Justice Scalia, wrote a dissent explaining why he felt that certiorari should have been granted. See *id.* at 2120-22 (Thomas, J., dissenting). Though she concurred with the Court's denial of certiorari, Justice Ginsburg wrote separately to "note that the dissent's portrayal of the opinion of the Minnesota Supreme Court is incomplete." *Id.* at 2120 (Ginsburg, J., concurring).

debate.<sup>134</sup> The denial of a petition for certiorari does not constitute a decision on the merits.<sup>135</sup> Thus, no conclusions may be drawn regarding the Court's stance on the constitutional status of religion-based peremptory challenges from its denial of certiorari in *Davis*.

The constitutional permissibility of religion-based peremptory challenges and the propriety of extending *Batson* to that context was clearly on the minds of the Supreme Court Justices when they heard oral argument in *J.E.B.* Indeed, the following observation by one commentator supports this point: "[T]he justices appeared most concerned with . . . whether the court would be committing itself to eliminating strikes based on other grounds such as religion . . . ."<sup>136</sup> Another account of the oral argument in *J.E.B.* reported that "[o]ne concern evident in the courtroom today was whether the addition of sex as a prohibited factor in jury selection would inevitably mean that religion, national origin, age and perhaps other factors would also be added to the prohibited list."<sup>137</sup> However, as the following argument demonstrates, courts faced with this issue in the future need not add religion to that list, despite the Supreme Court's decision in *J.E.B.* to add gender.

### III. IN DEFENSE OF THE RELIGION-BASED PEREMPTORY CHALLENGE

Several points raised in *Davis* demonstrate that an extension of *Batson*, *J.E.B.*, and the Equal Protection Clause's prohibition on the free, uninhibited exercise of peremptory challenges to challenges based upon religious affiliation is not constitutionally warranted.<sup>138</sup> Such an extension does not necessarily follow from the opinions of *Batson* and *J.E.B.*; the language used in those opinions does not necessarily dictate that religion-based peremptory challenges are or should be constitutionally prohibited, and those decisions themselves even suggest potential points of departure. Furthermore, the practical implications and difficulties of implementing such a rule counsel against an extension of *Batson* and *J.E.B.* to religion.

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134. Compare Marcia Coyle, *High Court Passes on Bid to Extend Peremptory Ban*, NAT'L L.J., June 6, 1994, at A12 (noting that, in declining to review *Davis*, the Court "drew the line—at least for now—against extending its non-discrimination rule to religion") with Tuite, *supra* note 11, at 6 ("Since denials of certiorari are not affirmances, one cannot assume that religion-based challenges will survive . . . .").

135. GERALD GUNTHER, CONSTITUTIONAL LAW 61 (12th ed. 1991); see also *Maryland v. Baltimore Radio Show*, 388 U.S. 912, 919 (1950) ("[A] denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review.").

136. Joan Biskupic, *Justices Consider Banning Sex-Based Exclusion of Jurors: Men and Women Can Be Equally Unbiased, Court Is Told*, WASH. POST, Nov. 3, 1993, at A3.

137. Linda Greenhouse, *Court Weighs Jury-Selection by Sex*, N.Y. TIMES, Nov. 3, 1993, at A22.

138. See *infra* parts III.B-C.

### A. *The Lay of the Land*

The Court has undeniably laid the procedural foundation for attacking religion-based peremptory challenges under the Equal Protection Clause. Such challenges are made possible by virtue of the Court's focus in *Powers* on the rights of the excluded juror,<sup>139</sup> as well as its holdings in *Powers* and *Edmonson* that the doctrine of standing does not preclude a party from asserting such rights.<sup>140</sup> Furthermore, *Edmonson* and *McCollum* demonstrate that the exercise of a peremptory challenge constitutes state action and thereby implicates the Equal Protection Clause regardless of which party exercises the peremptory challenge.<sup>141</sup> Finally, while *J.E.B.* itself involved a state paternity action and scrutinized the State's use of its peremptory strikes, *Edmonson* and *McCollum* suggest that the ruling in *J.E.B.* applies not just to the government, but also to private parties, in both civil and criminal contexts.<sup>142</sup> What remains questionable, however, is whether the Equal Protection Clause substantively prohibits religion-based peremptory strikes.

Clearly, religion cannot be used to systematically exclude groups from jury service. Federal law precludes the exclusion of persons of a particular religious faith from a venire on the basis of that faith.<sup>143</sup> However, the legislative history indicates that "the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons."<sup>144</sup> Similarly, the Supreme Court has held that the systematic exclusion of women from jury venires violates the Sixth Amendment's requirement that the jury venire be chosen from a fair cross-section of the community.<sup>145</sup> The Court has also ruled, however, that discriminatory exercises of peremptory challenges do not implicate nor violate the Sixth Amendment's fair cross-section requirement.<sup>146</sup> As one court has noted, there is an important distinction between excluding a cognizable group from a venire pool and peremptorily striking group members; while the former "bespeaks *a priori* across-the-board total unfitness," the latter "merely suggests potential partiality in a particular isolated case."<sup>147</sup>

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139. See *supra* notes 76-77 and accompanying text.

140. See *supra* notes 78-79, 84-85 and accompanying text.

141. See *supra* notes 82-83, 89 and accompanying text.

142. See Joan Biskupic, *Supreme Court, 6-3, Prohibits Sex Bias in Jury Selection*, WASH. POST, Apr. 20, 1994, at A1. In her concurrence, however, Justice O'Connor reiterated her position that *Edmonson* and *McCollum* had mistakenly categorized the exercise of peremptory challenges by private civil litigants and criminal defendants as "state action." *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1432 (1994) (O'Connor, J., concurring). Thus, while Justice O'Connor concurred with the majority opinion, she agreed with its holding only to the extent that the Court recognized that the Equal Protection Clause limits the government from discriminating on the basis of gender in jury selection. *Id.* Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, agreed with O'Connor's position. *Id.* at 1437 n.2 (Scalia, J., dissenting).

143. Jury Selection and Service Act § 1862, 28 U.S.C. § 1862 (1988).

144. H.R. REP. NO. 1076, 90th Cong., 2d Sess., 5-6 (1968).

145. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

146. See *Holland v. Illinois*, 493 U.S. 474, 486 (1989).

147. *United States v. Leslie*, 783 F.2d 541, 554 (5th Cir. 1986) (en banc) (italics in original), *vacated*, 479 U.S. 1074 (1987).

Before analyzing the propriety of extending the prohibitions of *Batson* and *J.E.B.* to religion-based peremptory challenges, it is important to note that the practice in question is not one which rarely occurs; a constitutional attack on religion-based peremptory challenges would have neither an imaginary nor a purely theoretical target. Indeed, when trial lawyers proceed with voir dire, they seem to be commonly concerned with the religious affiliations of potential jurors and the strength of their religious beliefs. Attorneys use information regarding jurors' affiliations and beliefs,<sup>148</sup> coupled with certain preconceived notions and stereotypes about such affiliations and beliefs, to form the basis of their challenges for cause and peremptory challenges. Literature for the practitioner evidences the reliance attorneys place on information and assumptions about a juror's religion and religious beliefs.

These preconceived notions and stereotypes exist in two basic forms. Some are related to particular religious faiths. For instance, one text cautions as follows: "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."<sup>149</sup> Another practice manual notes that religion can be "critical" in divorce and child custody cases, for prospective jurors who identify with religions that oppose divorce "tend to be closed-minded and judgmental."<sup>150</sup> The reasoning offered by the State in *Davis* regarding Jehovah's Witnesses provides a concrete, real-life example of this type of religious stereotyping.<sup>151</sup>

Trial lawyers also base peremptory challenges on their perception of the strength of a particular belief system or faith. For example, one text advises that attorneys in criminal cases should probe the strength of a prospective juror's religious beliefs in order to "gauge the rigidity of that juror's concepts of right and wrong"; an active churchgoer is labeled a dogmatic moralist and thus likely to identify with the prosecution.<sup>152</sup> This advice comports with the philosophy espoused by noted criminal defense attorney Clarence Darrow: "In general, I don't want a religious person, for he believes in sin and punishment."<sup>153</sup> Yet another text warns: "Religious fanatics are almost always self-righteous and narrow. Fundamentalists are conservatively oriented. Devout church members tend to be conformists. However, some are very

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148. Questionnaire answers and investigative results provide attorneys with information about prospective jurors' religious affiliations. Some of the questionnaires that prospective jurors are required to complete ask them to indicate their religious preferences. See 2 GINGER, *supra* note 7, § 12.23. Other questionnaires only implicitly invite them to provide this information by asking them to list those social and civic organizations to which they belong. See *id.* § 12.24; WERCHICK, *supra* note 13, § 9.4. Attorneys may also learn about prospective jurors' religious beliefs by submitting the venire list to someone who is familiar with the community. *Id.* § 5.8.

149. REID HASTIE ET AL., *INSIDE THE JURY* 123 (1983) (citation omitted).

150. GOBERT & JORDAN, *supra* note 22, at 393.

151. See *supra* text accompanying note 129.

152. GOBERT & JORDAN, *supra* note 22, § 11.08.

153. KASSIN & WRIGHTSMAN, *supra* note 25, at 53 (quoting EDWIN H. SUTHERLAND & DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 442 (7th ed. 1966)).

compassionate. Jurors with a strong Catholic faith may favor Catholic litigants."<sup>154</sup>

Not only do these preconceived notions and stereotypes exist within the legal community, but attorneys also act upon them.<sup>155</sup> Because such religion-based challenges do in fact occur, the issue, in light of *Batson* and *J.E.B.*, thus becomes the propriety of acting upon them from a constitutional standpoint. In reality, "use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken."<sup>156</sup> But should courts hold that, based upon *Batson* and *J.E.B.*, the Constitution prohibits this practice of acting upon notions concerning religious affiliation and perceived religious beliefs when exercising peremptory challenges? Some courts addressed and answered this question before the Court decided *J.E.B.*<sup>157</sup> But now that the Court has extended *Batson* to gender, courts can expect to be presented with this question more frequently.

### B. Constitutional Considerations: Drawing the Line

Prior to *J.E.B.*, the case against extending *Batson* to the context of religion could have begun—and ended—with the argument that the Equal Protection Clause does not apply to peremptory challenges.<sup>158</sup> Indeed, before *J.E.B.*, discussion regarding the proper constitutional scope of the peremptory challenge often revolved around the debate concerning the breadth of the

154. ROBERT A. WENKE, *THE ART OF SELECTING A JURY* 79 (2d ed. 1988).

155. This Note in no way intends to suggest that the religious stereotypes on which some attorneys rely always or even frequently have any basis in fact or are, as a practical matter, appropriate grounds upon which an attorney should base his peremptory challenges. Indeed, in this regard, this Author believes that one commentator provides the most useful advice to the practitioner by noting that religion is a fallible predictor: "If we do our jobs as advocates, . . . we force ourselves to recognize that individual members of any group may not perform according to such outdated stereotypes." WERCHICK, *supra* note 13, §§ 8.8, 21.8. The points noted in the text are offered merely to demonstrate that there is (in reality) a practice which is potentially subject to constitutional attack.

156. *Batson v. Kentucky*, 476 U.S. 79, 138 (1986) (Rehnquist, J., dissenting).

157. See *supra* notes 122-32 and accompanying text.

158. This argument formed the basis of the Texas Court of Appeals' refusal to extend *Batson* to religion. *Casarez v. State*, 857 S.W.2d 779 (Tex. Ct. App. 1993) (en banc), *rev'd*, 1994 WL 695868, at \*1 (Tex. Crim. App. Dec. 14, 1994); see also *Batson*, 476 U.S. at 123 (Burger, C.J., dissenting) ("[U]nadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case."). In *Casarez*, the prosecutor cited religious affiliation as a race-neutral explanation for peremptorily challenging two African-American venirepersons. 857 S.W.2d at 782. The court upheld this explanation against the defendant's constitutional attack on the theory that "[t]raditional equal protection analysis is not appropriate when applied to peremptory challenges. The *Batson* decision itself did not apply traditional equal protection analysis . . ." *Id.* at 783. The Texas Court of Criminal Appeals subsequently reversed the appellate court's judgment and held that the Equal Protection Clause of the Fourteenth Amendment applies to peremptory challenges and prohibits religion-based peremptory challenges. *Casarez*, No. 1114-93, 1994 WL 695868, at \*1 (Tex. Crim. App. Dec. 14, 1994).

Before the *J.E.B.* decision, this argument was refuted by pointing to the Court's extensive reference to the Equal Protection Clause throughout the *Batson* opinion. It is interesting to note, however, that neither the Court's grant of certiorari nor counsel for the defendant in *Batson* mentioned equal protection as an issue. *Babcock*, *supra* note 48, at 467.

holding and reasoning in *Batson*.<sup>159</sup> In *J.E.B.*, however, the Court deprived this argument of all vitality when it explicitly relied on the Equal Protection Clause to determine the constitutionality of gender-based peremptory challenges. The Court clearly established that the Equal Protection Clause provides the proper framework for evaluating claims that peremptory challenges were exercised in a discriminatory manner.<sup>160</sup>

Labeling the Equal Protection Clause of the Fourteenth Amendment as the proper analytical tool for assessing the constitutionality of religion-based peremptory challenges, however, raises a very intriguing issue. As one author notes, "Religion-based discrimination is rarely challenged under the equal protection clause."<sup>161</sup> The two religion clauses of the First Amendment to the Constitution<sup>162</sup> have traditionally governed constitutional issues of religion and religious discrimination. Application of the Equal Protection Clause to religion-based peremptory challenges would thus be an unusual step, one which implicates certain considerations that the Court has never before expressly addressed since the First Amendment, not the Fourteenth, has traditionally provided the framework for analyzing issues involving religion.

Equal protection analysis would first require a finding that either religion in general or specific religious denominations in particular constitute cognizable classes.<sup>163</sup> Furthermore, of the different "tiers" of review employed by the Supreme Court in analyzing purported equal protection violations,<sup>164</sup> it is not clear which the Court would apply to religion, though

159. In this regard, it is interesting to note that the *Batson* opinion itself uses none of the common equal protection terminology that one might expect to find in a traditional equal protection case. The Texas Court of Appeals made this observation. See *Casarez*, 857 S.W.2d at 783 n.2. Indeed, *Batson* and its progeny include no discussion of governmental objectives or the "fit" between the means chosen and the ends sought to be accomplished. See *infra* note 164.

160. *J.E.B.* thus defeats one of the arguments on which the Supreme Court of Minnesota relied in holding that religion-based peremptory challenges do not run afoul of the Constitution. Justice Thomas noted this point in his dissent to the Court's denial of certiorari in *Davis*. See *Davis v. Minnesota*, 114 S. Ct. 2120, 2121-22 (1994) (Thomas, J., dissenting) ("[*J.E.B.*] shatters the Supreme Court of Minnesota's understanding that *Batson*'s equal protection analysis applies solely to racially based peremptory strikes."), *denying cert. to* 504 N.W.2d 767 (Minn. 1993). As Justice Ginsburg pointed out in her concurrence with the Court's decision to deny certiorari, however, Justice Thomas' characterization is "incomplete." *Id.* at 2120 (Ginsburg, J., concurring). The *Davis* court relied on other factors to reach its holding, factors that are relevant in assessing the constitutional permissibility of religion-based peremptory challenges. See, e.g., *infra* text accompanying notes 188, 203, and notes 205-06 and accompanying text.

161. JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 5.15 (1988).

162. The First Amendment states in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend I. In its line of First Amendment decisions involving religion, the United States Supreme Court has treated the two religion clauses contained in the First Amendment separately; thus, while both the Establishment Clause and the Free Exercise Clause serve to protect one's religious beliefs and practices, each employs an analysis quite distinct from the other. See generally GUNTHER, *supra* note 135, at 1501-89 (separating the discussion of the Constitution and religion into two sections to correspond with the two clauses).

163. One court has questioned whether the Equal Protection Clause, in fact, even provides any degree of protection to religion. See *People v. Johnson*, 767 P.2d 1047, 1054 n.3 (Cal. 1989) (en banc) ("[U]nder *Batson* it is at least questionable whether . . . a religious group can constitute a 'cognizable group.'"), *cert. denied*, 494 U.S. 1038 (1990).

164. The Court treats racial and ethnic classifications as suspect for purposes of equal protection analysis. GUNTHER, *supra* note 135, at 638. Hence, the Court will invalidate such classifications if they are not narrowly tailored to a compelling governmental interest. See, e.g., *Shaw v. Reno*, 113 S. Ct.

strict scrutiny appears to be the appropriate framework. While the Supreme Court has never explicitly held that religion constitutes a suspect class so as to warrant strict scrutiny under the Equal Protection Clause, some Justices and commentators have simply assumed that it does.<sup>165</sup> One might plausibly reason by analogy to argue that strict scrutiny should, in fact, apply. Although *Larson v. Valente*<sup>166</sup> involved a challenge under the Establishment Clause of the First Amendment, the Court deviated in that case from its usual Establishment Clause analysis and instead applied strict scrutiny to a law which, in effect, preferred certain religious denominations over others.<sup>167</sup> The Court chose strict scrutiny as its primary mode of analysis after declaring that religious denominational preferences in the law are suspect.<sup>168</sup>

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2816, 2826 (1993). Strict scrutiny also applies when governmental action infringes upon a fundamental right or interest. GUNTHER, *supra* note 135, at 819. When religion-based peremptory challenges are permitted, the excluded juror is merely precluded from serving on that particular jury. Such preclusion does not constitute denial of any constitutionally recognized right. Jury duty generally has been deemed a privilege of citizenship. See Thiel v. Southern Pac. Co., 328 U.S. 217, 224 (1946). However, this privilege has not been recognized as fundamental so as to warrant strict scrutiny under the Equal Protection Clause. See GUNTHER, *supra* note 135, at 820 (noting that the fundamental interest designation is "limited to a very few areas," including equal access to voting and to the judicial process).

The Court treats gender-based classifications as quasi-suspect and therefore requires that they satisfy an intermediate form of scrutiny under the Equal Protection Clause. *Id.* at 636. Thus, to be valid, gender classifications must be substantially related to an important governmental objective. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976).

165. See, e.g., Davis v. Minnesota, 114 S. Ct. 2120, 2121 (1994) (Thomas, J., dissenting) (suggesting that classifications which warrant heightened scrutiny "presumably would include classifications based on religion"), denying cert. to 504 N.W.2d 767 (Minn. 1993); J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1438 (Scalia, J., dissenting) (noting that classifications warranting heightened scrutiny "presumably would include religious belief"); Erwin Chemerinsky, *The End of Gender-Based Peremptory Challenges*, TRIAL, Aug. 1994, at 69, 72 (stating that the Court has approved heightened scrutiny for religion).

A comparison of the plurality and dissenting opinions in *Casarez* suggests that it is not exactly clear what level of equal protection scrutiny is applicable to religion. The plurality concluded that religion-based peremptory challenges are subject to strict scrutiny. *Casarez v. State*, No. 1114-93, 1994 WL 695868, at \*8 (Tex. Crim. App. Dec. 14, 1994) (plurality opinion). The plurality reached this conclusion in an interesting manner. It first discussed the Supreme Court's most recent First Amendment case. *Id.* The plurality then concluded that freedom of religion is a fundamental right and that strict scrutiny is therefore the appropriate level of scrutiny under the Equal Protection Clause. *Id.* The plurality therefore does not appear to hold that religion is a suspect classification, but instead resorts to a "fundamental rights" argument. See *supra* note 164. By contrast, one of the dissenting judges asserted that "it has never been held that any religious group is a 'suspect class deserving special judicial protection' for Fourteenth Amendment purposes" and would hold that "religious-based peremptory strikes are not subject to strict scrutiny review." *Casarez*, 1994 WL at \*12 (McCormick, J., dissenting).

166. 456 U.S. 228 (1982).

167. *Id.* at 246. The statute at issue in *Larson* required religious organizations that received 50% or more of their solicitations from nonmembers to make certain disclosures. *Id.* at 231-32. The Court found that this law had the effect of granting denominational preferences. *Id.* at 246.

168. *Id.* at 246 ("[W]hen 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."). After conducting this analysis, the Court found that the government's interest was compelling but that the means chosen by the state to achieve that interest were not narrowly tailored. *Id.* at 248, 251.

In anticipating how the Court might treat arguments that *Batson* and *J.E.B.* should be extended to religion, *Larson* is the case cited by current Supreme Court Justices for the proposition that religion likely commands heightened scrutiny under the Equal Protection Clause. See *Davis*, 114 S. Ct. at 2121 (Thomas, J., dissenting); *J.E.B.*, 114 S. Ct. at 1438 (Scalia, J., dissenting).



While the issue of which amendment would provide the framework for analyzing religion-based peremptory challenges may be intriguing, it appears to be mainly academic. This is because the analysis applicable under the Free Exercise Clause<sup>169</sup> virtually mirrors the Equal Protection Clause's strict scrutiny inquiry. According to the Supreme Court, the Free Exercise Clause mandates that a law which burdens religious practices and which is not neutral or of general applicability "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."<sup>170</sup> Thus, whether scrutinized under the First or the Fourteenth Amendment, peremptory challenges based upon religion are likely subject to the same analysis.<sup>171</sup>

The fact that the analysis which would be applicable to religion-based peremptory challenges is therefore identical to that which applies to race does not mandate that the results should likewise be identical.<sup>172</sup> In the context of religion, the balance does not tip in favor of the excluded juror's rights, as it does in the context of race and gender. One could argue that the interest in preserving the peremptory challenge in its present form, requiring no explanation for its exercise (except when based upon race or gender), is compelling and substantial; the peremptory challenge has ancient roots and has been lauded throughout history as an essential mechanism in the jury selection process which fosters the constitutional right to an impartial jury.<sup>173</sup> Furthermore, several arguments can be raised to demonstrate that permitting religion-based peremptory challenges is a narrowly tailored mechanism for achieving this compelling interest.

While race- and gender-based peremptory challenges fail to satisfy equal protection scrutiny, religion differs in several respects which are significant enough to warrant a different outcome. The line can and should be drawn at religion, notwithstanding that the *J.E.B.* Court chose not to draw it at gender and instead extended *Batson*.<sup>174</sup> Placing the line between race and gender, on the one hand, and religion, on the other, would be neither implausible nor

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169. Of the two religion clauses contained in the First Amendment, peremptory challenges based on religion most likely implicate the Free Exercise Clause. See Recent Cases, 107 HARV. L. REV. 1164, 1166-67 (1994). Permitting challenges based upon religion does not "establish" religion or grant preferences to certain religious denominations but arguably affects one's free exercise of his religion.

170. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2226 (1993).

171. The Free Exercise Clause inquiry set forth in *Hialeah* mirrors the strict scrutiny analysis of the Equal Protection Clause. Both require a compelling governmental interest and narrow tailoring. Compare *supra* text accompanying note 170 with *supra* note 164.

172. Some commentators disagree with this assertion. See, e.g., Bruce Fein, *Engendering Juries by PC*, WASH. TIMES, Apr. 27, 1994, at A16 ("[T]he rationale of *J.E.B.* seems destined to end peremptory strikes based on religion or ethnicity."); Jeffrey Rosen, *Oversexed*, NEW REPUBLIC, May 16, 1994, at 12 ("All strikes based on constitutionally protected categories—race, sex, ethnicity, religion, national origin and illegitimacy—are now off-limits."). It is, however, incorrect to conclude that simply because race- and gender-based peremptory challenges fail to satisfy their respective levels of scrutiny under the Equal Protection Clause, challenges based upon religion must also fail to pass constitutional muster. Each attribute is entitled to a separate analysis because each obviously raises different concerns.

173. See *supra* part II.A; see also *Batson v. Kentucky*, 476 U.S. 79, 125 (1986) (Burger, C.J., dissenting) (noting that the history of and interests served by the peremptory challenge cannot be lightly regarded, even if its use is attacked on equal protection grounds).

174. In his analysis of existing case law prior to *J.E.B.*, one trial court judge summarily predicted that such a line will, in fact, be drawn. See Hett, *supra* note 36, at 432-33.

arbitrary.<sup>175</sup> Counsel for the respondent in *J.E.B.*, who argued for extension of *Batson* to gender, acknowledged that the feared slippery slope can be stopped at gender by noting during oral argument that he did not "think . . . that by extending *Batson* to gender all the chickens will get out of the henhouse."<sup>176</sup>

Several arguments can be advanced to support the assertion that *Batson* and *J.E.B.* involved unique situations and attributes which warranted Equal Protection Clause intervention, and that religious affiliation differs enough from race and gender that constitutional intervention is neither necessary nor desirable. These arguments suggest that the value of the peremptory challenge, in its traditional form, outweighs the harm that results from allowing religion-based peremptory challenges, while the harm occasioned by race- and gender-based strikes is so costly as to allow equal protection principles to modify the nature of the peremptory challenge when used in those limited situations.<sup>177</sup>

The degree of control people have over their attributes provides one important way in which religion can be distinguished from race and gender. People clearly have no control over their race or gender. It is commonly believed, however, that as a general proposition, religion is a chosen attribute over which an individual has control.<sup>178</sup> In arguing for the extension of *Batson* to gender in *J.E.B.*, the respondent's attorney espoused this understanding of religion and acknowledged this "degree of control" argument as a plausible dividing line between race and gender on the one hand and

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175. Justices Thomas and Scalia apparently disagree with this premise. Dissenting from the Court's denial of certiorari in *Davis*, Justice Thomas wrote that "no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause." *Davis v. Minnesota*, 114 S. Ct. 2120, 2121 (1994) (Thomas, J., dissenting), *denying cert. to* 504 N.W.2d 767 (Minn. 1993). Nevertheless, the two Justices voted to grant the petition for certiorari in *Davis* in order to remand it to the Minnesota Supreme Court to determine whether there is, in fact, any principled basis for refusing to extend *J.E.B.* to religion. *Id.* at 2122. Justices Thomas and Scalia apparently neglected to consider, however, that the Minnesota Supreme Court *did* offer principled bases for confining the holdings of *Batson* and *J.E.B.* to their respective contexts of race and gender. See *supra* notes 125-32 and accompanying text.

176. Coyle, *supra* note 57, at 27 (quoting John F. Porter, counsel for *J.E.B.*).

177. One author proposes a similar analysis, noting that an "implicit balancing test" can be found in *Batson* and its progeny. Prior, *supra* note 36, at 594. The interests balanced in those cases were the importance of the peremptory challenge in our judicial system and the equal protection rights of excluded jurors. *Id.* Prior thus explains these cases by asserting that, "with regard to racial stereotypes, the equal protection clause trumps the peremptory challenge." *Id.* at 594-95. He continues by proposing the following general test:

[W]henever a venireperson is struck through the use of a peremptory challenge and that strike is based on a discriminatory classification, the strike will be valid only where the Sixth and Seventh Amendment right of an impartial jury afforded to an accused in the criminal context and a civil litigant, respectively, outweighs the equal protection rights of the excluded juror.

*Id.* at 595. If Prior's balancing is applied in the context of religion, a different outcome than that reached in the contexts of race and gender emerges. The following analysis suggests how this difference in outcomes can be justified and thus supports the proposition that, while *Batson* and *J.E.B.* may have been correctly decided, they should not be extended to the context of religion.

178. Not everyone would agree that one always has complete control over his religious identity or that religion is always a matter of choice. In this regard, it is interesting to note that children tend to affiliate with their parents' denomination. See BERNARD SPILKA ET AL., *THE PSYCHOLOGY OF RELIGION* 78 (1985).

religion on the other: "The difference I see is that race and gender are not something you choose; we do choose our religion."<sup>179</sup>

A second persuasive justification can be offered for drawing the Equal Protection Clause dividing line to protect religion-based peremptory challenges from constitutional attack. While an attorney might rely on racial or gender stereotypes when exercising a peremptory challenge, these stereotypes generally have no basis in fact. The assumption that all or most members of one race or one gender think alike and hold the same or similar views on certain issues is unsupported and unwarranted. As the Supreme Court noted in *Batson*, "A person's race simply 'is unrelated to his fitness as a juror.'"<sup>180</sup> Race is simply an unacceptable and inaccurate proxy for impartiality.

Gender-based stereotypes that form the basis of peremptory challenges are often overbroad and archaic.<sup>181</sup> Gender, like race, is an inaccurate predictor of a juror's ability to be impartial.<sup>182</sup> As such, the *J.E.B.* Court found that gender-based peremptory challenges fail to satisfy equal protection scrutiny; because gender is an inaccurate predictor of a juror's ability to be impartial, such challenges, the Court established, do not substantially assist in securing a fair and impartial jury.<sup>183</sup>

On the other hand, it does not seem entirely irrational for an attorney, who has had little time and opportunity to learn about prospective jurors in any great detail, to act on the assumption that members of particular religious faiths share similar thoughts and philosophies linked to the particular belief system embraced by these faiths.<sup>184</sup> Religion, unlike race and gender, may

179. Coyle, *supra* note 57, at 27 (quoting John F. Porter, counsel for J.E.B.).

180. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

181. See, e.g., WARD WAGNER, JR., ART OF ADVOCACY—JURY SELECTION § 1.04[9] (1994) (recommending that prospective female jurors should not be chosen when either the plaintiff or his wife is young and attractive); Andrew J. White, Jr., *Selecting the Jury*, in SUCCESSFUL JURY TRIALS: A SYMPOSIUM 123-24 (John A. Appleman ed., 1952) (questioning whether housewives should be avoided due to their limited experiences).

182. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1427 (1994). The *J.E.B.* Court further noted that "[t]he majority of studies suggest that gender plays no identifiable role in jurors' attitudes." *Id.* at 1426 n.9. Some disagree with this premise, however. See, e.g., *id.* at 1432 (O'Connor, J., concurring) (suggesting that there is a correlation between a juror's gender and attitudes but that this correlation is "irrelevant as a matter of constitutional law"); Barbara Franklin, *Gender Myths Still Play a Role in Jury Selection*, NAT'L L.J., Aug. 22, 1994, at A1, A25 (quoting several practitioners who believe that gender is an accurate predictor in certain cases); Zick Rubin, *Peremptory Challenges: A Real Challenge*, MASS. LAW. WKLY., June 13, 1994, at 11 (arguing that "gender does matter" because "[o]ne's sex inevitably determines aspects of one's experience and, thus, affects one's views of the world").

183. *J.E.B.*, 114 S. Ct. at 1426.

184. One commentator's description of religion supports this point: "Religions are . . . communities of sense and value, groups of believers struggling to come to a common understanding of the world." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 142 (1993).

This point gave rise to sharp disagreement on the Texas Court of Criminal Appeals. One dissenter supported the proposition that it is fair to make assumptions based on religion, arguing that it is "not unjust to attribute beliefs characteristic of the faith to all members of the group" because they all "share the same faith by definition." *Casarez v. State*, No. 1114-93, 1994 WL 695868, at \*21 (Tex. Crim. App. Dec. 14, 1994) (Meyers, J., dissenting). The plurality not only thought that making this assumption was improper but also described it as fallacious, noting that all members of a religion do not always agree with their leaders. *Id.* at \*8 n.15 (plurality opinion).

in fact be an accurate predictor of the attitudes of prospective jurors. As jury scholar Albert Alschuler notes, religious affiliations in particular cases "can be something of a predictor."<sup>185</sup>

Religion potentially affects a juror's attitudes and his ability to be impartial because, as Stephen L. Carter notes, "religion matters to people, and matters a lot."<sup>186</sup> Not all religious influence on jury decision-making is necessarily objectionable;<sup>187</sup> a juror's religion may affect his decision-making without rendering him partial or biased. There are circumstances, however, in which one might legitimately fear the possibility that religion invites such partiality and bias. For instance, acceptance of a particular religious faith might coincide with a judgment about certain behaviors. Particular religious affiliations may, as a group, disapprove of such behavior or activity. During the course of trial, the possibility that one of the parties engaged in this behavior or activity may be addressed or revealed. A juror belonging to that particular religious denomination might, as a result, be biased against the party on that basis, even if that behavior or activity is not directly related to the issues of the case. Religion thereby indirectly becomes an improper influence and may impair a juror's ability to be impartial. The court in *Davis* noted this:

A juror's religious beliefs are inviolate, but when they are the basis for a person's moral values and produce societal views on such matters as the use of intoxicating liquor, cohabitation, necessity of medical treatment, civil disobedience, and the like, it would not seem that a peremptory strike based on these societal views should be attributed to a pernicious religious bias.<sup>188</sup>

In addition, a juror's religion may improperly influence him when the religion's particular tenets espouse a view concerning the role of law in

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185. Coyle, *supra* note 134, at A12 (quoting Albert Alschuler). Professor Babcock points to empirical studies which indicate that jurors with certain religious affiliations are predisposed to react to evidence or the defendant in a certain manner despite their attempts to be fair and impartial. Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1145 n.14 (1993).

One of the dissenting opinions in *Casarez* offers a reasoned explanation for the belief that religion may, in fact, serve as a predictor. According to Judge Meyers, members of a particular religion, unlike those with a common race or gender, are "distinguished by their beliefs, attitudes, and convictions." No. 1114-93, 1994 WL 695868, at \*20 (Tex. Crim. App. Dec. 14, 1994) (Meyers, J., dissenting). Thus, while race and gender say nothing about a prospective juror's beliefs, "[c]ertain religious beliefs tell us what his sympathies and prejudices are." *Id.* at \*19. By contrast, the plurality summarily dismissed the conclusion that religion is an accurate predictor of a juror's attitudes. *See id.* at \*9 (plurality opinion).

186. CARTER, *supra* note 184, at 4. Carter cites some very interesting statistics to support his point. Referring to a national magazine survey, he reports that four out of five Americans pray regularly, while nine out of ten report a belief in God. *Id.* In addition, Carter reports that "strong majorities of citizens tell pollsters that their religious beliefs are of great importance to them in their daily livcs." *Id.* Other statistics support Carter's propositions. For example, 92% of respondents in one survey claimed a religious preference, while 57% stated that their beliefs are very important to them. SPILKA ET AL., *supra* note 178, at 96.

187. See Michael Ariens, *Evidence of Religion and the Religion of Evidence*, 40 BUFF. L. REV. 65, 99-105 (1992). For example, Professor Ariens notes in his article that it should not be considered improper for a juror to rely on a divine revelation in deciding whether a criminal defendant is guilty. *Id.* at 104.

188. *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994).

society and the authority of people to judge their fellow men and women. Finally, religion may render a juror unable to act and think impartially if it causes the juror to discriminate against others who are of different or antagonistic faiths.<sup>189</sup> As one text notes, "[I]t does seem that members of minority religions that are in public disrepute have one strike against them when appearing before juries."<sup>190</sup>

Comparing the history of racial and gender discrimination with the history of religious discrimination, both in governmental participation and in the composition and selection of juries, provides a third justification for upholding religion-based peremptory challenges against constitutional attack while adhering to the holdings of *Batson* and *J.E.B.*<sup>191</sup> While certain religious faiths have undeniably been the targets of discriminatory treatment at various points in history,<sup>192</sup> instances of discrimination based upon race and gender have pervaded American history, from the early founding period through the present day.<sup>193</sup>

An examination of race and gender discrimination at the various stages in the jury selection process reveals that various mechanisms, including the peremptory challenge, have been used rampantly and abusively to prevent racial minorities and women from participating as jurors. Although the right of African-American men to serve on juries was recognized in 1880,<sup>194</sup> that right has never been fully realized because of the exclusive use of voter

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189. See Ariens, *supra* note 187, at 104.

190. JAMES P. LEVINE, JURIES AND POLITICS 142 (1992).

191. Professor Babcock suggests that this point does, in fact, justify prohibition of race- and gender-based peremptory challenges, while permitting those based upon religious attributes to remain intact. In response to those opposed to extending *Batson* to gender on the ground that most other peremptory challenges are likewise based upon "unpleasant stereotypes," Professor Babcock asserts: "But in the case of the postman or the Presbyterian, the same ancient stereotypes about their competence and predispositions have not been used to prevent them from voting, being summoned for juries, pursuing their chosen professions and vocations or otherwise participating in public life and discourse." Babcock, *supra* note 48, at 478; see also Babcock, *supra* note 185, at 1173.

192. One cannot ignore the ways in which religion formed the basis for depriving many people of various rights and opportunities to participate early in our nation's history. As the Supreme Court noted in *Everson v. Board of Education*, "The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." 330 U.S. 1, 8-9 (1947). For example, the Massachusetts Constitution of 1780 provided equal treatment only for those belonging to Christian denominations. ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 10 (1990). In early statutory provisions, one can find the codification of the "religious test oath"; thus, in Georgia, South Carolina, and New Hampshire, only Protestants were permitted to serve as state legislators. *Id.* at 14. Religious requirements for voting and office-holding declined early in the colonial period, however. See ROBERT J. DINKIN, VOTING IN REVOLUTIONARY AMERICA 40, 47 (1982). Still, until 1961, Maryland's constitution required that state officials declare their belief in the existence of God. *Torcaso v. Watkins*, 367 U.S. 488, 489 (1961). The United States Supreme Court eventually held, however, that this provision unconstitutionally interfered with public officials' freedom of belief. *Id.* at 496.

193. Consider, for example, that "[i]t took fifty-two years, roughly fifty national campaigns, and almost one thousand state campaigns, the whole adult life of many earnest women, to win the vote." Babcock, *supra* note 48, at 474.

194. See *Strauder v. West Virginia*, 100 U.S. 303 (1880).

registration lists to compile lists of prospective jurors in many jurisdictions.<sup>195</sup> Similarly, not until 1973 did all fifty states permit women to serve on juries; even then, nineteen states provided special gender-based exemptions from jury service.<sup>196</sup> It was another two years before the United States Supreme Court invalidated laws restricting jury service on the basis of gender by ruling that such laws violated the Sixth Amendment.<sup>197</sup>

The Court in *J.E.B.* not only discussed the history of excluding women from juries but also seemed to place great emphasis on this history. In his opinion for the Court, Justice Blackmun devoted an entire section to this issue, chronicling in detail America's history of excluding women from jury participation.<sup>198</sup> The *Batson* opinion similarly indicates that the Court was concerned with America's history of excluding African Americans from jury service.<sup>199</sup> That the Court focused on these histories of exclusion strongly suggests that they influenced the Court's decisions and were an integral component of the Court's rationale. The Court felt that checks on the uninhibited use of peremptory challenges to discriminate on the basis of race and gender were required, because "[d]iscrimination within the judicial system . . . is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others,'"<sup>200</sup> and "for a woman [such discrimination] reinvokes a history of exclusion from political participation."<sup>201</sup>

The historical exclusion of racial minorities and women from governmental participation and jury service supports active application of the Equal Protection Clause, even into the revered peremptory challenge arena, as a mechanism for ending such categorical exclusion; *Batson* and *J.E.B.* can thus be described as special responses to special needs.<sup>202</sup> In *Davis*, the Minnesota Supreme Court read *Batson* in this way, asserting that the *Batson* Court "could

195. See HIROSHI FAKURAI ET AL., RACE AND THE JURY 45 (1993). This is true because African Americans have historically tended to have low voter registration rates. *Id.*

196. JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 225 (1991). Some of these exemptions included pregnancy, having minor children, embarrassment, and simply "being female." *Id.*

197. See *Taylor v. Louisiana*, 419 U.S. 522 (1975).

198. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1422-24 (1994); see also Biskupic, *supra* note 142, at A1 (noting that Justice Blackmun's opinion for the Court in *J.E.B.* "was laced with concern about prejudice toward women in America and comparisons between sex and race discrimination").

199. See *Batson v. Kentucky*, 476 U.S. 79, 85 (1986).

200. *Id.* at 87-88 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

201. *J.E.B.*, 114 S. Ct. at 1428.

202. Justice Powell, author of the majority opinion in *Batson*, has since submitted that the decision did, in fact, have such a purpose: "Our decision in *Batson* . . . was justified by the compelling need to remove all vestiges of invidious racial discrimination in the selection of jurors . . ." *Gray v. Mississippi*, 481 U.S. 648, 672 (1987) (Powell, J., concurring).

Justice O'Connor has likewise intimated that *Batson* should be read narrowly due to the issue with which it dealt: The "special rule [of *Batson*] is a product of the unique history of racial discrimination in this country; it should not be divorced from that context." *Brown v. North Carolina*, 479 U.S. 940 (O'Connor, J., concurring), *denying cert. to* 345 S.E.2d 393 (N.C. 1986). In *J.E.B.*, Justice O'Connor similarly supported a limited reading of the Court's holding and suggested that *Batson* and *J.E.B.* were and should remain isolated responses to special needs: "[G]ender is now governed by the special rule of relevance formerly reserved for race." *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring).

no longer ignore the racist manipulation of the jury selection process and, therefore, modified use of the peremptory with respect to race."<sup>203</sup>

By contrast, history reveals few similar instances in which people of particular religious denominations have been categorically denied the opportunity to serve as jurors.<sup>204</sup> Moreover, peremptory challenges have not consistently been used to target particular religious faiths for exclusion. This fact proved important to the holding in *Davis*, where the court found that "religious bigotry in the use of the peremptory challenge is not as prevalent, or flagrant, or historically ingrained in the jury selection process as is race."<sup>205</sup> Thus, regarding religion-based peremptory challenges, there is no special need to which the Equal Protection Clause must respond. This is precisely one of the ways in which the *Davis* court justified drawing the line between religion and *Batson*, noting that extension of *Batson* to religion-based peremptory challenges "would not serve to remedy any long-standing injustice perpetrated by the court system against specific individuals and classes."<sup>206</sup>

203. *State v. Davis*, 504 N.W.2d 767, 769 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994).

204. There do appear to be, however, scattered instances of general religious discrimination in the jury selection process. For example, in considering an article of the State's Declaration of Rights which made belief in God a prerequisite for jury service, the Maryland Court of Appeals stated:

[N]o person otherwise competent shall be deemed incompetent as a juror on account of his religious belief, "provided, he believes in the existence of God, and that under His dispensation such power will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come."

*Schowgurow v. State*, 213 A.2d 475, 478 (Md. Ct. App. 1965) (quoting Article 36 of the Maryland Declaration of Rights). In *Schowgurow*, the court noted that it was common practice for citizens to be questioned orally and in writing about their belief in God before their names were even placed on juror lists. *Id.* at 479. The court then went on to hold that the state constitutional provision, which had the effect of making belief in God a prerequisite for jury service, violated the Federal Constitution. *Id.* at 482.

To avoid the argument that making jurors take oaths constitutes an impermissible religious qualification for jury service, some courts have interpreted their State's statutory provisions so as to permit affirmations instead. *See, e.g.*, *Jones v. State*, 585 P.2d 1340, 1341 (Nev. 1978) (permitting jurors to affirm in lieu of an oath so that religious groups were not excluded from jury service); *Jenke v. State*, 487 S.W.2d 347, 348 (Tex. Crim. App. 1972) (ruling that an affirmation could be substituted for an oath so that atheists and agnostics are not prohibited from serving on juries because of their religious choosing).

205. *Davis*, 504 N.W.2d at 771. Earlier in the opinion, the court asserted that the prevalence (or lack thereof) of religious discrimination in the use of peremptory challenges should be dispositive of the issue:

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.* at 769-70 (footnote omitted).

206. *Id.* at 771. In a footnote, the *J.E.B.* Court implicitly suggests that the differences in history might provide a mechanism for continuing to adhere to its positions in *Batson* and *J.E.B.* while refusing to extend those cases to religion. After holding that parties may not rely on gender stereotypes when exercising peremptory challenges, the Court stated:

The popular refrain is that all peremptory challenges are based on stereotypes of some kind, expressing various intuitive and frequently erroneous biases. . . . *But where peremptory challenges are made on the basis of group characteristics other than race or gender* (like occupation, for example), *they do not reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life.*

The impact of the particular type of discrimination on the integrity of our jury trial system provides one final justification for drawing the line between race and gender, on one hand, and religion, on the other. The *Batson* Court chose to disallow the use of peremptory challenges to exclude members of a particular race in part because of its concern for the institutional reputation of the judicial system. The Court noted that "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."<sup>207</sup> The *J.E.B.* Court similarly expressed concern for the integrity of the system should courts continue to permit strikes based upon gender. In this regard, the Court stated its belief that "[d]iscriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender."<sup>208</sup>

This concern for integrity, however, does not apply with equal force when asserted in the context of determining the constitutionality of religion-based peremptory challenges. One cannot say, as in the context of race and gender, that religious stereotyping in the jury selection process is so pervasive and has sufficient negative impact on the public's perception of the judicial system to warrant prohibition of religion-based peremptory challenges. In this context, the goal of seating an impartial jury and the role that religion-based peremptory challenges conceivably play in achieving this goal outweigh concerns for the integrity of the judicial system.<sup>209</sup> The Minnesota Supreme Court in *Davis* cited this point in its refusal to extend *Batson* to religion:

The use of the peremptory strike to discriminate purposefully on the basis of religion does not . . . appear to be common and flagrant. . . . This is not to say that religious intolerance does not exist in our society, but only to say that there is no indication that irrational religious bias so pervades the peremptory challenge as to undermine the integrity of the jury system.<sup>210</sup>

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*J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 n.14 (1994) (second emphasis added) (citations omitted). The source cited by the Court to support this statement also points to history as a potential dividing line between race and gender, on the one hand, and religion, on the other. See Babcock, *supra* note 48, at 1173.

207. *Batson v. Kentucky*, 476 U.S. 79, 99 (1986).

208. *J.E.B.*, 114 S. Ct. at 1427.

209. See *supra* notes 184-90 and accompanying text; *infra* notes 252-54 and accompanying text.

210. *Davis*, 504 N.W.2d at 771 (footnote omitted). A dissenting judge in another case demonstrates that this conclusion is not without its critics:

Given the historic human tendency to be intolerant with respect to religion, and given the great diversity of the religious faiths of our citizens, and the importance that our citizens place on religious faith, I would suggest that discrimination in jury selection on the basis of religion is as repugnant to our ideals and has the potential to be as socially disruptive as racial discrimination if it is allowed to continue.

*Casarez v. State*, 857 S.W.2d 779, 790 (Tex. Ct. App. 1993) (Hill, C.J., dissenting), *rev'd*, 1994 WL 695868, at \*1 (Tex. Crim. App. Dec. 14, 1994). While Chief Justice Hill's conclusion ultimately prevailed on appeal, the court of criminal appeals plurality decision did not engage in a comparison of racial and religious discrimination, though it did discuss religious discrimination in isolation. See *Casarez*, 1994 WL at \*6-7 (plurality opinion).

One student author agrees that public confidence in the judicial system is not undermined by the exercise of peremptory challenges based on religious affiliation. See Michael J. Plati, Comment,



Thus, there are tenable and persuasive ways in which the Court's holding in *Batson* and its extension to gender in *J.E.B.* can be reconciled with the argument that the Constitution should not similarly be held to prohibit religion-based peremptory challenges. This argument is further strengthened when one considers the practical implications which might result from a contrary ruling.

*C. Extending Batson and J.E.B. to Religion:  
A Practically Problematic Proposition*

Beneath the constitutional considerations lie the practical ramifications. Once the constitutional argument for curtailing religion-based peremptory challenges is cast aside, these ramifications are exposed, and upon considering them, the balance tips further in favor of preserving the peremptory challenge in its present form, protecting it from further erosion in the context of religion. In opposing the extension of *Batson* to gender, the State of Alabama recognized this; and, despite the fact that the Court rejected this assertion, the point should not be forgotten when considering the issue of religion: extension "would cause 'a great number more problems than it fixes.'"<sup>211</sup>

1. Identifying "Religion-Based" Challenges and  
"Religion-Neutral" Reasons

Setting aside the actual constitutional mechanics and the distinctions which warrant a different result in the context of religion, further practical issues confront courts that extend *Batson* and *J.E.B.* to religion. Courts that reject the distinctions previously noted and find such an extension warranted will likely implement those procedures set forth in *Batson* and *J.E.B.* to determine whether peremptory challenges have been exercised in a religiously discriminatory manner.<sup>212</sup> In accordance with the formulations set forth by the Supreme Court in *Batson* and *J.E.B.*, the party alleging that the strikes are religion-based would first be required to make a prima facie showing that the opposing party intentionally discriminated by basing its peremptory challenge on the religion of the challenged prospective juror. The party who exercised the peremptory challenge would then bear the burden of explaining the basis for the challenge. While this explanation need not rise to the level of a challenge for cause in order to be accepted by the court, the party must satisfy

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*Religion-based Peremptory Strikes and the Arizona Constitution: Can They Coexist?*, 26 ARIZ. ST. L.J. 883, 894 (1994). Plati suggests this after asserting, "Although religious conflicts have gained a similar social importance in other areas of the world, their impact on American society is minimal at present." *Id.* It is interesting to note, however, that Plati ultimately concludes that both the U.S. Constitution and the Arizona Constitution prohibit religion-based peremptory challenges after examining other factors he deems to have been critical in the race and gender cases. *Id.* at 895.

211. Biskupic, *supra* note 136, at A3 (quoting Alabama Assistant Attorney General Lois N. Brasfield during oral argument in *J.E.B.*).

212. See *supra* text accompanying notes 1-72, 118-19.

the court that the challenge was based on a characteristic other than religion.<sup>213</sup> In other words, the challenging party must offer a "religion-neutral" reason for exercising the peremptory challenge. While it appears that implementation of the procedures articulated in *Batson* and *J.E.B.* has not, as some had forecast, been unworkable,<sup>214</sup> utilizing these procedures in the context of religion-based challenges will prove problematic for trial courts as well as for litigants.<sup>215</sup>

Under this procedure, the party whose peremptory strike is challenged under a rule extending *Batson* and *J.E.B.* to religion will encounter practical difficulties. If courts extend *Batson* and *J.E.B.* to religion, this party will have two options, both of which are undesirable and problematic. The party might first attempt to articulate a religion-neutral reason to support his challenge. As Sarokin and Munsterman argue, however, "this requirement will not end the objectionable practices but will merely compel lawyers to be more creative in finding reasons for excluding potential jurors."<sup>216</sup> Furthermore, there are several limitations on gathering information about prospective jurors before and during the jury selection process.<sup>217</sup> Therefore, it might prove difficult for the party exercising the objectionable peremptory challenge to formulate and articulate a religion-neutral reason sufficient to justify the peremptory challenge.

The party attempting to exercise the allegedly impermissible peremptory challenge might instead try to convert the peremptory into a challenge for

213. As noted *infra* text accompanying notes 226-27, neither *Batson* nor *J.E.B.* provide clear indications of how this new "religion-neutral" requirement would be satisfied. The guidance offered by the Court in *Batson* regarding the sufficiency of an asserted race-neutral reason is discussed *supra* text accompanying notes 68-72. According to the *J.E.B.* Court, a gender-neutral reason "need not rise to the level of a 'for cause' challenge" in order to be sufficient. "[I]t merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual." *J.E.B.*, 114 S. Ct. at 1430.

214. See, e.g., *J.E.B.*, 114 S. Ct. at 1429 ("The experience in the many jurisdictions that have barred gender-based challenges belies the claim that litigants and trial courts are incapable of complying with a rule barring strikes based on gender."); Chemerinsky, *supra* note 165, at 73 (noting that "although *Batson* has significantly changed trial practice, it has not proven unworkable"). But see *J.E.B.*, 114 S. Ct. at 1431 (O'Connor, J., concurring) (suggesting that by extending *Batson* to gender, "the Court increases the number of cases in which jury selection—once a sideshow—will become part of the main event"); *id.* at 1439 (Scalia, J., dissenting) (noting that a consequence of the Court's holding "is a lengthening of the voir dire process that already burdens trial courts"); Chemerinsky, *supra* note 165, at 73 (stating that "[l]awyers and trial judges will struggle . . . with how to implement *J.E.B.* for years to come").

215. This problem of implementation was also raised by the State of Alabama in opposing the extension of *Batson* to gender during oral argument in *J.E.B.* See *Arguments Before the Court: Courts and Procedure*, *supra* note 106, at 3330. While it was rejected in that context, the argument nevertheless has its own vitality when considered in the different context of religion.

216. H. Lee Sarokin & G. Thomas Munsterman, *Recent Innovations in Civil Jury Trial Procedures*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra* note 48, at 383. This point is supported by the observation that "[l]awyers use laundry lists of 'whatever-neutral' explanations to plug into the second-step of the *Batson* 'three-step danse macabre,' and these laundry lists are even taught at CLE seminars." *Casarez v. State*, No. 1114-93, 1994 WL 695868, at \*17 (Tex. Crim. App. Dec. 14, 1994) (McCormick, J., dissenting).

217. For instance, in the federal system, the list of prospective jurors may be kept confidential until the day of trial unless the case involves treason or a capital offense. STARR & MCCORMICK, *supra* note 4, § 3.84 (citing 18 U.S.C. § 3432 (1988)). This precludes parties from conducting pre-voir dire investigations to gather information about prospective jurors. See *supra* note 13.

cause. In so doing, the party might find it necessary during voir dire to probe beyond the religious affiliation label into the area of that faith's particular belief system and doctrinal convictions. Such attempts to probe, however, are problematic in two respects. First, the trial judge's discretion governs the nature and scope of voir dire.<sup>218</sup> Many courts have thus held that, as a general rule, questioning a prospective juror about his religious beliefs is improper; this general rule is inapplicable only when the case involves a religious party or issue.<sup>219</sup> One text advising practitioners recognizes this general rule and cautions that "[r]eligious bias . . . is not a permissible area of inquiry except in rare instances."<sup>220</sup>

Attempting to turn an allegedly impermissible peremptory strike into a challenge for cause gives rise to yet another difficulty. As previously noted, a party must satisfy a fairly rigorous standard in order to successfully challenge a prospective juror for cause.<sup>221</sup> In order to satisfy this standard, the party will likely utilize voir dire questioning (if permitted by that particular court) to delve into the juror's religious affiliation and beliefs in an effort to demonstrate to the court that the affiliation and beliefs render the juror impermissibly partial or biased. The deep and probing questioning necessary to elicit responses which support a challenge for cause might, however, offend the juror to whom it is directed.<sup>222</sup> According to one

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218. See *Mu'Min v. Virginia*, 500 U.S. 415, 423-24 (1991); see also *State v. Davis*, 504 N.W.2d 767, 772 (Minn. 1993) (noting that "[t]he trial court, in the exercise of its discretion, controls the questions that can be asked to keep the voir dire within relevant bounds"), *cert. denied*, 114 S. Ct. 2120 (1994).

219. See, e.g., *United States v. Barnes*, 604 F.2d 121, 143 (2d Cir. 1979) (finding that, because religious questioning violates jurors' privacy interests and because religion had no bearing on any aspect of the case, it was not error for the trial judge to refuse to question jurors about their religion), *cert. denied*, 446 U.S. 907 (1980); *Yarborough v. United States*, 230 F.2d 56, 63 (4th Cir.) (finding that, in a case involving failure to file income tax returns, it was not error for the trial court to fail to inquire about jurors' religious affiliations), *cert. denied*, 351 U.S. 969 (1956); *State v. Via*, 704 P.2d 238, 248 (Ariz. 1985) (en banc) (ascertaining that, because "even relevant questions about religion cannot be considered in a vacuum isolated from their impact upon the privacy interests of venire members," the lower court did not err in refusing to question jurors about religious preference and church service attendance patterns where the issues and facts of the case did not involve religion), *cert. denied*, 475 U.S. 1048 (1986); *State v. Velarde*, 616 P.2d 104, 105 (Colo. 1980) (holding that the trial court did not abuse its discretion in failing to inquire into jurors' religious beliefs during voir dire); cf. *Hornsby v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 758 P.2d 929, 933 (Utah App.) (holding that it was an abuse of discretion for the trial court to refuse to allow parties to question jurors concerning their religious affiliation where a religious organization was a party to the case), *cert. denied*, 773 P.2d 45 (Utah 1988). The court in *Davis* also noted that voir dire questioning is and should be limited in this respect. *Davis*, 504 N.W.2d at 772.

These cases are relevant to the debate over the propriety of constitutionally prohibiting religion-based peremptory challenges in one other respect. Their holdings on the issue of the proper scope of voir dire questioning implicitly suggest that, in some cases, religion does matter; they imply that religion is, in fact, a helpful and legitimate consideration in attempting to seat an impartial jury. One might argue, therefore, that these courts implicitly support and uphold the use of religion-based peremptory challenges in certain circumstances. See *supra* notes 184-90 and accompanying text (discussing the premise that religion is more likely to be a predictor of juror attitudes than race and gender and may actually influence a juror's ability to be impartial).

220. WENKE, *supra* note 154, at 79.

221. See *supra* text accompanying notes 17-21.

222. A similar argument was made by Chief Justice Burger in his *Batson* dissent:

Prosecutors and defense attorneys alike will build records in support of their claims that peremptory challenges have been exercised in a racially discriminatory fashion by asking jurors to state their racial background and national origin for the record, despite the fact that "such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire."

observer, this was, in fact, the way in which Justice Ginsburg indicated that she might distinguish race and gender from religion during oral argument in *J.E.B.*: "She noted that sex or race is immediately noticeable, but said that to determine religion . . . may require an attorney to delve too deeply into a prospective juror's personal life."<sup>223</sup> In *Davis*, the Minnesota Supreme Court thought this was an unnecessary price to pay, noting that a rule extending *Batson* to the context of religion would invite voir dire questioning "excessively intrusive for the end sought to be achieved."<sup>224</sup> The offense that may result from such questioning might actually be more severe than any affront an excluded juror might feel as the result of being challenged on the basis of his religion.<sup>225</sup> In this way, therefore, an extension of *Batson* and *J.E.B.* to religion invites intrusive questioning on the part of the party exercising the challenge, which is perhaps more trouble than it is worth.

If courts do extend *Batson* and *J.E.B.* to the context of religion, they will confront additional problems as they endeavor to apply the new rule. Trial judges will be forced to grapple with the task of determining what reasons might satisfy the new religion-neutral requirement. The guidelines set forth in *Batson* and *J.E.B.* provide little assistance. As Chief Justice Burger noted in his *Batson* dissent, "A 'clear and reasonably specific' explanation of 'legitimate reasons' for exercising the challenge will be difficult to distinguish from a challenge for cause."<sup>226</sup> Writing for the Court in *J.E.B.*, Justice Blackmun stated only that a party charged with using gender-based peremptory challenges must offer an explanation "based on a juror characteristic other than gender, and the proffered explanation may not be pretextual."<sup>227</sup>

*Batson v. Kentucky*, 476 U.S. 79, 129-30 (1986) (Burger, C.J., dissenting) (footnote omitted) (quoting *People v. Motton*, 704 P.2d 176, 180 (1985)).

223. *Arguments Before the Court: Courts and Procedure*, *supra* note 106, at 3330. In clarifying the dissent's portrayal of the Minnesota Supreme Court's *Davis* opinion, Justice Ginsburg noted that this was one of the *Davis* court's key observations. See *Davis v. Minnesota*, 114 S. Ct. 2120 (1994) (Ginsburg, J., concurring) ("I write only to note that the dissent's portrayal of the Minnesota Supreme Court is incomplete. That court made two key observations: . . . (2) 'Ordinarily . . . , inquiry on voir dire into a juror's religious affiliation and belief is irrelevant and prejudicial, and to ask such questions is improper'") (quoting *Davis*, 504 N.W.2d at 772), *denying cert. to* 504 N.W.2d 767 (Minn. 1993).

224. *Davis*, 504 N.W.2d at 771.

225. This point is important to note, because the Court in *Batson* and *J.E.B.* placed great emphasis on the affront that race- and gender-based challenges cause to the excluded juror. Avoidance of such affronts was an integral component in the Court's decisions to prohibit peremptory challenges based on race and gender. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994); *Batson*, 476 U.S. at 87.

The Court's concern with the potential affront to the excluded juror, however, does not seem well-founded in the context of race and gender and seems even less convincing in the context of religion. The very nature of the peremptory challenge dictates that no reason need be given for its exercise. See *supra* notes 22-27 and accompanying text. It is thus unlikely that a peremptorily challenged juror will know why a party chose to excuse him; the prospective juror is not told that he was challenged on the basis of his race, gender, or religion. By simply paying attention to the course of voir dire, however, the excluded juror may be able to ascertain that he was challenged on the basis of his race or gender. Nevertheless, it seems unlikely that it will be evident to him that he was challenged on the basis of his religious affiliation.

226. *Batson*, 476 U.S. at 127 (Burger, C.J., dissenting).

227. *J.E.B.*, 114 S. Ct. at 1430.

The problem of defining what would constitute a sufficient religion-neutral reason stems from the deeper problem of what, in fact, would constitute an impermissible religion-based peremptory challenge. There are three types of challenges which might earn such a label: those based upon affiliation with a particular religious denomination, those based upon the general strength and conviction of a person's religious faith, and those based upon an individual juror's indication during voir dire that his particular religious beliefs are relevant to the issues involved in the case at bar.

When exercising the first type of religion-based challenge, an attorney relies on a series of assumptions. He must first know the religion with which a particular juror identifies and then assume that his knowledge concerning that particular faith, its belief system, and its practices is correct. He must also assume that the juror who espouses such a faith is representative of the faith and personally embraces its beliefs and engages in its practices. Finally, the attorney must presume that the juror will be influenced in a particular way by those beliefs and practices.

*Davis* provides an example of the first type of potential religion-based challenge.<sup>228</sup> There, when asked to provide a race-neutral reason for excluding a particular juror, the State cited the fact that the juror was a Jehovah's Witness.<sup>229</sup> The State then reasoned that members of that faith "are reluctant to exercise authority over their fellow human beings."<sup>230</sup> In challenging that particular juror, the State was obviously making the final assumption: that the juror, like other Jehovah's Witnesses, would be unable to judge the defendant and was therefore a partial juror.

The second type of potential religion-based challenge might arise, for example, when a defense attorney attempts to strike a juror who indicates that he attends church every Sunday and two additional times per week. The attorney's challenge is likely based on the assumption that the rigidity and structure evidenced by the juror's behavior indicates that the juror might be inflexible and intolerant of those who break the law or violate society's norms.<sup>231</sup> The attorney might thus conclude that the juror is likely neither impartial nor able to be.

An example of the third candidate which could be designated as an impermissible religion-based challenge would occur in cases involving issues which are emotionally or politically charged and about which people tend to hold strong views, such as abortion. An attorney representing a doctor prosecuted for performing a third trimester abortion will likely seek to peremptorily challenge a juror who expresses a religious conviction that abortion constitutes murder.<sup>232</sup> The attorney might legitimately question whether such a juror is capable of serving impartially and viewing the

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228. See *supra* text accompanying note 129.

229. *State v. Davis*, 504 N.W.2d 767, 768 (Minn. 1993), cert. denied, 114 S. Ct. 2120 (1994).

230. *Id.* (quoting from the record).

231. For examples of this type of religion-based assumption, see *supra* text accompanying notes 152-54.

232. I would like to thank Professor Daniel O. Conkle for providing this example.

evidence and parties in an unbiased manner. The attorney might thus choose to exercise a peremptory challenge to exclude this prospective juror.<sup>233</sup>

If *Batson* and *J.E.B.* are extended to prohibit religion-based peremptory challenges absent a neutral explanation for their exercise, which of these types of challenges would be deemed constitutionally impermissible? An extension of *Batson* and *J.E.B.* to religion would require a definitive answer if the new rule is to be workable in its new context.<sup>234</sup> If the first type of challenge is classified as religion-based and therefore constitutionally impermissible, the opponent to the challenge can make the requisite *prima facie* showing simply by demonstrating that Catholics, Methodists, Buddhists, or jurors belonging to other religious groups are being excluded by exercise of the peremptory challenge.

However, the question as to what qualifies as a "religion" under this new rule would then inevitably arise. Would it be akin to the Supreme Court's treatment of the issue in its conscientious objector cases, where it has construed the term "religion" broadly?<sup>235</sup> Formulating the definition of "religion" might prove to be problematic for purposes of this new rule when one considers that any belief system which addresses the meaning of life, ultimate concerns, or humanity's place in the universe might, in some people's lives, constitute religion.<sup>236</sup>

The fact that extending *Batson* and *J.E.B.* to religion would require courts to determine what exactly constitutes religion presents one further concern. Under the test articulated by the United States Supreme Court in *Lemon v. Kurtzman*,<sup>237</sup> activities violate the First Amendment's prohibition against

233. One might question why the doctor's attorney would not simply challenge this prospective juror for cause, arguing that the prospective juror's expressed conviction sufficiently supports such a challenge. Problems with this argument are addressed *infra* notes 248-50 and accompanying text.

234. Unless and until lower courts determine what precisely constitutes a religion-based peremptory challenge, the interim period of ambiguity could conceivably invite requests for a religion-neutral explanation for every peremptory challenge. These requests will in turn unnecessarily complicate voir dire. See *Davis*, 504 N.W.2d at 771.

235. See, e.g., *United States v. Secger*, 380 U.S. 163, 165 (1965) (holding that the applicable test for determining "religious" exemptions to the draft law was "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption"). If this broad meaning of religion becomes part of the rule restricting peremptory challenges based on religion, it follows that many *Batson*-like religion-based objections will likely result.

236. See ADAMS & EMMERICK, *supra* note 192, at 93. As such, one could argue that Epicureanism, nihilism, solipsism, and materialism are all "religions," and, therefore, that challenges based upon such belief systems are impermissible. See *id.*

One of the dissenting judges in *Casarez* also raised the issue of defining the boundaries of religion and the problems such a definition might pose for a new rule barring religion-based peremptory challenges. After noting that religion is marked by shared beliefs in principles, doctrines, or rules, Judge Meyers observed: "The treatment of religious creed as an inappropriate basis for peremptory exclusion cannot rationally be distinguished from a similar treatment of persons on account of their Libertarian politics, their advocacy of communal living, or their membership in the Flat Earth Society." *Casarez v. State*, No. 1114-93, 1994 WL 695868, at \*20 (Tex. Crim. App. Dec. 14, 1994) (Meyers, J., dissenting). From this observation Judge Meyers concluded that "the extension of *Batson* to religious belief" cannot be reconciled "without also extending it to constitutionally protected beliefs of other kinds." *Id.*

237. 403 U.S. 602 (1971).

governmental establishment of religion<sup>238</sup> when they excessively entangle government and religion.<sup>239</sup> If courts hold that challenges of the first type noted above are religion-based and therefore constitutionally impermissible, courts would be required to conduct inquiries into the nature of particular beliefs and to make decisions regarding whether such beliefs are religious in order to determine what meaning "religion" has for purposes of administering the new rule. The judiciary's hand in making this determination could very well constitute excessive entanglement and thus give rise to an Establishment Clause challenge under *Lemon*. Religion and the administration of justice would become inextricably intertwined if *Batson* and *J.E.B.* were extended to prohibit the first type of challenge because such an extension will necessarily require courts to become involved in the practical application of the rule.

Furthermore, with the first type of challenge, what would constitute a sufficient religion-neutral reason?<sup>240</sup> During voir dire in *Davis*, the defendant did not attack the State's religion-based reasoning or ask for a religion-neutral explanation. If he had, however, would the State's reasoning have sufficed?<sup>241</sup> If, in fact, reluctance to judge others is a belief embraced by the Jehovah's Witness faith, might this instead provide an adequate basis for a challenge for cause?<sup>242</sup> Would a religion-neutral reason in this context be one unrelated just to the religious denomination, or must it be devoid of any reference to religiosity and associated beliefs all together?

Labeling the second type of challenge religion-based and thereby forbidding it under this new rule would present problems as well. Such a determination suggests that not only is discrimination based upon one's particular religion banned, but so too is discriminating against a juror because he is religious. Again, this will invite a flood of objections to peremptory challenges,<sup>243</sup> and, as with the first type of potentially impermissible religion-based challenge, courts would then confront the difficult task of delineating which explanations, in fact, are unrelated to religiosity and are therefore sufficient to overcome a prima facie showing of discrimination.<sup>244</sup> If such a challenge

238. See *supra* note 162.

239. *Lemon*, 403 U.S. at 613.

240. The court in *Davis* did, in fact, anticipate the difficulty of determining what might constitute a religion-neutral reason: "[W]hen religious beliefs translate into judgments on the merits of the cause to be judged, it is difficult to distinguish, in challenging a juror, between an impermissible bias on the basis of religious affiliation and a permissible religion-neutral explanation." *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993), cert. denied, 114 S. Ct. 2120 (1994).

241. The State's reasoning is quoted *supra* at text accompanying note 129.

242. The *Davis* court raised this issue by asking whether "the explanation that the juror was 'reluctant to exercise authority over their [sic] fellow human beings' [would] be sufficient to overcome a prima facie case of religious bias." *Davis*, 504 N.W.2d at 771.

Of course, the attorney wishing to exercise a peremptory challenge on this basis might focus his voir dire questioning on the individual's particular beliefs. As earlier noted, however, this approach is problematic in two respects. First, some courts as a general rule do not permit parties to ask prospective jurors about religious affiliation and beliefs. See *supra* note 219 and accompanying text. Second, when courts do permit such questioning, prospective jurors might feel that it is unnecessarily intrusive and probing. See *supra* notes 222-25 and accompanying text.

243. See *supra* note 234.

244. See *supra* text accompanying notes 240-41.

is deemed to fall within those which would be prohibited by an extension of *Batson* and *J.E.B.* to religion, the problem of entanglement might also again be a factor because of the role courts would inevitably play in administering the new rule.<sup>245</sup>

Finally, several concerns would emerge if courts hold that the third type of challenge noted above is religion-based and therefore constitutionally impermissible. Prohibiting challenges of this type ignores the reality that, in some cases, religion does matter and can serve as an accurate proxy for a prospective juror's ability to be impartial and unbiased in a particular case.<sup>246</sup> While this type of challenge can be said to have its basis in the prospective juror's religious beliefs, banning the doctor's ability to peremptorily challenge the juror could potentially violate the doctor's constitutional right to an impartial jury and would also undermine his confidence in the system and his belief that he was given a fair trial.<sup>247</sup> If precluded from peremptorily challenging this juror by a rule that extends *Batson* and *J.E.B.* to religion, the attorney might feel forced to attempt to challenge the prospective juror for cause. However, because the trial judge would not be likely to simply accept expression of this belief as a sufficient showing to support a challenge for cause,<sup>248</sup> the attorney may be forced to engage in questioning which might seem unduly intrusive or offensive to the juror.<sup>249</sup> If, after such questioning, the trial judge denies the challenge for cause and this type of religion-based peremptory challenge has been banned by the extension of *Batson* and *J.E.B.*, the attorney will be left with a juror who is likely hostile toward him, and, as a result, toward his client.<sup>250</sup>

## 2. Stripping the Peremptory of Its Useful Functions

Yet another adverse consequence would arise if courts extend the prohibitions of *Batson* and *J.E.B.* to religion-based peremptory challenges. Such an extension would further curtail the free, uninhibited use of the peremptory challenge and encroach upon its traditional nature. An extension of *Batson* and *J.E.B.* to religion would undermine several of the extolled virtues of the peremptory challenge and thereby prevent the peremptory challenge from performing some of its most useful and vital functions in the jury selection process.<sup>251</sup>

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245. See *supra* notes 237-40 and accompanying text.

246. See *supra* notes 184-90 and accompanying text for a discussion of the assertion that religion may reflect a prospective juror's ability to serve impartially and in an unbiased manner.

247. See *supra* notes 36-41, 49-52 and accompanying text.

248. This might be true because courts typically grant challenges for cause only in very limited situations. See *supra* text accompanying notes 16-21, 43.

249. See *supra* notes 222-25 and accompanying text.

250. See *supra* notes 46-48 and accompanying text for a discussion of the ways in which the challenge can serve as a "shield" against such hostility.

251. For a general discussion of the valuable functions performed by the peremptory challenge, see *supra* part II.A.



First and foremost, an extension of *Batson* and *J.E.B.* to religion would diminish the ability of the peremptory challenge to assist in assuring that an impartial jury is seated. Plainly, in some cases an attorney's underlying assumptions about particular religions are clearly unsupported, overbroad generalizations.<sup>252</sup> The attorney, however, would be failing in his role as advocate by ignoring the very real possibility that, in some instances, a juror's religion may hinder that juror's ability to hear the evidence and decide the case impartially. Given the nature of religion, it would be erroneous to totally disregard the notion that a juror might occasionally be improperly influenced by his particular religious affiliation and beliefs.<sup>253</sup> Some courts have implicitly acknowledged this reality by allowing voir dire questions concerning a prospective juror's religion only in cases that involve a religious issue or a party affiliated with a religious organization or denomination.<sup>254</sup>

When a juror does have the potential to be partial or biased because of his religious affiliation and beliefs, it is likely to go unexposed for a variety of reasons. For instance, the juror himself may not realize that his religious affiliation or beliefs may have an adverse impact on his ability to impartially view the case and evaluate the evidence and may influence him in the jury room deliberations.<sup>255</sup> The uninhibited peremptory challenge is a useful tool in guarding against such "unacknowledged or unconscious bias."<sup>256</sup> More likely is the possibility that a juror simply will not admit, in open court, that his religion could have a bearing on his ability to be impartial.<sup>257</sup> A juror may not realize until he sees the evidence and hears the testimony that his religion may improperly influence his decision-making ability. Furthermore, potential religious biases may go unexplored because of the general tendency of some courts to prohibit any questioning of jurors regarding their religious beliefs.<sup>258</sup> Similarly, attorneys may choose not to probe into the area of religion when conducting voir dire because of the prospect that "[p]ointed questions directed at an area as sensitive as a potential juror's . . . religious

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252. For an example of poor judgment in choosing to rely on a clearly questionable religious stereotype, see *Whitsey v. State*, 796 S.W.2d 707 (Tex. Crim. App. 1989) (en banc). In offering a race-neutral reason for a peremptory challenge, the prosecutor in *Whitsey* opined that the Pentecostal juror against whom the challenge was being exercised belonged to a faith whose members "sometimes feel that they speak in tongues, therefore, becoming a fringe religious group." *Id.* at 711.

253. See *supra* notes 184-90 and accompanying text.

254. See *supra* note 219 and accompanying text.

255. See *People v. McCray*, 443 N.E.2d 915, 917-18 (N.Y. 1982), *cert. denied*, 461 U.S. 961 (1983); see also *Horwitz*, *supra* note 35, at 1402.

256. *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981).

257. See *McCray*, 443 N.E.2d at 917-18; see also *Horwitz*, *supra* note 35, at 1402 (noting that prospective jurors might not express religious beliefs during voir dire if they think such beliefs may be socially unacceptable). The possibility that a juror might not speak up if he feels that religion might affect his ability to be impartial is supported by one author's observation of American culture and religion: "[W]e have created a political and legal culture that presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them." *CARTER*, *supra* note 184, at 3.

258. See *supra* notes 219-20 and accompanying text. Courts' reluctance to allow jurors to be questioned about their religion was summed up by one court as follows: "As to religion, our jury selections system was not designed to subject prospective jurors to a catechism of their tenets of faith . . ." *United States v. Barnes*, 604 F.2d 121, 141 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

. . . biases may . . . alienate a juror against counsel and his position."<sup>259</sup> As a result, attorneys often ask the entire panel whether any juror's ability to be impartial might be affected by his religious affiliation.

Finally, if the court does permit (and an attorney does ask) questions which could reveal potential religious biases or prejudices, the jurors' answers might fail to lay a sufficient foundation for a challenge for cause. Challenges for cause are very strictly construed.<sup>260</sup> Without a realistic opportunity to conduct a more in-depth inquiry into potential improper religious influence, an attorney may not be able to actually pinpoint and articulate why a challenge for cause based upon religion is warranted. And, if the attorney does attempt to do so by trying to demonstrate religious bias via questioning only to have the challenge for cause denied, the juror, given the probing and intrusive nature of the questions regarding his religious affiliation, will likely be hostile toward the attorney and the party he represents.<sup>261</sup> The peremptory challenge can then be used to guard against the chance that this hostility will adversely affect the juror's ability to impartially analyze the case.

In this respect, religion is unlike many other attributes upon which attorneys often base their peremptory challenges. Race and gender are visually ascertainable. A court is not likely to prohibit questioning of a juror concerning his occupation and how it may affect his ability to serve as an impartial juror. Thus, there is a special need to allow the free, uninhibited use of the peremptory challenge, even when it is used to exclude jurors of particular faiths or beliefs. This is true not because stereotypes regarding different religions and beliefs are correct, but instead because every other tool of voir dire is an ineffective means of ferreting out those situations in which potential religious biases and prejudices may exist.

Extending *Batson* and *J.E.B.* to religion, therefore, deprives voir dire of the one tool—the peremptory challenge—that can accomplish such a task. Without that tool, the parties will be reluctant during voir dire to explore potential religious biases and prejudices that may, in some cases, be of legitimate concern. If the religion-based peremptory challenge were eliminated, the other mechanisms of voir dire could not be relied upon to root out even the few jurors whose religious affiliation might hinder their ability to be impartial.

### 3. Preventing Further Erosion of the Peremptory Challenge

Extending *Batson* and *J.E.B.* to religion would give rise to one final practical ramification, one which should perhaps be the most disturbing. Such an extension would further erode the traditional nature of the peremptory challenge and expose the challenge to a rapid downward slide into extinction. In *J.E.B.*, the Court refuted the assertion that an extension of *Batson* to gender

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259. *McCray*, 443 N.E.2d at 918.

260. See *supra* text accompanying notes 16-21, 43.

261. See *supra* notes 222-25 and accompanying text.

signals the demise of the peremptory challenge.<sup>262</sup> The Court instead stated that parties may still base peremptory challenges on attributes which are subject to rational basis review under the Equal Protection Clause.<sup>263</sup> Thus, in theory, while an extension of *Batson* and *J.E.B.* to religion would not technically expose the peremptory challenge to extinction, as a practical matter, such an extension would call for a redefinition of the term "peremptory challenge." Extending *Batson* and *J.E.B.* to religion would render even more inaccurate the traditional description of the peremptory challenge as one exercised "without a reason stated, without inquiry and without being subject to the court's control."<sup>264</sup> Placing religion within the rubric of *Batson* and *J.E.B.* would render the label "peremptory challenge" and what it has traditionally connoted devoid of any meaningful content and would further remove it from its traditional nature. Justice Scalia acknowledged this reality during oral argument in *J.E.B.* when, at the prospect of extending protection to jurors based on attributes beyond race and gender, he retorted, "'What would be left? . . . The postman and people with blond hair.'"<sup>265</sup>

In order for this threatened erosion to be a viable and persuasive argument against such an extension, however, one must be convinced that the current nature of the peremptory, as modified by *Batson* and *J.E.B.*, is, in fact, something worth saving from such a fate.<sup>266</sup> Clearly, the peremptory challenge is not a perfect creature. Nevertheless, its historical roots, its recognition by courts and commentators as an integral and valuable aspect of the jury selection process, and the useful functions that it serves<sup>267</sup> suggest that further encroachments which alter its traditional nature should be viewed and scrutinized with serious skepticism. For it is the traditional nature of the peremptory challenge—the fact that it can be exercised without explanation—that allows the challenge to serve those functions for which it has been commended. As one observer notes, "In order to carry out these critical functions properly, the unfettered use of the peremptory challenge is necessary. As Blackstone noted over two hundred years ago, the peremptory challenge is "'an arbitrary and capricious right; and it must be exercised with

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262. *J.E.B. v. Alabama ex rel T.B.*, 114 S. Ct. 1419, 1429 (1994) ("Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges.").

263. *Id.* Even before the Court's implicit ratification in *J.E.B.* of peremptory challenges based upon age, lower courts had rejected attempts to argue that *Batson* should be extended to this attribute. See *United States v. Pichay*, 986 F.2d 1259 (9th Cir. 1993) (per curiam); *United States v. Cresta*, 825 F.2d 538 (1st Cir. 1987), cert. denied, 486 U.S. 1042 (1988).

264. *Swain v. Alabama*, 380 U.S. 202, 220 (1965), overruled by *Batson v. Kentucky*, 476 U.S. 79 (1986).

265. Biskupic, *supra* note 136, at A3 (quoting Justice Scalia during oral argument in *J.E.B.*).

266. Indeed, some would not be troubled by abolition of the peremptory challenge. See, e.g., *Batson*, 476 U.S. at 108 (Marshall, J., concurring) ("[O]nly by banning peremptories entirely can such discrimination be ended."); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Sarokin & Munsterman, *supra* note 216, at 382 (providing three reasons why, for practical and principled purposes, the peremptory challenge should be eliminated, particularly in civil trials).

267. See *supra* part II.A.

full freedom, or it fails of its full purpose.'"<sup>268</sup> Clearly, in light of *Batson* and *J.E.B.*, the use of peremptory challenges can no longer be accurately described as "unfettered." Nonetheless, while the compelling need to eradicate racial and gender discrimination and the inaccuracy of using those attributes as proxies for juror impartiality justified curtailment of the free, uninhibited use of the peremptory challenge in those contexts, the line can and should be drawn at religion if the peremptory is to maintain its vital role in the jury selection process.

### CONCLUSION

After much anticipation by lower courts, scholars, and other commentators, the Supreme Court in *J.E.B. v. Alabama ex rel. T.B.* not only broadened the extent of the holding in *Batson* and its principles of equal protection beyond the context of race, but the Court also added gender to the list of attributes which the Constitution prohibits from serving as the basis of peremptory challenges. The issue that loomed in the backdrop while the Court considered *J.E.B.* is now at the forefront of the debate regarding the constitutionally permissible scope of the peremptory challenge. *J.E.B.* failed to resolve affirmatively the issue of whether peremptory challenges based upon religious affiliation are barred by the Constitution, as are those based on race and gender. The Court's denial of the petition for certiorari in *State v. Davis* further demonstrates that the issue remains unresolved.

The peremptory challenge thus faces a very uncertain future. In considering what shape this future should take with regard to religion, the whittling away of the peremptory challenge can and should be halted. Constitutional considerations do not warrant extension of *Batson* and *J.E.B.* to religion, and the practical implications of such an extension counsel against the adoption of a rule whereby religion-based peremptory challenges must be explained. A line which is neither arbitrary nor unreasonable can be drawn to preclude such an extension. While the outcome is justifiably different where race and gender are involved, in the context of religion and the clash of rights, the need to secure impartiality in trial by jury should triumph.

Nevertheless, while the Constitution may not be a barrier to religion-based peremptory challenges, an attorney's own sense of reality and decency should serve as a check on the improper exercise of such challenges. In a profession that takes pride in its self-regulating nature, attorneys must realize the limited assistance that notions about religions and religious practices provide in the effort to seat an impartial jury, and they should act accordingly. While the right to an impartial jury might prevail in the constitutional arena, jurors' desire not to be summarily judged solely on the basis of their religious affiliations should not be rendered meaningless in the everyday practice of law.

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268. *Lewis v. United States*, 146 U.S. 370, 378 (1892) (quoting Blackstone).