THE JURY IS OUT: THE URGENT NEED FOR A NEW APPROACH IN DECIDING WHEN RELIGION-BASED PEREMPTORY STRIKES VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

Robert W. Gurry[*]

I. INTRODUCTION

> One more thing, gentlemen, before I quit. Thomas Jefferson once said that all men are created equal . . . . We know all men are not created equal in the sense some people would have us believe . . . . But there is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. . . . Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal. I'm no idealist to believe firmly in the integrity of our courts and in the jury system—that is no ideal to me, it is a living, working reality. Gentlemen, a court is no better than each man of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up. I am confident that you gentlemen will review without passion the evidence you have heard [and] come to a decision . . . . In the name of God, do your duty.[1]

The jury system is one of two[2] fundamental institutions of American democracy that give legitimacy to the notion that the powers of our government truly are derived "from the consent of the governed"[3] and that ours is indeed a government "of the people, by the people, for the

---

[*] Robert W. Gurry is an associate at Faruki, Ireland & Cox P.L.L., a commercial litigation firm in Dayton, Ohio. J.D. 2005, University of Dayton School of Law. B.S. Business Administration, *summa cum laude*, 1999, Lee University. Mr. Gurry was a staff writer and associate editor on the University of Dayton Law Review and is a Blackstone Fellow with the Alliance Defense Fund. The author would like to thank Dean Lori Shaw and Assistant Professor and Head Librarian Susan Elliott, for their dedication to legal writing instruction and for selecting this comment the best overall article, Spring 2004, and awarding it the Cohen Excellence in Writing Award. Professor Elliott, in particular, spoils law students at Dayton with her patience, willingness to help, and immense knowledge of all things related to libraries, legal research, and scholarly writing.

[1] HARPER LEE, TO KILL A MOCKINGBIRD 205 (Warner Books 1982) (1960). In this passage, Atticus Finch delivered his famous closing argument at the jury trial of a black man accused of raping a young white girl in the 1930's Deep South.

[2] The other is voting to elect the officials who govern us.

[3] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[5] Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), *in* GARY WILLS, LINCOLN AT GETTYSBURG 263 (1992).

people."[5] From the beginning of the republic, the concept of trial by a jury of one's peers has been firmly engrained in our jurisprudence and even in our collective sense of what justice is and ought to be.[6] These documents that define our form of government—the Declaration of Independence, the Gettysburg Address, and the United States Constitution—also acknowledge the significance of a deity in our nation's genesis.[7] George Mason, one of the Framers instrumental in drafting the Bill of Rights, stated that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience."[8] Yet today, the sincere acknowledgment and involvement in one's faith, a supposedly protected right, can render a citizen unfit to participate in the vital civic role and government institution of the jury. This is not only inconsistent with the spirit of the Constitution, but is a perversion

---

[6] U.S. CONST. art. III, § 2, cl. 3 provides: "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and U.S. CONST. amend. VI guarantees the right to "a speedy and public trial, by an impartial jury *of the State and district wherein the crime shall have been committed.*" (emphasis added). Although the phrase "jury of one's peers" does not appear in the Constitution itself, it is the phrase that has come to describe part of the fundamental fairness which the jury system was designed to ensure. *Frame of Government of Pennsylvania* provided "[t]hat all trials shall be by twelve men, and as near as may be, *peers or equals*, and of the neighborhood." William Penn, Laws Agreed Upon in England, *in* FRAME OF GOVERNMENT OF THE PROVIDENCE OF PENNSYLVANIA art. VIII (May 5, 1682) (emphasis added). *See also* WILLIAM BLACKSTONE, 4 COMMENTARIES *349-50 (stating that the jury was part of "strong and two-fold barrier . . . between the liberties of the people, and the prerogative of the crown" because the jury required that "the truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of *his equals and neighbors, indifferently chosen,* and superior to all suspicion") (emphasis added). The other part of the barrier to which Blackstone referred was indictment by a grand jury. *Id.* at *302-03.

[7] "We hold these truths to be *self evident*, that all men are *created* equal, that they are endowed by their *Creator* with certain *unalienable* Rights . . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added). The nation's charter thus acknowledges that the rights of life, liberty, and happiness are derived from the natural law endowed by their "Creator." The Constitution itself harkens back to the divinely endowed rights when it sets forth as one of its own purposes, "*secur*[*ing*] the *Blessings* of Liberty," not creating them by authority of a humanist state. U.S. CONST. pmbl. (emphasis added). Immediately preceding Lincoln's immortal expression of democracy, "of the people, by the people, for the people," he mentions that "this [is a] nation under God." Lincoln, *supra* note 4.

[8] VIRGINIA BILL OF RIGHTS art. XVI (1776). George Mason is known as the "Father of the Bill of Rights" because he famously refused to sign the United States Constitution and then actually led the opposition to its ratification on the grounds that it did not sufficiently limit government's power to infringe on the rights of citizens. Mason was a delegate from Virginia to the Constitutional Convention and a member of the Virginia House of Burgesses; he authored the Virginia Constitution and the Virginia Bill of Rights, which has striking similarity to the Bill of Rights to the United States Constitution which he was also heavily involved in drafting. DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION, 205-06, 525 (1st ed. 1996).

of its core protections of religious liberty, free speech, and equal protection of the laws.

Mason's statement above, exemplifying an ideal once strongly held, but no longer actually ensured, seems strangely out of place in contemporary America. Recently, a wave of government actions have been methodically eroding the free exercise of religion[9] and the equal protection of the laws,[10] which the Constitution theoretically guarantees. In the last year alone, dozens of Ten Commandments monuments have been challenged as unconstitutional, and many removed from public buildings, including the most well known in Alabama;[11] a college student had his state scholarship taken away because he chose to double major in pastoral studies along with business administration;[12] and it was held that Catholic charities *must* offer contraceptives in their employee health plans, even though this violates a fundamental tenet of the Catholic faith.[13] Thus, it seems that "*all* men" does not mean what it used to mean.[14]

The jury is unique in its function and special in its importance to our system of justice. For centuries, it has been recognized in Anglo-American jurisprudence[15] as *the* vital unit of justice to protect weak individuals from the awesome power of the state.[16] Its uniqueness stems

---

[9] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . . or the right of the people to peaceably assemble . . . .").

[10] U.S. CONST. amend. XIV, § 1 ("No State . . . shall deny to any person within its jurisdiction the equal protection of the laws.").

[11] Glasroth v. Moore, 335 F.3d 1282 (11th Cir. 2003). For a thorough critique of the court's decision in *Glasroth*, see Curtis A. New, Note, *Moore Establishment or Mere Acknowledgment: A Critique of the* Marsh *Exception as Applied in* Glassroth v. Moore*,* 335 F.3d 1282 (11th Cir. 2003), 29 U. DAYTON L. REV. 423 (2004).

[12] Locke v. Davey, 540 U.S. 712, 713-25 (2004).

[13] Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County, 85 P.3d 67 (Cal. 2004).

[14] *See supra* note 7 (emphasis added). Even if Mason's statement and the Free Exercise Clause are not taken literally—so as to actually protect the religious freedom of all men—there is no Establishment Clause issue here of supposed "separation of church and state." It has simply not been asserted or even acknowledged in the case law that the religious beliefs of individual jurors sitting on the temporary state institution of a particular jury implicate the Establishment Clause of the First Amendment.

[15] Coburn R. Beck, *The Current State of Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 965 (1998). The peremptory challenge is believed to have originated over 700 years ago in England. *Id*.

[16] ROBERT D. STACEY, PH.D., SIR WILLIAM BLACKSTONE AND THE COMMON LAW: BLACKSTONE'S LEGACY TO AMERICA (ACW Press 2003) (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *342-43). "The trial by jury . . . is also that trial by the *peers of every Englishman*, which, as the grand bulwark of his liberties, is secured to him by the great charter. . . . Our law has therefore wisely placed this *strong . . . barrier . . . between the liberties of the people, and the prerogatives of the crown*" *Id.* (emphasis added).

from its use of disinterested "peers" to render judgment. Special importance emanates from the jury's role as a check to unfettered state power, the remarkably broad discretion it is granted, and the fact that ordinary citizens, without respect to power, wealth, prestige, or ancestry, engage in direct governance of each other. The American jury is a tradition both maligned as a crude instrument of amateurish law and extolled as the great equalizer of Mother Justice. Regardless of one's appraisal of the jury concept generally, it is a truism that the quality of a particular jury is limited by the quality of those individuals who comprise it. As Harper Lee put it, speaking through that mythical lawyer Atticus Finch: "[a] court is only as sound as its jury, and a jury is only as sound as the men who make it up."[17]

If a jury is "only as sound as the [people] who make it up,"[18] then it follows that the procedure for selecting those men and women must also be sound. In our adversarial system of justice, the primary tool used to select the most fair and impartial jury, is the *voir dire*[19] challenge.[20] There are two types of challenges: for cause, and peremptory.[21] The peremptory challenge, in particular, is a nimble and effective way for the parties' attorneys to eliminate jurors whom they suspect harbor some bias against their client or case, but which either cannot be proven or does not rise to the level of a cognizable basis for partiality. In this way, the peremptory challenge is the proverbial oil in the machinery of the trial court system. It allows the inarticulable human instinct of counsel to come into play, which, in theory, increases the litigants' confidence

---

[17] LEE, *supra* note 1, at 205.

[18] *Id*.

[19] WAYNE R. LAFAVE & JERALD H. ISRAEL, CRIMINAL PROCEDURE § 22.3(a) (2d ed. 1992). *Voir dire* is Latin for, 'to speak the truth,' and in common legal parlance is the name given to the jury selection process. *Id.*

[20] A challenge (in this article, challenge and strike are used interchangeably) is an action by one of the parties' attorneys to remove a prospective juror from the venire, or the pool of eligible jurors. The challenge itself may in turn be "challenged" by opposing counsel, which means it is contested and submitted for the trial judge's or appellate court's determination. Beck, *supra* note 14, at 963.

[21] Challenges for cause require that parties give a "narrowly specified, provable and legally cognizable basis of partiality" for the strike. Swain v. Alabama, 380 U.S. 202, 220 (1965). The right to challenges for cause is rooted in the Sixth Amendment's guarantee of an impartial jury. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI (emphasis added). S*ee also* Georgia v. McCollum, 505 U.S. 42, 57 (1992). There is no limit on the number of challenges for cause which a party may make. Peremptory challenges are the alter-ego of challenges for cause. Peremptory strikes are not based on the Constitution. Until recently, they have required no explanation as to the reasons for the challenge. The number of peremptory strikes allowed is limited by the statute or court rules according to jurisdiction. Beck, *supra* note 14, at 964.

that the jury will be objective. This, in turn, strengthens overall confidence in the integrity of the system and helps those found guilty to accept the outcome more easily. The Supreme Court has carved out certain exceptions to the complete freedom to exercise even peremptory strikes. Exercising a peremptory strike based on a prospective juror's race[22] or gender[23] is now unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment.

Likewise, religion-based peremptory strikes should be strictly scrutinized[24] under the Equal Protection Clause of the Fifth and Fourteenth Amendments, the First Amendment's Free Exercise and Free Speech Clauses, and the prohibition of religious tests for public service under Article VI of the United States Constitution.[25] Ideally, the Supreme Court should abandon the current *Batson v. Kentucky* approach[26] and extend its general First and Fourteenth Amendment strict scrutiny framework to challenges which implicate the suspect class and fundamental right of religious affiliation. Procedurally, the Court should require litigants' counsel to question allegedly biased jurors further in order to uncover some evidence that a specific belief held by that juror would be likely to prevent or substantially impair the performance of the prospective juror's duties to uphold the law in the case at bar.[27] *In the alternative*, the Court should extend the *Batson* three-step burden shifting approach to religion-based peremptory strikes.[28] Whichever option the Court may choose, religious exercise must receive its due constitutional protection.

Courts must stop attempting to determine which religious attributes constitute "affiliation," "involvement," "beliefs," and "practices"; and those which are "unusual," "strong," or "heightened" religious practices.[29] These distinctions are not meaningful, create absurd legal and logical inconsistencies, and allow for irrational discriminatory classifications which harm litigants, prospective jurors, and the community. The Free Exercise Clause is broad enough to

---

[22] Batson v. Kentucky, 476 U.S. 79, 87 (1986).

[23] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 144-45 (1994).

[24] *See infra* note 144 (defining constitutional strict scrutiny).

[25] U.S. CONST. amends. XIV, V, I, and art. VI.

[26] *See discussion infra* Part II(A)(2) (discussing the three-part burden shifting test in Batson v. Kentucky, 476 U.S. 79, 94-99 (1986)).

[27] Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)) (discussing standard for excluding prospective jurors who have conscientious scruples about capital punishment under the Sixth Amendment); Haile v. State, 672 So. 2d 555, 556 (Fla. Dist. Ct. App. 1996).

[28] *Batson*, 476 U.S. at 94-99.

[29] *See discussion infra* Part II(B) (delineating some of the ways in which modern courts have created and distinguished between various levels and typologies of religious free exercise).

encompass all of these distinctions within its protection. Peremptory strikes based on *any religious attributes* of a prospective juror must be subject to the same standard of strict scrutiny as ordinary equal protection and First Amendment claims which implicate either a suspect classification or a fundamental right. The burden of proof should rest on the party claiming that a religious view will lead to a bias in the prospective juror. This high standard is warranted by the protection which the Constitution affords to free exercise of religion generally, protection from public officials being subjected to religious tests, free speech, and equal protection of the laws.[30] This standard provides the appropriate level of protection and creates flexibility while, at the same time, limiting overly broad judicial discretion. Regardless of the utility or desirability of the peremptory challenge in the trial court system, it is the Constitution which must determine the parameters of the peremptory challenge, and not the reverse.

This article discusses the problem of navigating the apparent conflict between protecting freedom of religion and preserving the guarantee of an impartial jury. Section II provides context by examining the history and modern development of the peremptory challenge, including the conflicting case law on religion-based challenges. Section III shows why the Supreme Court must review this issue and clarify what standard is to be used to scrutinize religion-based peremptory strikes in *voir dire*. It sets forth the reasons why the current *Batson* test for race-based and gender-based peremptory strikes is not adequate for religion-based challenges (nor is it adequate even for gender-based and race-based strikes). It proposes a new approach and procedural method for applying the traditional strict scrutiny framework to religion-based challenges in *voir dire*, and suggests in the alternative that the *Batson* test be extended to these challenges. Finally, Section IV briefly concludes.

II. BACKGROUND

A. History and Transformation of the Peremptory Challenge

The history of the peremptory challenge in jury trials can be traced at least as far back as fourteenth century England.[31] It has been used in the United States for some 200 years and is used today in virtually every

---

[30] *See supra* note 24.

[31] *See* Christopher M. Ferdico, *The Death of the Peremptory Challenge:* J.E.B. v. Alabama, 28 CREIGHTON L. REV. 1177 (1995). The peremptory challenge developed sometime between 1256 and 1470, the time frame in which Henry Bracton and Sir John Fortescue were writing their treatises on English common law. *Id.* at 1177 n.2. The peremptory challenge has existed in the United States since its colonization. Swain v. Alabama, 380 U.S. 202, 213-14 (1965).

trial court in every jurisdiction nationwide.[32] Prior to 1986, a peremptory challenge could be defined as "one exercised without a reason stated, without inquiry and without being subject to the court's control."[33] This is in contrast to a challenge for cause, which requires that the party making the challenge provide a "narrowly specified, provable and legally cognizable basis of partiality" to sustain the strike.[34] Essentially, the challenge for cause must satisfy a higher threshold of proof to actually demonstrate to the court that there is some real degree of probability that a particular juror will be biased in the present case, while a peremptory challenge historically did not require any showing at all.[35] Such unregulated freedom with the peremptory challenge was the state of things in 1965 when the first significant peremptory challenge case was decided.

1. The Traditional Test for Discrimination in the Law of Peremptory Strikes

In 1965, the Supreme Court decided *Swain v. Alabama*, the first significant Constitutional challenge to the system of peremptory strikes which had become ubiquitous in the trial court system.[36] In *Swain*, the prosecution exercised peremptory challenges to strike all six black members from the jury panel; the black defendant was convicted of rape by an all-white jury and sentenced to death.[37] Although the Court did not

---

[32] The peremptory challenge is utilized in all fifty states and the District of Columbia either by statute or court rule. *Swain,* 380 U.S. at 217 (citing twenty-four state statutes providing for peremptory strikes as examples). *See e.g.*, Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (codifying peremptory challenges at the federal level). *See generally* ARNE WERCHICK, CIVIL JURY SELECTION app. A (2d ed. 1993); Pamela R. Garfield, Comment, J.E.B. v. Alabama *ex rel.* T.B.: *Discrimination by any Other Name . . . ,* 72 DENV. U. L. REV. 169, 172 (1994) (explaining that the Framers considered including peremptory challenges in the Constitution, but ultimately rejected it).

[33] *Swain*, 380 U.S. at 220.

[34] *Id*.

[35] Litigants receive an unlimited number of challenges for cause because the Constitutional guarantee of an impartial jury would be a farce if biased jurors were permitted to compromise the integrity of the jury system. *See In re* Murchison, 349 U.S. 133, 136 (1955) (citing the Due Process clause of the Fourteenth Amendment as grounds for ensuring a "fair trial in a fair tribunal").

[36] *See supra* note 31 (describing the universality of peremptory challenges in the American court system).

[37] *Swain*, 380 U.S. at 205. In the *Swain* case, the petitioner was also able to prove that no black individuals had actually served on a petit jury in Talladega County, Alabama, for fourteen years (although they had been called to jury service as part of the venire). Also, black citizens had served on grand juries, including the one that indicted the petitioner. *Id.*

sanction the selection of jury members on the basis of race,[38] it set an unrealistically high evidentiary standard for proving that racial discrimination had occurred.[39] For an equal protection challenge to a peremptory strike to succeed, the petitioner would have to establish that the government had engaged in a pattern of systematic elimination of black venirepersons from petit juries over a period of time.[40] The Court concluded that the petitioner had failed to meet this burden largely due to the peremptory challenge's function of eliminating any prospective juror without the obligation to state any reason.[41] Thus, although the Supreme Court did recognize a theoretical exception to the total carte blanche of parties exercising peremptory challenges, it meant little in terms of actually limiting the practice of striking prospective jurors on account of their race. The Court explained that:

> To subject the prosecutor's challenge *in any particular case* to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards.[42]

A radical change is exactly what was in store for the peremptory challenge in the Court's next significant decision some twenty years later. In fact, many scholars have argued that the challenge today should not rightfully be called peremptory.[43]

2. The Current Test for Peremptory Strikes

In 1986, the Supreme Court overruled its earlier decision in *Swain* to the extent that *Swain* had required a challenging party to establish a systematic pattern of discrimination in jury selection.[44] Instead, the *Batson* Court held that it was the proper role of the trial court to decide if the facts of each particular case established a prima facie showing of purposeful discrimination.[45] If a prima facie showing of discrimination was found, then the prosecution had the burden to proffer a race-neutral

---

[38] *Id.* at 204 ("Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.") (quoting Cassell v. Texas, 339 U.S. 289 (1950))).

[39] *Id.* at 227.

[40] *Id*.

[41] *Id.* at 221-22.

[42] *Id.* (first emphasis added).

[43] *See* Ferdico, *supra* note 30, at 1177; Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Steven M. Puiczis, Edmondson v. Leesville Concrete Co.: *Will the Peremptory Survive its Battle with the Equal Protection Clause?*, 25 J. MARSHALL L. REV. 37 (1991).

[44] Batson v. Kentucky, 476 U.S. 79, 96, 100 (1986).

[45] *Id.* at 98.

explanation.[46] The prosecution's failure to offer a race-neutral reason for the strike would result in the preclusion of the peremptory strike at trial or a reversal on appeal.[47]

In *Batson v. Kentucky*, the prosecutor eliminated all four black venirepersons, and the black defendant was convicted of burglary by an all-white jury.[48] The defense counsel moved to discharge the jury before it had been sworn in, claiming that the prosecutor's removal of the black veniremen violated petitioner's rights to a jury drawn from a cross section of the community under the Sixth and Fourteenth Amendments and his rights to equal protection of the laws guaranteed under the Fourteenth Amendment.[49] The trial judge denied petitioner's motion stating that peremptory challenges may be used to "strike anybody [the parties] want to."[50] The Kentucky Supreme Court affirmed the lower court decision, and the United States Supreme Court granted certiorari.[51]

The Supreme Court reversed the decision of the Kentucky Supreme Court and held that the Equal Protection Clause prohibits a prosecutor's discriminatory use of peremptory challenges based on an individual juror's race.[52] Before *Batson*, all the cases which had been successfully appealed on the basis of discrimination in jury selection had done so by showing that the jurisdiction had discriminated either by allowing faulty procedures for selecting the entire jury pool, or allowing a particular race to be disproportionately underrepresented over a period of time based on a statistical comparison of the jurisdiction's racial demographics to the composition of jury pools, grand juries, or petit juries.[53] Thus, it was a

---

[46] *Id.* At this time, *Batson* type challenges were only applicable to race and only applied against prosecutors in criminal cases.

[47] *See generally id.*

[48] *Id*.

[49] *Id.* at 83.

[50] *Id.*

[51] *Id.* at 84.

[52] *Id.* at 84-90.

[53] *Id.* at 95. The *Batson* Court cited several cases showing this. *Id.* In *Whitus v. Georgia*, for example, the prospective jurors were selected from a jury roll based on a racially segregated tax digest which had been condemned in an earlier appellate proceeding. 385 U.S. 545, 545 (1967). There was an opportunity for discrimination, and the prosecution failed to explain why the condemned jury selection roll was used in petitioners' retrial. *Id*. The prosecution failed to rebut petitioners' prima facie showing of discrimination. *Id.* "[T]he disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to this conclusion [of purposeful discrimination]." *Id.* at 552. In *Castaneda v. Partida*, the respondent made out a prima facie case of purposeful discrimination by presenting census statistics that clearly identified Mexican-Americans as a disadvantaged class and revealed a percentage of the county's population far exceeding the percentage on

significant expansion in terms of evidentiary methods when the *Batson* Court announced that a single case with one race-based peremptory strike was sufficient for unconstitutional discrimination.[54] Unlike the test in *Swain,* it is not essential for the defendant to show that members of his race have been systematically excluded in the past. The institutional discrimination is only one potential source of evidence which may be used to establish a prima facie case of discrimination "in selecting the defendant's venire."[55]

The Court outlined a new test for determining cases involving equal protection challenges to peremptory strikes.[56] Where defense counsel presents to the trial judge evidence supporting a prima facie case of purposeful discrimination, then the burden shifts to the prosecution to proffer a race-neutral explanation for striking the juror(s) in question.[57] The explanation is not required to be "persuasive, or even plausible."[58] All that is required is that the explanation not reveal that "discriminatory intent is inherent in the prosecutor's explanation."[59] Ultimately, it is up to the trial judge to determine, based on the totality of the circumstances, whom and what to believe by weighing the credibility of the government's explanation against the defendant's case for purposeful discrimination.[60]

To make a prima facie showing of purposeful racial discrimination under *Batson*, the defendant must show (1) "that he is a member of a cognizable racial group";[61] (2) "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race"; and (3) "that these facts and any other relevant

---

respondent's grand jury list. 430 U.S. 482, 494 (1977). Additionally, the "key man" system of selecting the grand jury was found to be highly subjective. *Id.* at 491.

[54] *Batson,* 476 U.S. at 95-96.

[55] *Id.* at 95.

[56] *Id.* at 90-94.

[57] *Id*.

[58] Purkett v. Elem, 514 U.S. 765, 768 (1995).

[59] Hernandez v. New York, 500 U.S. 352, 360 (1991).

[60] *Batson*, 476 U.S. at 98 (quoting Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (stating that "'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court," and noting that a "trial judge's findings [in the context of discrimination in jury selection] largely will turn on evaluation of credibility"). *See also* United States v. Mahan, 190 F.3d 416, 425 (6th Cir. 1999).

[61] *But see* Powers v. Ohio, 499 U.S. 400, 420 (1991) (modifying the requirement that the petitioner be of the same race as the challenged juror and allowing a defendant to make a successful showing of purposeful racial discrimination even if the challenged jurors are of a different race than defendant).

circumstances[62] *raise an inference* that the prosecutor used that practice to exclude the veniremen from the petit jury *on account of their race.*"[63]

The *Batson* Court suggested a non-exclusive list of the "circumstances," or pieces of evidence, that might establish a prima facie case of discrimination in the exercise of a peremptory strike.[64] These include (1) evidence of a pattern of strikes against those of a particular race, and (2) the nature of the prosecutor's questions and statements during *voir dire*.[65] Other factors have been added by lower courts, including (1) whether most or all of the members of an identified group have been struck from the venire, (2) whether a disproportionate number of peremptory challenges were used to exclude specific racial or ethnic groups, and (3) whether excluded jurors shared race as their only common characteristic.[66]

3. Extending the *Batson* Test to Gender-Discrimination and Beyond

Just eight years after its holding in *Batson,* finding a Constitutional exception for race-based peremptory challenges, the Court extended this protection to apply to gender-based challenges.[67] In a suit to establish paternity and obtain child support, the State of Alabama sued on behalf of a single mother, and an all-female jury found the defendant to be the father.[68] Of the twelve males on the thirty-six member initial jury panel, the state used nine of its ten peremptory strikes to remove male jurors, and the defense used all but one of its strikes to remove female jurors.[69] This resulted in an all-female jury.[70] The petitioner objected, arguing that the challenges were exercised solely on the basis of gender to exclude male jurors in violation of the Equal Protection Clause.[71] The trial court rejected petitioner's argument that "the logic and reasoning of *Batson v. Kentucky*, which prohibits peremptory strikes solely on the

---

[62] *See* Cheryl G. Bader, Batson *Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror's Speech and Association Rights*, 24 HOFSTRA L. REV. 567 (1996) (cataloging the various factors that courts have proposed for determining whether a defendant has established a prima facie case of purposeful racial discrimination).

[63] *Batson,* 476 U.S. at 96 (emphasis added).

[64] *Id.* at 97.

[65] *Id*.

[66] *See* People v. McDonald, 530 N.E.2d 1351, 1357 (Ill. 1988); State v. Gilmore, 511 A.2d 1150, 1164-65. (N.J. 1986).

[67] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145 (1994).

[68] *Id.* at 128-30.

[69] *Id.* at 129.

[70] *Id.*

[71] *Id.*

basis of race, similarly forbids intentional discrimination on the basis of gender" under equal protection.[72]

The Supreme Court began its equal protection analysis with its normal multi-tiered scrutiny approach, applying intermediate scrutiny and requiring the government to show "an exceedingly persuasive justification" to justify its gender-based classifications.[73] The Court agreed with the State's argument that historical views of men and women *could* potentially lead to concomitant biases.[74] But the Court concluded that "gender simply may not be used as a proxy for [a juror's] bias" because there was not enough "support for the conclusion that gender alone is an accurate predictor of juror's attitudes" as to be *substantially related* to the *important government objective* of ensuring a fair and impartial jury.[75] The *Batson* three-part test was extended to apply to the State's gender-based challenge in the same way it applied to race in *Batson*.[76] The Court emphasized the rights of individual jurors to be free from invidious discrimination in jury selection, rather than the rights of the litigating parties themselves.[77]

4. Incremental Extensions and Clarification of the Equal Protection Doctrine

In the cases that followed *Batson*, a number of expansions were made to the doctrine, and the rationale on which the doctrine itself rested was clarified. The Court extended *Batson's* protection to apply even to defendants who are not of the same race as the juror being challenged.[78] That same year, the doctrine was extended to apply to civil litigants.[79] One year later, the Court extended the reach of *Batson* again to allow both parties—defense and now prosecution—to benefit from equal protection in jury selection.[80]

In addition to extending the classes and contexts to which *Batson* applied, the Court also clarified the primary rationale on which the doctrine now rests. It is not so much the effect that invidious discrimination might have on the outcome of a particular case which chiefly concerned the Court; rather, it was the right of the prospective jurors themselves to participate in one of the most fundamental civic

---

72 *Id.*

73 *Id.* at 136 (quoting Pers. Adm'r v. Feeny, 442 U.S. 256, 273 (1979)).

74 *Id.* at 137-43.

75 *Id.* at 139, 143.

76 *Id.* at 144-46.

77 *Id.* at 141.

78 Powers v. Ohio, 499 U.S. 400, 419 (1991).

79 Edmonson v. Leesville Concrete Co., 500 U.S. 614, 614 (1991).

80 Georgia v. McCollum, 505 U.S. 42, 49 (1992).

responsibilities.[81] In addition to the rights of the jurors, the Court also acknowledged the interest of upholding the integrity of the judicial system and thus, indirectly, the community or society itself.[82]

B. Religion-Based Peremptory Challenges

Although the United States Supreme Court has held that race and gender are constitutionally protected categories, it has not extended this same recognition to religious affiliation and exercise in the context of jury selection.[83] Moreover, the federal and state courts have created a panoply of holdings which have produced great inconsistency in both results and the various legal theories used to reach those results.[84]

In a recent case, the Third Circuit Court of Appeals upheld a conviction where three prospective jurors were excused due to peremptory challenges which the prosecutor admitted to making on the

---

[81] *Id. See also* Ramseur v. Beyer, 983 F.2d 1215, 1224 (3d Cir. 1992), *cert. denied*, 508 U.S. 947 (1993) (stating that *jurors* have the right to be unmarred by public discrimination in the justice system).

[82] *McCollum*, 505 U.S. at 49.

[83] United States. v. DeJesus, 347 F.3d 500, 510 (3d Cir. 2003), *cert. denied* by DeJesus v. United States, 541 U.S. 1086 (2004) (stating that the Supreme Court has not ruled on this issue). *See* Davis v. Minnesota, 511 U.S. 1115, 1115 (1994) (denying certiorari to appeal from Minnesota Supreme Court which declined to apply *Batson* to religion-based peremptory challenges); United States v. Clemmons, 892 F.2d 1153, 1158 n.6 (3d Cir. 1990) (declining to consider claim of religious discrimination in exercise of peremptory strike because issue was raised for the first time on appeal).

[84] The *DeJesus* court also noted that "[t]here is no clear consensus among the other Circuits on this issue." *DeJesus,* 347 F.3d at 510. *See e.g.,* United States v. Stafford*,* 136 F.3d 1109, 1114 (7th Cir. 1998) (stating in dicta that "[i]t would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc.," but holding that because "status of peremptory challenges based on religion is unsettled," a strike based on religion was not plain error); United States v. Berger, 224 F.3d 107, 120 (2d Cir. 2000) (declining to decide whether *Batson* extends to strikes based on religious affiliation because prosecutor provided a reason for the strike based on something other than juror's membership in a protected class); United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (extending *Batson* to religion-based challenges). The state courts are not uniform in their approach to this issue either. *Compare* State v. Fuller, 812 A.2d 389, 397 (N.J. Super. Ct. App. Div. 2002) (finding that exclusion of jurors based on religious affiliation would violate the state constitution's Equal Protection Clause), State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) (holding that *Batson* encompasses peremptory strikes based upon religious affiliation or membership), *and* Thorson v. State, 721 So. 2d 590, 594 (Miss. 1998) (holding that state constitutional and statutory law prohibit the exercise of peremptory challenges based solely on a person's religion), *with* Casarez v. State, 913 S.W.2d 468, 492 (Tex. Crim. App. 1995) (en banc), *as corrected in* 913 S.W.2d 468, 496 (1997) (holding that "interests served by the system of peremptory challenges in Texas are sufficiently great to justify State implementation of choices made by litigants to exclude persons from service on juries . . . on the basis of their religious affiliation"), *and* State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to strikes on the basis of religious affiliation).

basis of religious beliefs of the prospective jurors.[85] The court stated that it was upholding the conviction because the Supreme Court has not ruled on the issue of whether *Batson* and its progeny apply to religious affiliation, and even if *Batson* did apply, the three jurors were properly challenged on account of "heightened religious involvement" and "strong religious beliefs" as opposed to presumably ordinary religious practices and beliefs.[86] Thus, courts have upheld admittedly religion-based peremptory strikes based on the distinction between "religious affiliation" and "religious involvement," and "heightened" or "strong" religious beliefs.[87] A similar approach is that of upholding religion-based peremptory strikes due to a prospective juror's strongly professed beliefs based on the premise that the challenging party was *not singling out any particular religious group*, and therefore, the challenge was not prohibited on equal protection grounds or otherwise.[88] At least one court has gone so far as to hold that *Batson* and equal protection simply do not apply to any religion-based strikes, even including religious *affiliation*.[89] The *Casarez* court explained this as follows: ascribing particular moral, political, or social beliefs to women and African Americans is overly broad because not all members of the group subscribe to the beliefs.[90] It is therefore invidious because individual members who do not share the belief suffer due to the attribution anyway.[91] But in the case of religion, the attribution was deemed by the court not to offend equal protection principles because,

> in the case of religion, the attribution is not overly broad, and therefore not invidious, when the belief is an article of faith. Because all members of the group share the same faith by definition, it is not unjust to attribute beliefs characteristic of the faith to all [of them].[92]

Still other courts have held that *Batson* and equal protection *do extend* to religion-based challenges.[93] Many states have statutes which bear on the question, and at least one court has held that religion-based

---

[85] *DeJesus,* 347 F.3d at 503-11.

[86] *Id.* at 500, 503.

[87] *Id*.

[88] *Fuller*, 812 A.2d at 397 (finding that exclusions of jurors based on religious affiliation would also violate the state constitution's Equal Protection Clause).

[89] *Casarez*, 913 S.W.2d at 496 (holding that *discrimination on the basis of personal belief was a proper consideration* in jury selection in determining suitability for jury service). The court held that the interest served by the system of peremptory challenges was sufficiently great to justify state implementation of choices made by litigants to exclude persons from service on juries in individual cases on the basis *of their religious affiliation*. *See id*. (emphasis added).

[90] *Id.*

[91] *Id*.

[92] *Id*. at 492.

[93] State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001).

peremptory strikes are prohibited by both statute and state constitution.[94] Thus, there is a great variety of legal approaches and results on both the federal and state levels.

III. ANALYSIS

A. The Court Must Define Constitutional Protection for Religion-Based Peremptory Strikes Because Harmful Religious Discrimination is On-Going and Uncertainty is Causing Confusion for Litigants and Lower Courts

In the same way that courts and prosecutors resisted constitutional protection for racial discrimination before *Batson*, many now resist constitutional protection for religious discrimination. In 1993, the Minnesota Supreme Court held that the *Batson* line of cases does not extend to peremptory strikes based on religious affiliation.[95] The court explicitly recognized in its reasoning that "[t]he United States Supreme Court has not ruled on whether *Batson* should extend beyond race-based peremptory challenges."[96] The Minnesota court noted that the Supreme Court was, at the time, waiting to hear a case involving an equal protection challenge to a gender-based peremptory strike during *voir dire* (which subsequently led to the Supreme Court extending *Batson* and equal protection to gender-based peremptory strikes).[97]

In addition to the lack of Supreme Court precedent, three other reasons were cited by the *Davis* court as justification for its decision not to extend equal protection to peremptory strikes based on religion. First, the court assumed, without actually demonstrating, that "there is no indication that irrational religious bias so pervades the peremptory challenge as to undermine the integrity of the jury system."[98] But is there really "no indication"? In actuality, there is a long and growing litany of cases showing exactly the opposite—that there are frequent biases against religious jurors and many can, at least arguably, be called irrational.[99] It is no mystery why such religious discrimination goes on with steady consistency. The United States Supreme Court has yet to

---

[94] Thorson v. State, 721 So. 2d 590, 594 (Miss. 1998).

[95] State v. Davis, 504 N.W.2d 767, 768-72 (Minn. 1993), *cert. denied,* 511 U.S. 1115 (1994).

[96] *Id*. at 768.

[97] *Id.* (citing J.E.B. v. State *ex rel.* T.B., 606 So. 2d 156 (Ala. Civ. App. 1992), *cert. granted*, 508 U.S. 905 (1993), *rev'd*, 511 U.S. 127 (1994)).

[98] *Id.* at 771.

[99] *See* Caroline R. Krivacka, J.D. & Paul D, Krivacka, J.D., Annotation, *Use of Peremptory Challenges to Exclude Persons from Criminal Jury Based on Religious Affiliation—Post-Batson State Cases*, 63 A.L.R. 5th 375 (1998) (citing approximately 50 examples involving challenges to peremptory strikes based on religious discrimination from state criminal cases alone). *See also supra* note 83 (cataloging only a few of these cases). The irrationality of several of these religious discrimination cases is discussed *infra*.

recognize any protection for the religious beliefs of prospective jurors.[100] Many other jurisdictions as well afford little or no constitutional proscription of these religion-based strikes.[101] In these courts, there is no disincentive to the ongoing practice of tacit religious discrimination in the competitive efforts of litigants to win trials. The examples in these cases, exemplifying this lack of protection, severely undermine the bold assertion by the *Davis* court that "there is no indication that irrational religious bias so pervades the peremptory challenge."[102]

Second, the *Davis* court's assertion ignored the United States Supreme Court's standard for finding discrimination in violation of the Equal Protection Clause. As a predicate to extending constitutional protection to religion-based challenges, the *Davis* court was looking for evidence of "perva[sive]" religious bias.[103] It found that the use of the peremptory strike to discriminate purposefully on the basis of religion did not appear to be as "common and flagrant" as racial bigotry in jury selection.[104] Yet this search for discrimination in the aggregate directly contradicts the standard which the Supreme Court identified in *Batson* when overruling its decision in *Swain*. The *Baston* Court stated the principle that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury *solely on evidence* concerning the prosecutor's exercise of peremptory challenges *at the defendant's trial*."[105] The Court pointed out that "since [its] decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying *solely* on the facts concerning its selection *in his case*."[106] "[A] consistent pattern of official racial discrimination" is *not* "a necessary predicate to a violation of the Equal Protection Clause. A

---

[100] The *Davis* case is the first of two instances where the U.S. Supreme Court has denied hearing an appeal seeking to apply *Batson* to classifications based on religious affiliation, and the Court has never directly spoken on the issue. State v. Davis, 504 N.W.2d 767 (Minn. 1993). *See also* Goff v. State, 931 S.W.2d 537 (Tex. Crim. App. 1996), *reh'g denied*, (Oct. 16, 1996), *and cert. denied*, 520 U.S. 1171 (1997).

[101] United States v. DeJesus, 347 F.3d 500. 500 (3d Cir. 2003) (holding that *Batson* did not apply to peremptory strikes based on religious "beliefs"); United States v. Berger, 224 F.3d 107, 120 (2d Cir. 2000) (declining to decide whether Batson extends to strikes based on religious affiliation because prosecutor offered valid class-neutral reason for the strike); Casarez v. State, 857 S.W.2d 779 (Tex. App. 1993), *aff'd*, 913 S.W.2d 468 (Tex. Crim. App. 1995) (holding that *Batson* does not extend to the exclusion of venirepersons based on religious beliefs).

[102] *Davis,* 504 N.W.2d at 771.

[103] *Id.* at 668-772.

[104] *Id.* at 771 ("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.").

[105] *Batson*, 476 U.S. at 96 (emphasis added).

[106] *Id.* at 95 (first emphasis added).

single invidiously discriminatory governmental act" is *not* "immunized by the absence of such discrimination in the making of other comparable decisions."[107] Hence, Judge Simonett's reasoning in *Davis* is in direct contradiction to the Supreme Court's reasoning in *Batson*. The Supreme Court's subsequent extension of *Batson's* protection to gender-based peremptory strikes[108] further supports the individualized approach because gender-discrimination has been in many ways "less common and flagrant" than racial discrimination. The reasoning in *Batson* and in *J.E.B. v. Alabama ex rel T.B.* requires the current Court to extend the doctrine to protect religious beliefs and affiliation in *voir dire*.

Third, the *Davis* Court pointed out that "religious affiliation (or lack thereof) is not as self-evident as race or gender."[109] Again, the Court offers no support for this conclusory statement. While the claim that race and gender are more "self-evident" than religion may ultimately be true, its implication—that the deeply religious are not as easily discriminated against in jury selection—does not logically follow. Take, for example, a Catholic priest who wears the robe and white collar of his faith, the Orthodox Jew with his skull cap and curled forelocks, or the traditional Muslim in long white shirts and pants or burqahs in the case of women.[110] Even the mere act of carrying a Bible around in public today can cause one to stick out like a sore thumb. These are no less visible (nor less stigmatizing in many cases) than gender or race. There are, in actuality, far more religious indicators which identify those who practice their faith than the *Davis* Court was willing to acknowledge.

Even setting aside the practical evidence of religious visibility, the *Davis* Court's reasoning is flawed as it relates to the process of jury selection. The court's focus on the "self-evident" nature or identifiability of a particular class is based on the premise that the more easily identifiable the trait, the more likely it is that discrimination will occur.[111] But in the context of jury selection, religion is as easy to identify as race or gender. That is because the entire process of empanelling the venire is designed to elicit any potential traits that may, in the opinions of the parties, bias the prospective jurors. In a typical *voir dire*, there is a three-tiered method for filtering out those whom the parties believe will

---

[107] *Id.* (quoting its earlier decision in Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977) (emphasis added)).

[108] *See generally* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

[109] *Davis,* 504 N.W.2d at 771.

[110] *See, e.g.,* State v. Fuller, 812 A.2d 389, 397 (N.J. Super. Ct. App. Div. 2002) (finding permissible a peremptory strike based on prosecutor's inference from juror's traditional Muslim clothing that juror was religiously devout and therefore likely to be defense-oriented).

[111] *See generally Davis*, 504 N.W.2d at 767.

be unfavorable to their case.[112] First, each member of the jury pool fills out a questionnaire, which can be relatively extensive.[113] In these questionnaires, even in trials that have no direct relation to anything religious, questions about religious persuasions are common.[114] Second, the judge conducts individual *voir dire* questioning of the panelists.[115] Finally, the parties themselves often have the opportunity to question the jurors with little restriction[116] and exercise peremptory strikes and challenges for cause.[117] These procedures allow ample opportunity for religious beliefs and practices to be identified, and, of course, they frequently are. This, in turn, makes religious discrimination not only possible, but easy.

1. The Current Standard is Unclear

The United States Supreme Court has declined to hear a case on whether religion-based peremptory strikes are protected under Equal Protection, the First Amendment, or the *Batson* doctrine.[118] Moreover, there is a disagreement between the various state and federal jurisdictions on this issue.[119] This combination of the volume of cases litigated and the lack of any uniform constitutional standard creates inefficiency in the judicial process because the rules differ by jurisdiction and may not be clear if they have even been litigated at all. Litigants cannot be sure what the standard is, convictions are often appealed and overturned, and resources are consumed by more frequent appeals and longer trials due to extended *voir dire*. This confusion and inefficiency makes the issue ripe for constitutional review by the Supreme Court.

---

[112] It should be noted that the *voir dire* process does vary significantly depending on what jurisdiction and court system one is examining. Therefore, what follows is meant as a generic or composite version of the jury selection process, not as any predominant form.

[113] United States v. DeJesus, 347 F.3d 500, 502 (3d Cir. 2003). Although *voir dire* does differ by jurisdiction, there are a number of features that are common to many jury selection procedures. *See* Bader, *supra* note 61, at 573 n.25. For a general discussion of various jury selection procedures, see Jon M. Van Dyke, JURY SELECTION PROCEDURES (1977).

[114] *DeJesus*, 347 F.3d at 503. *See also supra* note 100 (describing the volume of cases that arise due to either oral or written questioning of prospective jurors' religious beliefs).

[115] *Id.*

[116] *Id*.

[117] *Id*.

[118] State v. Davis, 504 N.W.2d 767, 768-72 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994).

[119] *See supra* Part II.B. for a discussion of the widely varying rules by jurisdiction.

2. Defendants, Prospective Jurors, and Society All Suffer from the Supreme Court's Reticence to Speak to this Issue

The peremptory strike cases have recognized three groups that are harmed by the lack of constitutional protection for race and gender in *voir dire*: litigants, prospective jurors, and society through the injury to the judicial system's integrity.[120] *Batson* focused chiefly on the harm to the litigant whose interests in receiving a fair trial are compromised by unconstitutional challenges.[121] Thus, the *Batson* Court held that the first step in challenging a peremptory strike was showing that the defendant was himself a member of the same cognizable racial group as that of the excluded jurors.[122]

> Selection procedures that purposefully exclude African Americans from juries *undermine* that *public confidence*—as well they should. "The overt wrong, often apparent to the entire jury panel, *casts doubt* over the obligation of *the parties, the jury, and indeed the court* to adhere to the law throughout the trial of the cause."[123]

The Court has also recognized that prospective jurors and the community itself hold an interest in having confidence that the courts will faithfully apply the law and not allow invidious discrimination.[124] All of these reasons for prohibiting racial and gender discrimination apply equally to religion-based discrimination. The Court must resolve this situation which continues to be injurious to litigants, jurors, the court system, and society itself.

B. The Constitution Protects Even the "Unusual," "Strong," and "Heightened" Exercise of Religion and Extends to "Affiliation," "Beliefs," "Involvement," and "Practices"

The Free Exercise Clause is broad enough to encompass all of the various distinctions which courts have attempted to draw regarding religious observances and involvement.[125] Among the categories of race, gender, and religion, only religion is mentioned in the text of the Constitution itself. Article VI states that "no religious Test shall ever be required as a Qualification to *any* Office or public Trust under the

---

[120] Georgia v. McCollum, 505 U.S. 42, 49 (1992).

[121] *Batson*, 476 U.S. at 97.

[122] *Id*.

[123] *McCollum*, 505 U.S. at 49 (quoting Powers v. Ohio, 499 U.S. 400, 412-13 (1991) (emphasis added)).

[124] *Id.* at 49.

[125] Black's Law Dictionary defines the word, 'exercise' as "[t]o make use of; to *put into action*." BLACK'S LAW DICTIONARY 594 (7th ed. 1999) (emphasis added). The "'Free Exercise Clause'" is defined as "[t]he constitutional provision . . . prohibiting the government from interfering in people's religious *practices* or forms of worship" *Id.* at 675 (emphasis added).

United States."[126] The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[127] No direct or indirect reference to race or gender appears in either the Constitution or any of the amendments.[128] In the context of the Court's strict scrutiny framework, religion is the only class or affiliation which merits the highest level of protection, which can be called absolute protection.[129] This standard states that "a law targeting religious belief as such is never permissible."[130] This begs the question: Why is such special status and prominent placement given to religious considerations in the text of the United States Constitution itself? Fortunately, the Framers, in their extremely prolific writings, answered this question with unmistakable clarity.

According to the United States Supreme Court, it is a matter of historical fact that this nation and its government were founded by a religious people and on principles of religious faith.[131] The great majority of the Framers were self-proclaimed Christians with "strong," "heightened," and what would today be called by the courts, "unusual" religious beliefs.[132] A few examples of the religious views and practices of

---

[126] U.S. CONST. art. VI (emphasis added). This applies to petit juries since the Supreme Court has found the jury to be an institution of the government. *Powers*, 499 U.S. at 407 (stating that the jury is an important part of the democratic process and is a part of government).

[127] U.S. CONST. amend. I.

[128] The Thirteenth Amendment, which makes slavery illegal, and Fourteenth Amendment, which grants equal protection under the laws, have obvious and direct application to African Americans and were undeniably motivated by the ills of slavery. However, the actual status of race per se is not protected or explicitly stated in the same way as religion. U.S. CONST. amends. XIII, XIV.

[129] *See* Benjamin Hoorn Barton, *Religion-Based Peremptory Challenges After* Batson v. Kentucky *and* J.E.B. v. Alabama: *An Equal Protection and First Amendment Analysis,* 94 MICH. L. REV. 191, 199-200 (1995) (defining both absolute scrutiny and strict scrutiny for religious expression).

[130] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

[131] Church of The Holy Trinity v. United States, 143 U.S. 457, 457 (1892) (stating that "beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true."). *See also* THE CHRISTIAN AND AMERICAN LAW (H. Wayne House ed., 1998). Political Science Professors Donald Lutz and Charles Hyneman conducted a detailed study of the *political* writings of the Framers from the founding period of 1760–1805 in order to determine which sources most influenced the Framers in forming the American system of government. They reviewed an estimated 15,000 writings of the Framers to see what sources the Founders cited. They reduced the study to 916 items, and studied these closely to identify quotations. Lutz and Hyneman identified 3,154 references, of which the source cited far more than any other—34 percent—was the Bible (with Deuteronomy, the restatement of the law, being the most often cited book).

[132] *See* BARTON, *supra* note 7, at 123-27 (discussing historical documentation of the strong religious beliefs and actions throughout the lives of the vast majority of the early patriots who have been called Framers).

the Framers, the early Supreme Court, and the United States Congress confirm the central importance placed on religious liberty *even in the context of public expression and official government actions*.[133]

C. The Batson *Test Should be Abandoned in Favor of the Ordinary Equal Protection and First Amendment Framework: Strict, Intermediate, and Rational Review*

Constitutionally protected religious freedom may be based on the First Amendment, the Equal Protection Clause of the Fourteenth (or Fifth) Amendment, or the Religious Test Clause of Article VI.[134] In the context of religious discrimination, the particular clause or section of the Constitution does not appear to be altogether vital to an accurate analysis of the issue:

---

[133] The U.S. Supreme Court stated:

> [W]e find everywhere a clear recognition of the same truth. Among other matters and note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing every where under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.

Holy Trinity, 143 U.S. at 471. "[R]eligion and virtue are the only foundations . . . of republicanism and of all free *governments*." BARTON, *supra* note 7, at 156 (quoting 9 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, Vol. IX, 636 (Charles Francis Adams ed., Little, Brown, & Co. 1854) (emphasis added)). James Madison stated that, "to the same Divine Author of every good and perfect gift we are indebted for all those privileges and advantages, religious *as well as civil*, which are so richly enjoyed in this favored land." *Id.* at 182 (quoting 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1797 561 (James D. Richardson ed., 1899) (emphasis added)). Many of the Framers of the Constitution had the very type of "heightened religious involvement" which the modern courts have found indicative of potential biases sufficient to ground peremptory strikes. This religious fervor of our predecessors presents a cruel irony. By the standards of many of the modern courts, the very patriots who "pledge[d] to each other [their] Lives . . . Fortunes, and . . . sacred Honor," could be found unfit to serve on one of the two primary vanguards designed to secure that liberty—the jury. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). Since many of these early patriots ultimately sacrificed their lives for the cause, perhaps remembering more accurately what they fought for is in order as modern courts interpret their work.

[134] U.S. CONST. art VI (stating that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States").

> [E]mphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses – the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, . . . and the Equal Protection Clause . . . all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.[135]

Perhaps this explains why the Court has applied its strict scrutiny framework to all of these clauses in various areas of constitutional law, (naturally, with some minor permutations based on the narrow issues and sub-issues in play). While the strict scrutiny terminology is found nowhere in the text of the Constitution, it has been the judicially accepted tool for solving real world problems without literally applying the apparent meaning of the Constitutional text.[136]

1. The *Batson* Test Affords Too Much Discretion but Not Enough Flexibility

One of the weaknesses of the *Batson* test as a legal standard is that it offers judges very broad discretion in arriving at an essentially factual conclusion—whether an attorney's peremptory strike was or was not motivated by an impermissible classification—while simultaneously allowing very little flexibility in its overall approach. *Batson* and its progeny stand for the proposition that once a court accepts that an impermissible classification has motivated a peremptory strike, then the strike will be absolutely disallowed.[137] This approach does not embrace the dexterousness or degree of nuance which the strict scrutiny framework recognizes as a necessary part of interpreting and applying broad constitutional principles. Under strict scrutiny, even race-based discrimination is allowed where there is a compelling interest and the means used are narrowly tailored to effectuate that interest.[138] In dicta, the Court has left open possibilities that classifications based on race can survive strict scrutiny in cases where past discrimination against a particular race within a particular institution can be shown to have a lingering effect.[139] More recently, it was held that race-based classifications in admissions policies were justified when narrowly

---

[135] Bd. of Educ. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

[136] For example, if the First Amendment's admonition that "Congress shall make no law . . . abridging the freedom of speech" was applied completely literally, then Congress could not prohibit people from yelling out "Fire" in a crowded theatre. U.S. CONST. amend. I.

[137] *Batson*, 476 U.S. at 94-99; J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128-46 (1994) (both resulting in reversal of lower court decisions, including a criminal conviction being overturned in the former).

[138] Grutter v. Bollinger, 539 U.S. 306 (2003).

[139] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

tailored to the interest of "diversity" in higher education.[140] In the area of free speech, at least four distinct categories have been recognized as compelling governmental interests capable of passing constitutional muster when regulations are narrowly tailored to reduce or prohibit them: fighting words,[141] obscenity,[142] fraudulent misrepresentation,[143] and defamation.[144] While the merits of these respective results have been and will continue to be debated, surely one of the virtues of this approach is that it has allowed flexibility and nimble decision making. This recognizes the many different situations in which constitutional problems arise and makes allowance for a greater degree of nuance in decision making. At the same time, a general strict scrutiny approach takes some discretion away from judges because the burden of justifying the use of a suspect classification or burdening a fundamental right now rightfully rests on the party exercising the peremptory strike. The standard is clearer, and the presumption in favor of constitutional protection is restored.

2. The *Batson* Test is Unnecessary Because the Ordinary Strict Scrutiny Framework Will Better Serve Both First and Fourteenth Amendment Challenges to Peremptory Strikes

The majority in *Batson* never specifically states the conventional strict scrutiny test,[145] which is applied in every other equal protection (and First Amendment) context. Because this framework is more developed in the law and already affords the protection which the *Batson* Court sought to increase from the unrealistic *Swain* evidentiary threshold,[146] it should be used to adjudicate challenges to peremptory strikes. For some reason, which the *Batson* Court did not explain, it never applied strict scrutiny and never stated whether race-based

---

[140] Grutter v. Bollinger, 539 U.S. 306 (2003).

[141] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[142] Miller v. California, 413 U.S. 15 (1973).

[143] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

[144] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[145] The conventional strict scrutiny test requires that a state action which infringes upon a fundamental right or distinguishes based on a suspect class, must survive the Court's strict constitutional scrutiny. That is, the state action must serve some "compelling" governmental interest and the state action must be "narrowly tailored" to achieve that compelling objective. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995). If neither a fundamental right nor a suspect class is implicated, then ordinary rational basis review applies (meaning that there must only be a legitimate state objective and the state action must only be rationally related to that objective to survive Constitutional review). *Id.*

[146] The *Batson* Court overruled *Swain* to the extent that *Swain* required petitioner to establish a systematic pattern of discrimination in jury selection. *Batson*, U.S. 476 at 94.

peremptory challenges constituted facial discrimination.[147] The current *Batson* burden shifting test encourages litigants' counsel to lie to the court about the real reason for which they are striking a juror. This is because the test does not require that the party's explanation for striking the juror be "persuasive, or even plausible."[148] All that is required is that the explanation not reveal that "discriminatory intent is inherent in the prosecutor's explanation."[149] It is not surprising then that there have been a number of cases where a party peremptorily struck an African American juror, was accused of excluding the juror based on race, and *then* offered an argument based on religious beliefs as a race-neutral explanation.[150] It should be remembered that only after *Batson* did litigants cease to openly use race as a basis to strike jurors. In the current absence of protection, religion is similarly proffered in open court as a reason to strike jurors.[151]

D. Equal Protection and First Amendment Analysis of the Peremptory Strike Requires the Highest Protection for Religious Exercise and Affiliation

The Equal Protection Clause and the First Amendment share enough common ground in the context of peremptory challenges to analyze both essentially together.[152] The Court has recognized that the strict scrutiny standard is essentially the same for racial and religious classifications under the First and Fourteenth Amendments.[153] Though distinctions are made where necessary, most of the analysis in the sections below applies almost interchangeably within either Equal Protection or First Amendment strict scrutiny analysis.

1. The Peremptory Strike is Not a Compelling Interest

Although certain factions of the Supreme Court have hinted at finding that the peremptory strike represents a compelling interest for purposes of constitutional review, no majority of the Court has ever

---

[147] *See* Barton, *supra* note 128, at 194-96 (comparing *Batson* and *J.E.B.* to the Court's normal equal protection approach).

[148] Purkett v. Elem, 514 U.S. 765, 768 (1995).

[149] Hernandez v. New York, 500 U.S. 352, 360 (1991).

[150] *See* United States v. DeJesus, 347 F.3d 500, 500 (3d Cir. 2003); United States v. Clemmons, 892 F.2d 1153, 1153 (3d Cir. 1989).

[151] *See id*.

[152] *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 687 (1994) (stating that the Religion Clauses, Free Exercise Clause and the Equal Protection Clause speak with one voice and that equal treatment is the *sine qua non* of Constitutional protection).

[153] Employment Div. v. Smith, 494 U.S. 872, 886 (1990); *See also* Barton, *supra* note 129, (noting the shared strict scrutiny approach for both First and Fourteenth Amendment challenges in the context of religion-based peremptory strikes).

explicitly stated as much.[154] This is fortunate because a closer look at the trial process shows that the peremptory strike is not essential to impartial juries and fair trials and, therefore, is not compelling in the constitutional sense. In *J.E.B.*, the Court is still referring to the "State's *legitimate* interest in achieving a fair and impartial trial" and explicitly states that it is not determining "the value of peremptory challenges."[155] Thus, there is considerable doubt as to whether the peremptory strike would be found a compelling interest if specifically reviewed by the Court today.

Peremptory strikes are one procedural tool in the trial process employed as a means of attempting to ensure an impartial jury; they are not essential to achieving that constitutionally required result.[156] The peremptory strike, unlike the challenge for cause, is *not* used to target unqualified jurors, but effectively results in parties strategically selecting jurors more sympathetic to their cause, and thus *more biased*.[157] The peremptory strike allows parties to exclude neutral potential jurors in favor of more partial jurors. Accordingly, it cannot be said that peremptory strikes are required in order to achieve an *impartial* jury. Since peremptory strikes are not required to further the constitutional interest of an impartial jury, they are not and should not be treated as a compelling interest.

Even if the peremptory strike was found to have such a connection to the mandate of impartial juries and fair trials as to be deemed a compelling interest, the challenge must still give way to the freedom to practice one's religious faith. That is because religious affiliation and expression constitute both a fundamental right and a suspect class—and unlike the peremptory strike, religious freedoms are expressly spelled out in the Constitution's text.

2. Religious Affiliation is a Fundamental Right

Fundamental rights are those which are "explicitly or implicitly guaranteed by the Constitution."[158] There is no question that free

---

[154] The *Batson* dissent pointed out that the peremptory strike has historically been treated as "substantial, if not compelling." *Batson*, 476 U.S. at 125 (Burger, J., dissenting). Even here, the Justices acknowledged that the opinion of the Court was "silent," and was "leaving this issue . . . to further litigation." *Id.*

[155] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136-37 (1994) (emphasis added).

[156] "Although peremptory challenges are valuable tools in jury trial, they 'are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial.'" *Id.* at 137 n.7 (quoting Georgia v. McCollum, 505 U.S. 42, 57 (1992)).

[157] "No rule of law or practice requires that a litigant's exercise of a peremptory challenge relates in any way to the juror's ability to sit impartially on the case." Bader, *supra* note 61, at 584.

[158] San Antonio Indep. Sch. Dist. v. Rodriguez*,* 411 U.S. 1, 33-34 (1973).

exercise of religion is a constitutional, fundamental right.[159] Government actions or classifications which burden a fundamental right are subject to strict scrutiny.[160] Government denial of the opportunity to sit on a jury based on religious classification clearly burdens the free exercise of religion. It forces citizens to choose between the freedom to observe their religious beliefs and having the opportunity to administer justice by sitting on a jury. As such, it places a heavy burden on the would-be religious individual.[161] It also has a chilling effect on the freedom of expression that all of the First Amendment clauses are designed to protect because those wanting to be eligible to fulfill their civic and patriotic duty of jury service will be discouraged from overtly practicing their faith.

3. Religious Affiliation Constitutes a Suspect Class

The Supreme Court's equal protection framework has defined suspect classes as those groups "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process."[162] As the Court has recognized, religious classes have been subjected to discrimination and persecution throughout this country's history.[163] Heightened scrutiny was first acknowledged as being the appropriate standard for statutes directed at particular religious (and racial) minorities in the famous

---

[159] Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974) (stating that "[u]nquestionably, the free exercise of religion is a fundamental constitutional right").

[160] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 666-67 (1990) (holding that strict scrutiny is the standard of review for abridgment of First Amendment rights to free speech).

[161] The importance of religion is self-evident from the billions of people worldwide willing to make it a significant and often fundamental part of their lives and the sacrifices that many make to adhere to it. The importance of the jury is discussed in Section I and was recognized by the Supreme Court in Powers v. Ohio, 499 U.S. 400, 407 (1991) (quoting Alexis de Tocqueville over 150 years ago in 1 DEMOCRACY IN AMERICA 334-37 (Schocken 1st ed. 1961). Stating,

> [T]he institution of the jury raises the people itself . . . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society."

Id.

[162] *Rodriguez*, 411 U.S. at 28.

[163] *See* Everson v. Bd. of Educ., 330 U.S. 1, 8-12 (1947) (noting that Catholics, Protestants and Jews have often been the object of maltreatment, even if that has often been the product of inter-religious conflicts).

footnote four in *United States v. Carolene Products Co*.[164] Since then, the Court has several times stated that classifications based on religion are "inherently suspect" in the context of equal protection.[165] Religious persecution has been no milder or less insidious than other forms: "[M]en and women had been fined, *cast in jail, cruelly tortured, and killed*" for their religious beliefs.[166] In recognizing the historic pervasiveness of persecution of even orthodox religions, the Court in *Everson v. Board of Education* cited James Madison, who realized the need to Constitutionally protect the "liberty of conscience" to practice one's faith unhindered by the tyranny of the government.[167]

In contrast to other forms of invidious discrimination, such as racial, gender-based and so-called sexual orientation discrimination, religious discrimination is on the rise and en vogue.[168] A brief review of a few contemporary cases shows not only that sincere religious believers are a cognizable class, but that there is a rising tide of anti-religious sentiment which is easily discernible. American citizens have been peremptorily excluded from juries based on a variety of religion-oriented reasons. Religion-based peremptory strikes have been upheld based in whole or in part on prospective jurors' affiliation with the Catholic faith,[169] Jehovah's Witness church,[170] status as a preacher and wearing of a cross during *voir dire*,[171] Buddhist beliefs,[172] reading of the Bible and Christian books, choir practice, theological degrees, status as deacon and trustee, Sunday School teacher, ability to forgive others, and general hobbies or activities with a church.[173] Religion-based challenges have been made, but not upheld, based on the jurors' affiliation with the

---

[164] 304 U.S. 144, 152-53 n.4 (1938) (listing class traits which serve to qualify a group for suspect class status).

[165] City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 885 (1985).

[166] *Everson*, 330 U.S. at 9 (emphasis added).

[167] *Id.* at 11 n.9. "There are at this time in the adjacent country not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are *very orthodox*. . . . So I must beg you to pity me, and pray for *liberty of conscience to all*." (quoting James Madison, *in* 1 WRITINGS OF JAMES MADISON 18, 21 (1900)).

[168] *See generally* DAVID LIMBAUGH, PERSECUTION: HOW LIBERALS ARE WAGING WAR AGAINST CHRISTIANITY (Regnery Publ'g Inc. 2003) (describing how traditional Judeo-Christian adherents are, with increasing frequency and acceptance, subject to discrimination and persecution in government, public schools, private spheres, the media and even churches themselves, based on religious beliefs and lifestyle).

[169] Commonwealth v. Carleton, 629 N.E.2d 321 (Mass. App. Ct. 1994).

[170] Ramos v. State, 934 S.W.2d 358 (Tex. Crim. App. 1996).

[171] Bass v. State, 585 So. 2d 225 (Ala. Crim. App. 1991), *overruled on other grounds by* Trawick v. State, 698 So. 2d 151 (Ala. Crim. App. 1995).

[172] People v. Hope, 658 N.E.2d 391 (Ill. 1995).

[173] United States v. DeJesus, 347 F.3d 500, 502 (2003).

Jewish faith,[174] the Baptist denomination,[175] and the Islamic religion,[176] among others. Justice Scalia recently articulated this in his distinctive sardonic style in his dissent in *Locke v. Davey*:

> One need not delve too far into modern popular culture to perceive *a trendy disdain for deep religious conviction*. In an era when the Court is so quick to come to the aid of other disfavored groups, its indifference in this case, which involves a form of discrimination to *which the Constitution actually speaks*, is exceptional. . . . What next? Will we deny priests and nuns their prescription-drug benefits on the ground that taxpayers' freedom of conscience forbids medicating the clergy at public expense? . . . When the public's freedom of conscience is invoked to justify *denial of equal treatment*, benevolent motives shade into indifference and ultimately into *repression*.[177]

One of the factors which the *Batson* Court expressly stated as tending to show impermissible discrimination is the nature of "the prosecutor's questions and statements during *voir dire*."[178] The tone of the language used in several cases dealing with peremptory strikes for religious individuals is noteworthy. One prosecutor explained his religion-based peremptory challenge in a recent case this way: "The problem I have with [the three jurors] is . . . they read the Bible. . . . [A]ny of *these people* that read the Bible*, I want nothing to do with.*"[179] Justice Rehnquist, writing for the Court in *Davey*, described religious instruction as being "of a different *ilk*."[180] In *United States v. DeJesus*, the government mused that the reason for its previous mistrial against the defendant "may very well have been . . . some type of religious belief that *infected or paraded* into the jury's province in the first trial."[181] Apparently this is the brave new world in which Americans with "unusual," "strong," or "heightened"[182] religious beliefs are indeed second-class citizens. This sampling of the current judicial and cultural milieu shows that not only is religious affiliation a suspect class, but unlike race and gender, it is a

---

[174] Joseph v. State, 636 So. 2d 777 (Fla. Dist. Ct. App. 1994).

[175] State v. Gilmore, 511 A.2d 1150 (N.J. 1986).

[176] People v. Langston, 641 N.Y.S.2d 513 (N.Y. Sup. Ct. 1996).

[177] Locke v. Davey, 124 S.Ct. 1307, 1320 (2004) (Scalia, J., dissenting) (emphasis added) (citation omitted). In this case, a student, Joshua Davey, was offered a "Promise" Scholarship from the state of Washington for low-income and high-achieving students. When Davey decided to double major in pastoral ministries and business administration, he was told that he could not use the scholarship for such a religious endeavor. *Id.* at 1309-16.

[178] Batson v. Kentucky, 476 U.S. 79, 97 (1986).

[179] Haile v. State, 672 So. 2d 555, 556 (Fla. Dist. Ct. App. 1996) (emphasis added).

[180] *Davey*, 124 S.Ct. at 1309.

[181] United States v. DeJesus, 347 F.3d 500, 503 (2003). Albeit, the government put fourth no evidence to support this speculation of what might have happened in the previous mistrial.

[182] *Id.* at 502, 509-10.

suspect class whose susceptibility to invidious discrimination is increasing.

Far from being limited to mere insults, modern religious discrimination is taking form in renewed acts of violence and actual government policy hostile to religious people. Examples of violence against Christians include recent shootings at Wedgewood Baptist Church in Fort Worth, Texas; specific targeting of Christian students at Columbine High School in Littleton, Colorado; and the shootings of praying students in Paducah, Kentucky.[183] Presidential candidate Gary Bauer cited the shootings as examples of a "disturbing pattern" of religious persecution.[184] Former House Majority Leader Dick Armey echoed Bauer's sentiment when, in a September 29, 1999 speech, Armey stated, "We are witnessing a rising level of bigotry against people of faith, especially Christians."[185] Armey also pointed out that the anti-religious sentiment has infected official state policy; the Justice Department's own "Healing the Hate" middle school curriculum suggests to school counselors that children may be *dangerous* if they grow up in a "very religious" home.[186] These examples and a multitude of others warrant the Court's prompt adjudication of religion-based peremptory strikes based on the increasing discrimination against religious people.

Even though religion is, generally speaking, a protected class, there is a legitimate question of whether it may still be necessary to demonstrate a particular history of religious discrimination *in jury selection* in order to justify strict scrutiny for jurors who are peremptorily excluded.[187] While this may have been necessary at one time to justify applying equal protection scrutiny to peremptory strikes, *Batson* expressly eliminated this requirement in overruling *Swain*.[188] The majority in *Batson* emphasized in its holding that even a "single invidiously discriminatory governmental act" violates equal protection. "'[A] consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause.'"[189] Thus, a specific history of religious discrimination in the context of jury

---

[183] Frank York, Is Christianity a 'Hate Crime'?, WorldNetDaily (Dec. 3, 1999), http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=17272.

[184] *Id*.

[185] *Id*.

[186] *Id*.

[187] Batson v. Kentucky, 476 U.S. 79, 84-87 (1986) (citing a history of racial discrimination in the jury system); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 134 (1994) (citing a similar history of gender discrimination in jury selection).

[188] *Batson,* 476 U.S. at 94-99.

[189] *Id.* at 95 (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

selection is not necessary to afford strict scrutiny protection to jurors based on religious beliefs.[190]

4. Narrow Tailoring Requires the Most Searching Inquiry Even in *Voir Dire*

Whether based on equal protection or First Amendment analysis, the strict scrutiny standard is the same: the law or practice at issue must be narrowly tailored to serve a compelling government interest.[191] Narrow tailoring is commonly determined by asking whether the means employed by the government statute or policy are "necessary" to achieve the objective in the sense that "no less restrictive [or intrusive] alternative" could succeed in achieving the particular compelling objective.[192] The doctrine is designed to prohibit the use of invidious stereotypes and thus minimize potential discriminatory harm even where classifications *are* justified by some compelling interest.[193] The definition of stereotype—which is the primary evil to be shunned in Equal Protection Law[194]—is "a fixed or conventional notion or conception, as of a person, group, idea, etc., held by a number of people, and allowing for no individuality, critical judgment, etc."[195] This seems to be exactly what many of the courts have been allowing in the area of peremptory strikes. For example, prosecutors have commonly asserted

---

[190] Although it is not necessary in legal terms to show this history of religious discrimination in jury selection, it is probably not at all difficult to demonstrate that indeed, a significant amount of this type of religious discrimination has occurred. *See supra* note 101 for a representative sample of the sheer volume of cases that have actually been litigated based on claims of religion-based discrimination.

[191] *Compare* Wygant v. Jackson Bd. of Educ.*,* 476 U.S. 267, 279-80 (1986) (holding that under the Equal Protection Clause, "[T]o pass constitutional muster, [racial classifications] must be 'necessary . . . to the accomplishment' of their legitimate purpose" (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)), and "narrowly tailored to the achievement of that goal" (quoting Fullilove v. Klutznick, 448 U.S. 448, 480 (1980)), *with* Larson v. Valente, 456 U.S. 228, 247 (1982) (holding under the First Amendment that a "rule must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest") (citation omitted).

[192] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978).

[193] The evil of steadying a suspect class such as race is that the stereotypes "'impermissibly value[d] individuals' based on a presumption that 'persons think in a manner associated with their race.'" Gratz v. Bollinger, 539 U.S. 244, 271 (2003) (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 618 (1990). In her now-vindicated dissent, Justice O'Connor joined by Justices Rehnquist, Scalia, and Kennedy, explained this position: Narrow tailoring is designed to ensure that the only instances where a suspect class such as race may be used by the state, even where a vital interest *is* at stake is where the discriminating law scrupulously adheres to the vital interest, thus minimizing the potential harm which the discrimination will cause. *Metro*, 497 U.S. at 603 (O'Connor, J., dissenting).

[194] *Bakke*, 438 U.S. at 298, 360.

[195] WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1405 (4th ed., IDG Books 2000).

that people who have forgiven[196] others because of spiritual beliefs are less inclined to sit in judgment of other human beings and uphold the law.[197] As mentioned earlier, one court has gone so far as to say that "in the case of religion, the attribution [of moral, political, or social beliefs] is not overly broad, and therefore not invidious . . . [b]ecause all members of the group share the same faith by definition, it is not unjust to attribute beliefs characteristic of the faith to all of them."[198] The absurdity of this statement is matched only by its audacity. Judge Stapleton discerned and nicely articulated the fatal analytical leap made by these courts in his dissenting opinion in *DeJesus*:

> [A] prosecutor may undoubtedly strike a juror for being unwilling to sit in judgment of another human being. However, a prosecutor may not, consistent with the Equal Protection Clause, *infer solely from* a prospective juror's race, gender, or *religion* that he will be *unwilling to sit in judgment* of another, and then offer that unwillingness as a permissible basis for a peremptory challenge.[199]

Common sense bolsters the judge's point that the assumptions based on religious practices, currently being allowed by many courts, are unfounded. As noted below, many of the same evangelicals who make up the most conservative ranks of the political spectrum tend to hold the *toughest* views on crime. Studies consistently show that Protestants and Catholics are 10–20% more likely to support capital punishment than non-religious persons.[200] This sharply higher support for capital punishment among religious individuals—precisely the ones who believe

---

[196] Incidentally, these cases grossly misunderstand the theological concept of (at least Biblical) forgiveness. Forgiveness is not inconsistent with holding criminals accountable to society and civil government for their crimes. Rather, it is entirely coherent to say to an individual who has committed a crime against you, "I forgive you because God has shown me His own infinite grace which I did not deserve. He asks me to attempt to extend that same grace to you personally, but you must still be accountable to the civil government which God instructs all to obey and pay your debt to the rest of society." Telecom Interview with Terry Cross, Ph.D., Professor of Theology and Dean of the School of Religion, Lee University, Cleveland, TN (Jan. 20, 2004).

[197] United States v. DeJesus, 347 F.3d 500, 505-11 (3d Cir. 2003) (holding that religion-based peremptory strikes were a permissible race-neutral reason primarily because the prosecutor was entitled to infer that the jurors would be less able to exert judgment on fellow humans); State v. Fuller, 812 A.2d 389, 397 (N.J. Super. Ct. App. Div. 2002) (finding permissible a peremptory strike based on prosecutor's inference from juror's traditional Muslim clothing that juror was religiously devout and therefore likely to be a defense-oriented).

[198] Casarez v. State, 913 S.W.2d 468, 496 (Tex. Crim. App. 1995).

[199] *DeJesus*, 347 F.3d at 514 (Stapleton, J., dissenting) (emphasis added).

[200] In 2003, 70% of mainline Protestants and 79% of Catholic Americans supported capital punishment compared to only 60% for non-religious individuals. THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, RELIGION AND POLITICS: CONTENTION AND CONSENSUS (2003), http://people-press.org/reports/display.php3?PageID=722.

in Biblical forgiveness—exposes a fatal flaw in prosecutors' and courts' assumptions that religious practice equates to inability to serve judgment on others for violating the law. Even in mainline Christendom, there is roughly a 70–30% split of opinion in favor of capital punishment—hardly a consensus of thinking![201] This is merely one example to show that all religious people do not think alike as a demographic group and that the current stereotypes pretending that people of faith are less inclined to uphold the law are specious. Therefore, excluding jurors based on religious beliefs or practices is not even rationally related, let alone narrowly tailored to some supposed interest in selecting jurors who can sit in judgment of fellow humans. The Supreme Court must step in and stem the tide of these increasingly frequent and erroneous stereotypes that pervade the lower courts today.

a. Attorneys Have a Duty to Question Further to Uncover an Actual Belief or Opinion that Raises a Presumption of Impartiality or Bias for that Prospective Juror

As a procedural extension of the Court's general strict scrutiny analysis, it should require litigants' counsel to (1) question allegedly biased prospective jurors beyond vague innuendo and stereotypical religious assumptions, and (2) to adduce some actual evidence showing that a specific belief held by the juror would likely prevent or substantially impair that juror's performance of the duties to determine the case at bar based on the evidence presented and the applicable law.[202] In *Haile v. State*, the court stated:

> The [lower] court erred by failing to *inquire more deeply* into the *reasons* advanced by the state for exercising a peremptory challenge aimed at Ms. King. The court should have conducted a *more penetrating inquiry* into what appears to be a pretextual reason; the defendant is entitled to a new trial.[203]

In *Batson*, the Supreme Court correctly reasoned that "[j]ust as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."[204] The Court went on to explain that the "core

---

[201] *Id*.

[202] *See* People v. Hall, 672 P.2d 854, 854 (Cal. 1983) (holding that the trial court committed reversible error in accepting the prosecutor's explanations of his peremptory challenges at face value, and that the court had a duty not only to compel the prosecutor to explain his peremptory challenges, but also to conduct a serious evaluation of those explanations for purposes of determining whether they were bona fide).

[203] Haile v. State, 672 So. 2d 555, 556 (Fla. Dist. Ct. App. 1996) (emphasis added).

[204] *Batson*, 476 U.S. at 97 (citation omitted).

guarantee of equal protection . . . would be meaningless" if the Court on the one hand forbade the state to justify peremptory strikes by referring directly to the veniremen's race, but still allowed the party to justify a strike by couching it in terms of "assumptions" of bias "which arise solely from the jurors' race."[205] This boils down to a standard that prohibits striking a venireperson based *either directly or indirectly* on the individual's race. Applying the same principle to religion-based challenges exposes the hypocrisy which currently exists when judges say, apparently with straight faces, that discrimination based on "heightened religious involvement" or "unusual beliefs" is somehow substantively different from discrimination based on religious affiliation (evidently meaning religious sects with which persons associate). These distinctions hold no meaning for the individuals who are peremptorily struck from jury duty because they go to church, or sing in the choir, or read the Bible, or engage in other Christian or religious practices. Their constitutional rights are violated due to their lifestyle, their beliefs, and their actions—all of which are covered under the deliberately broad umbrella of "free exercise of religion."[206] Even the courts which have attempted to distinguish between *religious beliefs* in general, as opposed to *particular denominations,* fail to recognize that the sole purpose for different denominations is the set of sacred beliefs which constitute them. Thus, these distinctions do not inoculate otherwise impermissible discrimination merely by selecting a different word which technically distinguishes a fact pattern from some prior court precedent. The Constitution protects religious exercise, whatever its label.

The equal protection principle articulated in *Batson* is that discrimination against a suspect class is neither allowed directly nor indirectly through a proxy by another name. If this is carried forward to apply to the fundamental right of religious expression, then the absurdity of the *DeJesus* case and similar cases is exposed. In *DeJesus*, the court allowed the peremptory strikes to stand based on the venirepersons' "heightened religious involvement" and "fairly strong religious beliefs."[207] The prosecutor clearly based these assumptions of bias on the perception of how the venirepersons' religious beliefs would affect their ability to judge the facts impartially. In making his race-neutral explanation, the prosecutor admitted basing his assumptions of bias at least indirectly, and probably even *directly* on the religious persuasions of the venirepersons. Thus, under the *Batson* standard, the challenges should be struck down as violating the equal protection rights of the litigants, the prospective jurors, and the community.

---

[205] *Id.* at 97-98.

[206] U.S. CONST. amend. I.

[207] *DeJesus*, 347 F.3d at 502-03, 510.

b. It Must be Determined Whether the Prospective Juror's Belief Would "Prevent or Substantially Impair the Performance of his Duties as a Juror in Accordance with his Instructions and his Oath"[208]

The constitutional protection of religious liberty, like other constitutional protections, is not absolute. Accordingly, some analytical framework must be devised to reconcile the substantial protection it is afforded with the also-important interest of the right to trial by an impartial jury.[209] One standard strikes a sensible balance between the two weighty interests. It is the standard used for deciding whether for-cause challenges exercised to exclude prospective jurors based on their conscientious views regarding capital punishment deprive a defendant of an impartial jury.[210] It asks whether the juror's "views about capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath" to "consider and decide the facts impartially and conscientiously apply the law as charged by the court."[211] This standard is used to determine the propriety of for-cause challenges, not ordinary peremptory strikes. Therefore, the higher threshold requirement must be justified if it is to be applied to religion-based peremptory challenges.

First, the explicit constitutional protection given to religion necessitates a higher standard of protection than other ordinary rights. Strict scrutiny requires that the free exercise of religion must not be compromised absent a showing that the law or rule in question is narrowly tailored to achieve a compelling interest of the State.[212] The language and approach of the *Wainright v. Witt* standard recognizes the need to balance these interests.[213] On the one hand, it requires a party wanting to exclude a juror with some scruples about the death penalty to show some connection to, or questioning of, the juror's ability to decide the case based on the merits of the evidence presented and applying the law.[214] Thus, it does not permit the prosecutor to challenge the juror for cause if all that can be inferred from the juror's answers is that he or she

---

[208] Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)) (discussing standard for excluding prospective jurors who have conscientious scruples about capital punishment under the Sixth Amendment).

[209] U.S. CONST. amend. VI provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury of the State and district wherein the crime shall have been committed* . . ." (emphasis added); U.S. CONST. amend. XIV provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[210] *Wainright*, 469 U.S. at 420.

[211] *Id*.

[212] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 143 U.S. 457, 533 (1993).

[213] *Wainright*, 469 U.S. at 420-21.

[214] *Id*.

"would be more emotionally involved or would view their task 'with greater seriousness and gravity.'"[215] This standard does not allow use of the sloppy stereotype that all persons having any lack of comfort with the death penalty are subject to exclusion merely on that basis. On the other hand, in attempting to establish a connection between the juror's viewpoint and an inability to fairly administer his duties, the prosecution is not required to make such a biased attitude unmistakably clear to the trial judge. In fact, the trial judge may decide that a particular juror would be unable to faithfully and impartially apply the law from his own impression "[d]espite [a] lack of clarity in the printed record."[216]

This higher standard comports with the stronger protection that strict scrutiny is designed to ensure. The Supreme Court's rulings protecting litigants and prospective jurors from discrimination during *voir dire* have come about despite considerable resistance and criticism.[217] The *Batson* Court itself acknowledged, but discounted, the potential danger that its holding would "eviscerate" the function of the peremptory challenge to achieve the most fair and impartial jury possible as part of a fair trial.[218] While *Batson* and its offspring have spawned a substantial amount of scholarly criticism (and support), it does not seem to have eviscerated the important function that the challenge still plays in the trial process throughout the nation.[219] Nor, as the appellee–prosecutor in *Batson* predicted, has the test led to insurmountable administrative difficulties.[220] Some will argue that requiring the higher standard effectively converts the peremptory challenge into a for-cause challenge. This theory is misdirected because the name one gives to the protection required by the Constitution is not significant; the practical legal effect is what matters. To be sure, the approach argued for here does elevate the religion-based peremptory strike to a higher threshold, requiring litigants to meet a more rigorous standard when excluding a juror based on religious exercise. This is much the same as what the *Batson* and *J.E.B.* cases did for race and gender-based peremptory challenges. Moreover, as is demonstrated

---

[215] *Id*. (quoting Adams v. Texas, 448 U.S. 38, 49 (1980)).

[216] *Id.* at 425.

[217] *See supra* note 32 for examples of law review articles criticizing the *Batson* line of cases.

[218] Batson v. Kentucky, 476 U.S. 79, 98 (1986).

[219] *See supra* note 43 for several law review articles arguing that the peremptory challenge either will be, or already is, eviscerated as an effective tool in selecting fair juries.

[220] The California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years before *Batson*, were burdensome for trial judges. *Batson*, 476 U.S. at 90-99.

below, the Constitution affords special protection to religion beyond even race and gender.[221] The Constitution is the supreme law of the land; the peremptory strike is a mere procedural tool. Like the mighty river which forms the contours of its surrounding canyon, so must the Constitution carve out the parameters of the peremptory strike, not the other way around.

E. Placing the Burden on the Party Claiming the Bias is Consistent with the High Degree of Protection Given to Religious Expression in the Constitution

Religion and religious practice are given special status and protection by the Constitution explicitly—unlike race or gender. [222] Even the provision in Article VI that "no religious test shall ever be required as a qualification to any office or public trust under the United States" supports the application of strict scrutiny when using religious factors in peremptorily striking a potential juror.[223] The protection of religious exercise in the Constitution is much broader than many of the current courts now acknowledge. Unlike gender or race, religious protections are explicitly in the text of the Constitution itself, and in more than one clause. When religion-based challenges are allowed, four different Constitutional clauses are violated: (1) Free Speech, (2) Free Exercise of religion, (3) Equal Protection, and (4) the prohibition of using religious litmus tests for public office found in Article VI.

When prospective jurors are suspected of biases associated with religious beliefs, the questioning attorney must develop the juror's testimony and establish that the juror actually does, or at least is likely to, harbor the alleged bias. Then the attorney must also demonstrate that the bias itself would cause prejudice in the case at bar; in other words, it must be shown that the bias would be likely to cause an unfair trial in light of the case's subject matter.[224] The reason for these additional requirements is that religious affiliation is both a

---

[221] *See infra* Part III.E. (explaining the constitutional justifications for recognizing the highest degree of protection for religious affiliation).

[222] U.S. CONST. amend. XIV. Neither race, gender, nor any equivalent of these actually appears in the text of the Fourteenth Amendment or elsewhere in the Constitution. In contrast, religious liberty appears explicitly in the original text of both Article VI and in the First Amendment. This comment does not argue that protection for race and gender should in any way be lessoned, but rather that religious liberty must once again be given at least a level of protection consistent with an honest interpretation of the Constitution.

[223] U.S. CONST. art. VI.

[224] For example, a juror who had a strong belief against capital punishment would be completely irrelevant in a misdemeanor case. In contrast, a juror who believed that all adulterers should still be stoned in accordance with Old Testament Jewish law is probably biased in regard to a divorce proceeding where infidelity is a central issue.

fundamental right and a suspect class. To abridge such a right or draw such a suspect classification, the party challenging must show that the challenge is narrowly tailored to meet a compelling state interest.[225] As has been discussed above, the peremptory strike itself is not a compelling or fundamental interest because it is not essential to a fair and impartial jury. The challenge is narrowly tailored only if the challenging party can establish that the bias is very likely to prejudice one of the parties in the case. If this test is met, then the challenge will be sustained on the basis of the improper bias notwithstanding the religious source of the bias. The questioning attorney must at least develop the prospective juror's testimony so that a nexus can be drawn between the religious belief or practice and the alleged bias that such a belief or practice would be likely to cause in the case at bar. Currently, none of these safeguards are required. Consequently, many citizens have had their constitutional rights trampled by litigants and by the courts who are entrusted to protect them.

Applying the standard previously set forth requires little imagination or ingenuity for attorneys and judges. Much of its strength lies in its simplicity. In the *DeJesus* case, for example, the prosecutor merely should have questioned the jurors further to ascertain whether, in fact, their religious beliefs and involvement would actually impair their ability to judge the case based on the evidence and applicable law. The prosecutor could have begun by asking the juror, who had forgiven the murderer of his cousin, whether that belief in forgiveness (or the particular experience itself) would affect his ability to judge another human being; this question was apparently never asked.[226] If it were asked, however, it could be followed by a series of questions probing further how the prospective juror could grant personal spiritual forgiveness on the one hand, while at the same time holding a criminal accountable to the civil government in the case at bar. These questions asked by a skillful attorney, together with the prospective juror's unrehearsed answers, provide a much greater opportunity for the trial judge to determine credibility and whether the religious beliefs would substantially and improperly influence the juror's performance of duties

---

[225] This is nothing more than the ordinary constitutional strict scrutiny test which is used whenever a fundamental right is implicated.

[226] Transcript of Jury Selection at 53–55, United States v. DeJesus, 347 F.3d 500, (3d Cir. 2003) (No. 99-728). *See also*, United States v. DeJesus, 347 F.3d 500, 514-515 (3d Cir. 2003) (Stapleton, J., dissenting). Stating that,

> [T]he voir dire transcript reveals no indication from either McBride or Bates that they would be reluctant to convict or pass judgment on another human being. If they had exhibited such a reluctance, the government clearly would have been able to use such a belief, regardless of whether it had a religious basis, as the reason behind a peremptory strike.

Id.

in a given case. If the juror answered that his belief in forgiveness would make it difficult to hold another person accountable or if the trial judge had reason to doubt the veracity of his answers, then the juror may still be properly excluded (if the potential bias is sufficient to compromise the compelling interest of the fair trial itself). This avoids the logical fallacy of jumping from the mere religious activities of an individual to concluding that the person cannot uphold the oath and decide a case on its merits. This satisfies constitutional strict scrutiny under the First and Fourteenth Amendments if the peremptory strike is someday found to be a compelling interest or if the individual juror's degree of bias must be excluded to ensure the compelling interest of an entire fair trial itself.

IV. CONCLUSION

If constitutional protection for religious discrimination in jury selection is not soon recognized and defined by the Supreme Court, religious discrimination will continue to occur and is very likely to increase. This harms the litigants themselves, the excluded members of the panel, the court system's integrity, and society as a whole. When individuals with strong religious beliefs or involvement are excluded from the fundamental civic role of serving on a jury, it violates the Equal Protection Clause of the Fourteenth Amendment, Article VI's prohibition of any religious test being used for a public office, and all the best principles of the First Amendment's guarantees of free speech and religious expression. When the Court began its experiment with the *Batson* doctrine in 1986, it did so in the name of equality. But the current message to religious individuals called for jury duty is clear: Thou Shalt Not Believe. The standard for religion-based strikes is unclear, and the harm this causes is troubling. The Supreme Court must act to remedy this injustice. Until this problem is remedied, the jury is still out on *Batson* and the law of peremptory challenges. A verdict is needed, and it is needed quickly.