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State v. Davis: Peremptory Strikes and Religion—The Unworkable Peremptory Challenge Jurisprudence*

I. INTRODUCTION

In *State v. Davis*[1] the Supreme Court of Minnesota held that a religiously motivated peremptory challenge was not a violation of the equal protection clause of the Fourteenth Amendment. In doing so, it failed to extend the United States Supreme Court's recent peremptory challenge jurisprudence, which has consistently extended defendants' and jurors' equal protection rights, to its next logical step.[2]

This note will argue that the Minnesota Supreme Court erred in its analysis by refusing to apply the Supreme Court's logic to religiously motivated peremptory challenges. In Parts II and III this note will discuss the background and facts of the *Davis* decision. Part IV will explain the method the Minnesota Supreme Court used in deciding the case. Part V will discuss problems with the Minnesota Supreme Court's reasoning in not extending the *Batson v. Kentucky*[3] prohibition against racially based peremptory challenges to religiously based challenges. Additionally, Part V will argue that, although the Minnesota Supreme Court erred when it refused to prohibit religiously motivated challenges, the United States Supreme Court peremptory challenge jurisprudence is

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1. 504 N.W.2d 767 (Minn. 1993).

2. The Supreme Court has slowly increased the scope of the equal protection clause over jury selection procedures. *See generally* Strauder v. West Virginia, 100 U.S. 303 (1879) (holding that the equal protection clause precludes state from limiting juror selection pool to white males only); Swain v. Alabama, 380 U.S. 202 (1965) (holding that the equal protection clause protects defendant if the prosecutor has exercised peremptory challenge persistently to exclude jurors of the defendant's race from previous juries); Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the equal protection clause allows defendant to establish a prima facie case of discrimination based on suspect peremptory challenges by prosecution in defendant's voir dire only); Powers v. Ohio, 499 U.S. 400 (1991) (holding that the equal protection clause allows defendant to assert juror's equal protection rights when prosecutor's peremptory strikes are suspect even if the defendant and juror are of a different race); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (holding that the equal protection clause protects juror's and litigant's equal protection rights in civil cases because attorneys are state actors); Georgia v. McCollum, 112 S. Ct. 2348 (1992) (holding that the equal protection clause precludes defense attorneys from making race based peremptory strikes); J.E.B. v. Alabama, 114 S. Ct. 1419 (1994) (holding that the equal protection clause precludes gender-based peremptory challenges).

3. 476 U.S. 79 (1986).

illogical and unmanageable. This note contends that a return to the standards established in *Batson* would bring more legitimacy and manageability to the Court's peremptory challenge jurisprudence and would have allowed the Minnesota Supreme Court to reach the same result it reached in *Davis* without making unreasonable conclusions.

II. BACKGROUND

The Supreme Court first applied equal protection to jury selection procedures in *Strauder v. West Virginia*.[4] Strauder was a black man who had been indicted for murder.[5] The state statute defining the jury selection pool precluded black men from being selected as jury members.[6] Strauder argued that this preclusion violated his equal protection rights under the Fourteenth Amendment.[7] The Supreme Court agreed and held "that the statute . . . discriminat[ed] in the selection of jurors . . . against negroes because of their color, [which] amount[ed] to a denial of the equal protection of the laws to a colored man when he is put upon trial."[8]

Almost one hundred years later, the issue of whether race based peremptory challenges constituted a violation of the equal protection clause reached the Supreme Court in *Swain v. Alabama*.[9] The *Swain* case involved a black defendant who had been indicted for robbery.[10] During the voir dire, the prosecutor exercised his peremptory strikes against all of the black jurors in the jury pool.[11] Swain claimed that the peremptory challenges constituted discrimination in the jury selection process and that this discrimination violated his equal protection rights.[12] The Court held against the defendant but concluded that if "a prosecutor, . . . in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors,"[13] his behavior creates a presumption that the peremptory challenges violate the Fourteenth Amendment's Equal Protection Clause.[14]

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4. 100 U.S. 303 (1879).
5. *Id.* at 304.
6. *Id.*
7. *Id.*
8. *Id.* at 310.
9. 380 U.S. 202 (1965).
10. *Id.* at 203.
11. *Id.* at 210.
12. *Id.*
13. *Id.* at 223.
14. *Id.* at 224.

In *Batson v. Kentucky*,[15] the Court revisited the peremptory challenge issue. Batson, a black man, had been indicted for robbery and receipt of stolen goods.[16] During the course of the voir dire, the prosecutor excused all four remaining black jurors with peremptory challenges. Batson contended that his Fourteenth Amendment right to equal protection had been violated.[17] The court held that a defendant could establish a prima facie case of discrimination in the peremptory challenge context by establishing that he or she "is a member of a cognizable racial group, and [that] the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."[18] Further, the defendant should realize that the peremptory challenge allows people who wish to discriminate the opportunity to do so.[19] Additionally, the Court required that "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen . . . on account of . . . race."[20] The Court then held that "the burden shifts to the State to come forward with a neutral explanation"[21] for the peremptory challenge. The Court's decision tempered the more stringent *Swain* requirement that the defendant prove a consistent historical pattern of prosecutorial discrimination in peremptory challenges.

The Court continued to broaden the rights of the defendant to challenge race based peremptory challenges in *Powers v. Ohio*.[22] Powers, a white man indicted for murder, challenged the prosecutor's six peremptory strikes that excluded all black venirepersons from the jury.[23] The Supreme Court held that the jurors' equal protection rights had been violated[24] and that the defendant had standing to sue on behalf of the juror.[25]

While the previous cases were all criminal cases, in *Edmonson v. Leesville Concrete Co.*,[26] the Court extended the prohibition against race based peremptory challenges to civil litigants. Edmonson was a black litigant suing Leesville Concrete for negligence relating to a job-site

15. 476 U.S. 79 (1986).
16. *Id.* at 82.
17. *Id.* at 83.
18. *Id.* at 96 (citation omitted).
19. *Id.* (citing Avery v. Georgia, 345 U.S. 559, 562 (1953)).
20. *Id.*
21. *Id.* at 97.
22. 499 U.S. 400 (1991).
23. *Id.* at 403.
24. *Id.* at 409.
25. *Id.* at 415.
26. 500 U.S. 614 (1991).

accident.[27] The defendant used two of its peremptory challenges to excuse black jurors.[28] In response to Edmonson's appeal, the Supreme Court extended the equal protection analysis to civil litigants because they were state actors when they exercised their peremptory challenges.[29]

Finally, the Court extended the race neutrality requirement in peremptory challenges, which previously had applied only to the prosecution in criminal cases, to criminal defendants in *Georgia v. McCollum*.[30] This case involved two white defendants who were indicted for aggravated assault and simple battery against two black victims. The State filed a motion to prohibit them from exercising peremptory challenges in a racially biased manner.[31] The trial court denied the motion because "[n]either Georgia nor federal law prohibit[ed] criminal defendants from exercising peremptory" challenges.[32] On appeal, the Supreme Court held that, because the defendants were state actors when exercising peremptory challenges, they, like the state, could not exercise their challenges in a racially discriminatory manner.[33]

III. FACTS IN *STATE V. DAVIS*

Although the race based peremptory challenge had a long history of exclusion prior to *State v. Davis*,[34] the question of whether religiously based peremptory challenges were improper had not been answered. The defendant, Edward Lee Davis, was an African-American who was charged with aggravated robbery.[35] During jury selection, no jurors were challenged for cause, but the prosecutor used one of her three peremptory challenges to excuse a black man from the panel.[36] The defendant objected to the peremptory strike and asked for a race neutral explanation.[37] The prosecutor explained that she had excused the juror not because of the juror's race but because the juror was a Jehovah's

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27. *Id.* at 616.
28. *Id.*
29. *Id.* at 630.
30. 112 S. Ct. 2348 (1992).
31. *Id.* at 2350.
32. *Id.* at 2352.
33. *Id.* at 2359. The Supreme Court has decided J.E.B. v. Alabama, 114 S. Ct. 1419 (1994), which held that gender based peremptory challenges are also unconstitutional. Although the United States Supreme Court decision has relevance to the decision that this note addresses, it does not form part of the background to the decision in this case because it was decided after the *Davis* decision.
34. 504 N.W.2d 767 (Minn. 1993).
35. *Id.* at 768.
36. *Id.*
37. *Id.*

Witness.[38] The trial judge ruled that the peremptory strike would stand because the prosecutor had given a race neutral explanation.[39] Davis was convicted of the charges.[40]

Davis appealed the conviction to the Minnesota Court of Appeals, claiming that the trial court had abused its discretion by allowing a religiously discriminatory peremptory challenge.[41] The appellate court upheld the trial court's decision, and Davis appealed to the Minnesota Supreme Court.[42]

IV. REASONING

Justice Simonett writing for the Minnesota Supreme Court began the majority's analysis by arguing that *Batson* is only a limited exception to the *Swain* decision.[43] He argued that the *Batson* holding was necessitated by the "serious and well-documented" abuse of the peremptory challenge by prosecutors to exclude racial minorities from the jury.[44] Because Justice Simonett believed that the peremptory challenge had not been used "common[ly] and flagrant[ly]" against religious groups, he refused to extend the *Batson* decision to include religiously based peremptory challenges.[45] He further argued that religiously motivated peremptory challenges are more legitimate than race based challenges since the reasons for the challenge are grounded in a juror's particular beliefs which could affect how he or she would decide a case.[46] Finally, since "religious affiliation . . . is not as self-evident as race or

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38. The prosecutor explained that "it was highly significant to the state . . . that the man was a Jahovah [sic] Witness . . . . I would never, if I had a preemptory [sic] challenge left, strike [—] or fail to strike a Jahovah [sic] Witness from my jury." *Id.*

39. *Id.*

40. State v. Davis, No. C7-92-1037, 1993 WL 593, at *1 (Minn. Ct. App. Jan. 5, 1993) (unpublished opinion).

41. *Id.*

42. *Id.*

43. *Davis*, 504 N.W.2d at 768.

44. *Id.* at 770.

45. *Id.* at 771.

46. The court explained:

> Yet when religious beliefs translate into judgments on the merits of the cause to be judged, it is difficult to distinguish, in challenging a juror, between an impermissible bias on the basis of religious affiliation and a permissible religion-neutral explanation. In the case before us, for example, would the explanation that the juror was "reluctant to exercise authority over their fellow human beings" be sufficient to a prima facie case of religious bias? A juror's religious beliefs are inviolate, but when they are the basis for a person's moral values and produce societal views . . . it would not seem that a peremptory strike based on these societal views should be attributed to a pernicious religious bias.

Id.

gender," the court contended that disallowing religiously neutral peremptory challenges would become too complicated to administer.[47]

The court also recognized that the *Powers* decision, which gave the litigant standing to sue on behalf of the juror, was based on two significant policy considerations: first, racially biased peremptory challenges promote "cynicism respecting the jury's neutrality and its obligation to adhere to the law;"[48] second, a juror excluded because of race "suffer[s] a profound humiliation."[49] The court conceded that these two considerations logically lead to the extension of *Batson's* prohibition against racially motivated challenges to include religiously motivated peremptory challenges.[50] However, relying on its conclusion that religiously based challenges were not used "purposefully to perpetrate religious bigotry"[51] and on its understanding of the history of peremptory challenges,[52] the court refused to apply these considerations to the *Davis* case.[53]

The dissenting opinion by Justice Wahl argued that dicta issued in several previous Supreme Court opinions supported an extension of *Batson* to purposeful religious discrimination in peremptory challenges.[54] Justice Page joined Justice Wahl's dissent, and, in addition, argued that Minnesota Statute section 593.32 would preclude a religiously motivated peremptory strike.[55]

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47. *Id.*
48. *Id.* at 769 (quoting Powers v. Ohio, 499 U.S. 400, 412 (1991)).
49. *Id.*
50. *Id.* at 769.
51. *Id.* at 769-70.
52. *Id.* at 770.
53. The court stated:

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

Id. at 769-70.

54. *Id.* at 773. She argues that the opinions in Georgia v. McCollum, 112 S. Ct. 2348 (1991), and Ristaino v. Ross, 424 U.S. 589 (1976), support the conclusion that religiously motivated peremptory challenges should be suspect under the *Batson* rule. *Davis*, 504 N.W.2d at 773 (Wahl, J., dissenting).
55. *Id.* at 774.

V. ANALYSIS

A. The Minnesota Supreme Court Erred by not Requiring a Religiously Neutral Explanation for the Peremptory Challenge

When the Minnesota Supreme Court refused to require a religiously neutral explanation for the peremptory challenge by the prosecutor in this case, it incorrectly analyzed *Swain* and *Batson* and failed to apply the precedent of the United States Supreme Court. First, the court mischaracterized the *Batson* decision. Second, the court misanalyzed the *Batson* decision's historical analysis of the peremptory challenge.

The Minnesota Supreme Court mischaracterized *Batson* when it claimed that the decision was only a "limited exception" to *Swain* and, therefore, must be analyzed in light of the *Swain* decision.[56] The contention that *Batson* is only a "limited exception" to *Swain* is incorrect; *Batson* actually overruled the *Swain* decision.[57]

Even if the court's characterization were correct, its assumptions about religiously based peremptory challenges were flawed. It claimed that religiously based peremptory challenges were not as common as race based peremptory challenges were before the *Batson* decision. In a footnote, the court cited cases in which other courts found that religiously motivated reasons constituted a sufficiently race neutral explanation to overcome a *Batson* challenge.[58]

The court explained that these cases demonstrated that religiously based peremptory challenges had been upheld by other courts. The first case was *United States v. Clemmons*.[59] It involved a man convicted of selling stolen treasury bonds. The man claimed that the prosecution's exclusion of Balhadra Das, a minority juror who appeared to be black (although he probably was Asian-Indian), was suspect and demanded a race neutral explanation.[60] The prosecution explained that he struck the juror because he was "Hindu in religion."[61] The court upheld the prosecution's challenge because the religious reason given was a race neutral

56. *Id.* at 768.

57. The United States Supreme Court stated in reference to *Batson*, "Relying upon the Equal Protection alone, we overruled *Swain* to the extent it foreclosed objections to the discriminatory use of peremptories in the course of a specific trial." Powers v. Ohio, 499 U.S. 400, 405 (1991). *See also* Georgia v. McCollum, 112 S. Ct. 2348, 2352 (1992) ("In Batson v. Kentucky, 476 U.S. 79, 106 (1986), the Court discarded *Swain's* evidentiary formulation.").

58. *Davis,* 504 N.W.2d at 771 n.3 ("There is authority that the religious beliefs of a juror may provide a race-neutral reason for a *Batson* challenge.").

59. 892 F.2d 1153, 1154 (3rd Cir. 1989), *cert. denied*, 496 U.S. 927 (1990).

60. *Id.* at 1155-56.

61. *Id.* at 1156.

explanation.[62] The other case the court cited, *People v. Malone*,[63] involved a defendant who was convicted of armed robbery. Three black jurors were challenged by the prosecutor.[64] When the defendant demanded a race neutral explanation, the prosecutor explained that he excused one of the jurors because of "her religious convictions."[65] Again the court that heard the case upheld the challenge.[66]

Although the court undoubtedly cited these cases to support its decision not to extend the *Batson* case, the cases indicate that striking a juror because of religion is not an uncommon occurrence.[67] In fact, by requiring race neutral explanations from prosecutors, the *Batson* case has drawn attention to many religiously (not to mention gender) motivated challenges. The Minnesota Supreme Court's own footnote severely undermines its contention that religiously based peremptory challenges are not a general problem in the peremptory challenge system.

The court also misanalyzed the *Batson* decision when it claimed that the history of the peremptory challenge required the court to continue allowing religiously based peremptory challenges.[68] The court argued that since the randomness of the jury pool seems unfair, the peremptory challenge system served to alleviate the jury pool's arbitrariness and ease the minds of the litigants.[69] It further argued that because race based peremptory challenges were so prevalent, they undermined the integrity of the peremptory challenge and cast doubt on its fairness.[70] For that reason, the court felt that the restrictions on peremptory challenges were properly limited in cases involving racially motivated challenges. The *Davis* court further argued that since religious discrimination in jury selection was not as prevalent, it did not damage the jury system's credibility and, therefore, the religiously based peremptory challenge need not be limited.[71]

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62. *Id.* at 1157.

63. 570 N.E.2d 584, 586 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 135 (Ill. 1991).

64. *Id.* at 588.

65. *Id.*

66. *Id.*

67. Another case involving a religious explanation given as a race neutral ground for exclusion of a juror was Chambers v. State, 724 S.W.2d 440 (Tex. Ct. App. 1987). The case involved a defendant convicted of burglary. *Id.* During the selection of the jury, four black venireperson were excused by the prosecution. One of the challenged jurors was excluded because he was a member of the Church of Christ which the prosecutor thought was "a little bit away from the main stream." *Id.* at 442. Another excluded juror was challenged because she was a Jehovah's Witness. *Id.*

68. *See* State v. Davis, 504 N.W.2d 767, 770 (Minn. 1993).

69. *Id.*

70. *Id.*

71. *Id.* at 771.

However, in finding against the defendant, the court emphasized the widespread abuse of the race based peremptory challenges as its principal vice[72] but largely ignored the real vice of race based peremptory challenges: these challenges are unfair *per se*. Using them casts doubt on the peremptory challenge as a device to alleviate the jury pool's unfairness and to ease the minds of litigants.[73] However, the perception of unfairness applies equally to both religious based and race based peremptory challenges whether or not religious based peremptory challenges are used as frequently as race based challenges were. Just as it does when an exclusion is based on race, the idea that a person may be excused from jury service based on his or her religion casts a shadow of unfairness on the jury process rather than building its esteem in the eyes of the litigants and of the community.[74] However, the court contended that religion is a more permissible ground for juror exclusion than race because it forms the basis of personal beliefs that might legitimately lead to exclusion from a jury.[75] This contention suggests that all members of a particular religion think the same way on all issues. However, to contend that all people of the same religion have identical beliefs and therefore are unable to serve as impartial jurors and should be excluded is to "accept as a defense to . . . discrimination the very stereotype the law condemns."[76]

Clearly, the Minnesota Supreme Court erred when it claimed that *Batson* was a limited exception to *Swain* which should not be extended to religiously based peremptory challenges. The question still remains however whether the *Batson* decision should be applied in *Davis*. Although the *Batson* decision did mention the violation of the juror's equal protection rights,[77] it only held that a defendant would have a legitimate claim if the claim were based on the prosecution's violation of the defendant's equal protection right, not the juror's.[78]

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72. *See id.* at 770-71.

73. *See id.* Noticeably absent from the Minnesota Supreme Court's analysis is any mention of the unfairness of the race based peremptory challenge. The analysis focuses instead on its prevalence.

74. *See* J.E.B. v. Alabama, 114 S. Ct. 1419, 1430 (1994); Georgia v. McCollum, 112 S. Ct. 2348 (1991); Peters v. Kiff, 407 U.S. 493, 503-4 (1972) (Marshall, J., concurring).

75. *See Davis*, 504 N.W.2d at 771.

76. *J.E.B.*, 114 S. Ct. at 1427; Powers v. Ohio, 499 U.S. 400, 410 (1991).

77. The Court stated, "As long as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror." Batson v. Kentucky, 476 U.S. 79, 87 (1986).

78. *See id.* at 96.

The Court did not decide that a defendant could assert a juror's equal protection rights until the *Powers* decision.[79] The Court in *Powers* declared that racial discrimination "'casts doubt on the integrity' . . . and fairness of a criminal proceeding" because the jury selection process was intended to act as a "vital check" on the power of the state to discriminate.[80] The Court first argued that if discrimination is allowed in the jury selection process, the public perceives that the process is unfair.[81] In the context of jury selection it is difficult to see how religious discrimination would be viewed by the public any differently then racial discrimination.[82] Both types of discrimination seem to be intolerable to most Americans,[83] and both types of discrimination are prohibited by the Constitution.[84]

The second argument of the Court in *Powers* was that the juror who is excluded "because of race suffers a profound personal humiliation heightened by its public character."[85] Again, the *Davis* opinion is unclear about why a juror who is dismissed because of his or her religion would not suffer the same public humiliation that the Court describes in the context of racially motivated peremptory challenges.[86]

Although the Minnesota Supreme Court in *Davis* conceded that logically, it should apply the analysis of *Powers* to religiously motivated peremptory challenges,[87] it still refused to do so based on its contention that religiously based peremptory challenges were not as prevalent as race motivated peremptories. Since this belief in the "limited" nature of *Batson* was wrong, *Powers* must be applied. Consequently, the court should have extended the requirements of *Powers* to religiously motivated challenges because the exclusion of people from a jury based on religion

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79. *Powers*, 499 U.S. at 415 ("We conclude that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the jury because of race.").

80. *Id.* at 401.

81. *Id.*

82. *See id.* at 425 (Scalia, J., dissenting); State v. Davis, 504 N.W.2d 767, 773 (Minn. 1993) (Wahl, J., dissenting); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 765 (1992).

83. America's long history of protecting against state involvement in religious affairs seems to support this.

84. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); U.S. CONST. amend. XIV, § 1.

85. *Powers*, 499 U.S. at 413-14.

86. The Court never explained in *Powers* what causes the humiliation, or if the humiliation only extends to those who have been dismissed because of race. *See id.* at 413. The Court's extension of protection to sex-based discrimination seems to indicate that the humiliation caused by exclusion is not limited only to race based challenges. *See* J.E.B. v. Alabama, 114 S. Ct. 1419, 1430 (1994).

87. State v. Davis, 504 N.W.2d 767, 769 (Minn. 1993).

causes public cynicism about the jury system and personal humiliation to the excluded juror, just as it does for exclusions based on race.

B. *Requirement of Religiously Neutral Peremptory Challenges Demonstrates the Illegitimacy of* Batson's *Progeny*

Although the Minnesota Supreme Court in *Davis* did not follow the logic of the *Powers* decision, the *Powers* decision requires an extension of the prohibition against racially discriminatory peremptory challenges to religiously discriminatory challenges.[88] This natural and logical extension of the recent United States Supreme Court jurisprudence demonstrates the illegitimacy of the decisions: first, because the jurisprudence conflicts with the purpose of the peremptory challenge; and second, because the focus on the violation of the juror's equal protection rights is a departure from sound logic and is administratively burdensome.

1. *Purpose of the peremptory challenge*

Peremptory challenges have existed for a long time.[89] The English common law recognized the right of the defense and the prosecution to challenge jurors without any cause.[90] The United States, deriving the practice from England,[91] also recognized the right to peremptory challenges early in its history.[92] Although there is no Constitutional guarantee to a peremptory challenge, "the challenge is 'one of the most important of the rights secured to the accused.'"[93]

The peremptory challenge, unlike challenges for cause, is exercised "without a reason stated."[94] It allows litigants to eliminate jurors based on "sudden impressions and unaccountable prejudices"[95] that have arisen because of "[their] limited knowledge of [the jurors]."[96] These sudden impressions may be based on group affiliation.[97] The purpose of the challenge is to allow the litigants the opportunity to "eliminate extremes of partiality" and to select jurors who will decide the case "on the basis

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88. *See supra* part V.A.
89. *See* Swain v. Alabama, 380 U.S. 202, 212-18 (1965).
90. *Id.* at 213.
91. *Id.* at 214.
92. *Id.*
93. *Id.* at 218 (quoting Stilson v. United States, 250 U.S. 583, 586 (1919)).
94. *Id.* at 220; Edmonson v. Leesville Concrete Co., 500 U.S. 614, 633 (1991) (O'Connor, J., dissenting).
95. Lewis v. United States, 146 U.S. 370, 376 (1892).
96. *Swain*, 380 U.S. at 221.
97. *See id.*

of evidence placed before them."[98] By allowing the litigant to challenge those whom he or she fears will be unfair, the court system "fosters both the perception and reality of an impartial jury."[99]

2. *Focus of equal protection analysis should be on the litigant*

Adhering to the historical purpose of the peremptory challenge, the United States Supreme Court in its early decisions focused on violations of the defendant's equal protection rights.[100] It was not until *Powers* that the Court extended the right of the defendant to assert the equal protection claim of an excluded juror.[101] There are two problems with the *Powers* approach, however. First, the juror focus appears logically unsound. Second, the defendant's right to a fair trial is much more important than the juror's right to equal protection in the jury selection process.

In its early decisions, the Supreme Court focused on the litigant's equal protection rights. In *Strauder*, the Court found that a statute allowing only white men to serve on juries violated a black man's equal protection rights. The Court explained:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former.[102]

The reasoning seemed to be that because a white person had the right to have the possibility of having a white person on his or her jury that a black person should have the right to have the possibility of having a black person on his or her jury.[103] In *Batson*, the Court continued to emphasize the link between the race of the defendant and the race of the juror when it required that "the defendant . . . must show that he is a

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98. *Id.* at 218.

99. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 633 (1991) (O'Connor, J., dissenting).

100. *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986) ("The defendant first must show that he is a member of a cognizable racial group . . ."); *Swain*, 380 U.S. at 223-24 (denying an equal protection violation in a criminal case); Strauder v. West Virginia, 100 U.S. 303, 309 (1879) ("And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?").

101. Powers v. Ohio, 499 U.S. 400, 409 (1991).

102. *Strauder*, 100 U.S. at 309.

103. *See Powers*, 499 U.S. at 419 (Scalia, J., dissenting). *Cf.* Underwood, *supra* note 82, at 733-36.

member of a cognizable group, and that the prosecutor has used peremptory challenges to remove from the venire members of the defendant's race."[104] The Court suggested that if the litigant were not allowed a jury that could include members of his or her race while other litigants were allowed a jury that could include members of their race the fairness of a jury panel was suspect.

Beginning in *Powers*, the Court allowed the litigant to assert the juror's claim of an equal protection violation on a theory of third party standing.[105] The Court claimed that barring the claim "because [the petitioner's] race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service."[106] Subsequent to its decision in *Powers*, the Court extended the right to challenge race based peremptories to private litigants[107] and criminal defendants.[108] In addition, the Court extended the prohibition to include sex-based peremptories[109] based on the juror's equal protection rights.

This recent shift in focus to the juror's equal protection rights contravenes the sound policy of the Court's earlier decisions. The earlier decisions focused on the litigant because allowing discrimination in the jury selection process undermines the litigant's perception of fairness.[110] It is difficult for a litigant to have faith in a process that excludes members of his or her race from participating in the jury. The *Swain* and *Batson* cases increased the litigant's perception of fairness by prohibiting jury practices that discriminate against the litigant based on his or her race.[111] Since historically the goal of the peremptory challenge was to increase the litigant's perception of fairness in jury selection, the equal protection analysis in those cases tended to restore the litigant's faith in the peremptory challenge system by eliminating unfair application of it against him or her.

In the *Powers* analysis, however, the fairness of the peremptory system is not measured by how the litigant perceives the process but by

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104. *Batson*, 476 U.S. at 96.

105. *Powers*, 499 U.S. at 415.

106. *Id.*

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

108. Georgia v. McCollum, 112 S. Ct. 2348 (1992).

109. J.E.B. v. Alabama, 114 S. Ct. 1419 (1994).

110. *See Edmonson*, 500 U.S. at 633 (O'Connor, J., dissenting); Batson v. Kentucky, 476 U.S. 79, 87 (1986); Swain v. Alabama, 380 U.S. 202, 219 (1965).

111. In the *Swain* case, the Court argued that the use of the challenge was "being perverted" when used to discriminate against black jurors. *Swain*, 380 U.S. at 223. In *Batson* the Court stated, "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson*, 476 U.S. at 86.

its effect on the juror.[112] Rather than strengthening the litigant's perception of fairness by invalidating procedures that discriminate against him or her, the equal protection clause is used to invalidate jury selection procedures that humiliate the excluded juror.[113] Since peremptory challenges were not used to exclude jurors of the litigant's same race or sex,[114] the litigant's faith is not undermined significantly because the peremptory challenge has not been unfairly applied against him or her.[115] Although the juror does have an actionable claim if he is excluded from a jury because of his race,[116] the Court should not give a litigant standing to sue on behalf of the juror, because the litigant's perception of fairness has not been significantly diminished. Also, a juror's perception of unfairness is a very weak ground upon which to base standing.

The Court's continued focus on the violation of the juror's equal protection rights has very serious consequences. By emphasizing the juror's equal protection rights, the Court has subordinated the right of the litigant to the right of the juror. For instance, since *McCollum* the Court has recognized the right of the state to object to the peremptory challenges of a criminal defendant if they are racially motivated.[117] This decision protects a juror from being humiliated and becoming cynical about the fairness of the jury process while ignoring the defendant's right to exclude jurors that he feels will unfairly judge his case.

There are two problems with the *McCollum* approach. The first problem is that the decision ignores the purpose of the peremptory challenge, which is to increase the *litigant's* perception of fairness.[118] The second problem is that the juror's right to equal protection in jury selection is placed above the litigant's right to a fair trial.[119] Justice

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112. *See* Powers v. Ohio, 499 U.S. 400, 414 (1991) ("The rejected juror may lose confidence in the court and its verdicts as may the defendant.").

113. *See id.*

114. Although the litigants in *J.E.B.* and *Edmonson* were members of the same excluded group, the Court focused on the juror's equal protection rights. *See* J.E.B. v. Alabama, 114 S. Ct. 1419, 1430 (1994); *Edmonson*, 500 U.S. at 618-19.

115. In fact, at times the litigant that is being challenged for his or her peremptory strikes is a criminal defendant who surely will not have an increase in faith about the fairness of the peremptory strike system if *his or her* challenges are the ones being held to violate the equal protection clause. *See generally* Georgia v. McCollum, 112 S. Ct. 2348, 2348 (1992) (holding that a criminal defendant cannot exercise race based peremptory challenges).

116. *See* Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970).

117. *McCollum*, 112 S. Ct. at 2359 ("We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.")

118. *See Edmonson*, 500 U.S. at 633 (O'Connor, J., dissenting); Batson v. Kentucky, 476 U.S. 79, 87 (1986); Swain v. Alabama, 380 U.S. 202, 219 (1965).

119. The juror also has standing to sue on his own behalf. *See Carter*, 396 U.S. 320.

Thomas explained the significant problems with such an approach when he wrote, "In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death."[120] By focusing on the juror, the Court has given greater weight to the right of the party with the least at stake in the trial process.

The focus on the juror's right also makes the peremptory challenge unmanageable. By focusing on the juror's right, any party to a suit may make a claim of purposeful exclusion and force a race neutral explanation.[121] The number of *Batson* claims will consequently increase significantly.[122] Also, uncertainty about the permissible use of the peremptory challenge, may cause many litigants to refrain from exercising otherwise legitimate challenges because they fear protracted litigation over whether a juror's equal protection rights have been violated. Since litigants will not be able to exclude jurors whom they perceive to have a bias, they may lose faith in the fairness of the jury selection process.[123] This result is exactly what the peremptory was designed to avoid.

C. *Suggested Remedies to the Peremptory Problem*

In order to alleviate the problems that the recent peremptory challenge jurisprudence has created, the Court should return to a stricter application of *Batson*. It should require that a litigant[124] show that he

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120. *McCollum,* 112 S. Ct. at 2360 (Thomas, J., concurring).

121. Since *McCollum* allows the state to protest exclusions that a criminal defendant makes, 112 S. Ct. at 2359, *Edmonson* allows civil litigants to make a claim, 500 U.S. at 628, *Powers* allows defendants who are not in the juror's cognizable group to make a claim on behalf of the excluded juror, Powers v. Ohio, 499 U.S. 400, 415 (1991), and *J.E.B.* extends the *Batson* protection to women, J.E.B. v. Alabama, 114 S. Ct. 1419 (1994), a litigant could *always* contend that the exclusion of a juror was based on the juror's sex/race and demand a sex/race neutral explanation whether the litigant was the same sex/race or not. The consequence is that *any* party can *always* force race neutral or gender-neutral explanations because nothing but the group status of the *juror* is at issue.

122. Since 1986, four *Batson* claims have reached the Supreme Court. Before that, peremptory challenge claims were relatively rare. Since the litigants can now claim third-party standing to sue on behalf of jurors, the amount of claims will probably increase significantly. The Minnesota Supreme Court recognized this potential when it stated, "If the life of the law were logic rather than experience, *Batson* might well be extended to include religious bias and, for that matter, an endless number of other biases." State v. Davis, 504 N.W.2d 767, 769 (Minn. 1993). The United State Supreme Court has now extended the *Batson* protection to sex discrimination in peremptory challenges. *See J.E.B.*, 114 S. Ct. 1419.

123. *See supra* part V.B.1.

124. Because *Edmonson* applies *Batson* to civil litigants, a plaintiff or a defendant would be able to make a *Batson* challenge. Although the Court focused on the jurors' rights in *Edmonson*, 500 U.S. at 618-19, the plaintiff and the excluded jurors' were of the same race. The outcome of the case, therefore, would have arguably been the same if the Court had

is a member of a cognizable group, that the excluded juror is also a member of that group, and that other facts give rise to a presumption that the peremptory strike is based on that classification before the opposing litigant must give a group-neutral explanation.[125] By doing this, the litigant's equal protection rights are still protected. The Court can also safely extend the *Batson* prohibition of race based peremptory challenges to other suspect classifications, such as religion, because the standard for determining violations of equal protection will be more manageable.[126] Although jurors' equal protection rights will not be safeguarded by the litigant,[127] this rule retains manageability and will maintain the viability of the peremptory challenge. If the Court continues to follow its recent cases, the peremptory challenge process will likely become hopelessly confused and unmanageable.[128]

If the Minnesota Supreme Court in *Davis* would have followed the *Batson* analysis its result would have been the same, but not because the religiously motivated peremptory challenge was less flagrant or common as the race based peremptory challenge. Since Davis was not of the same religion as the excluded juror, his argument would have failed the first tier of the *Batson* inquiry. The result would have been easier to reach and the classification of religiously motivated peremptory challenges as a more acceptable form of discrimination would have been avoided.

If the Court continues to feel that the juror's equal protection rights are of predominant importance, the Court could simply eliminate peremptory challenges, because the juror's rights will probably be best protected by eliminating a process that fosters what the Court views as unsavory discrimination.[129] Complete elimination of peremptory challenges would better serve the Court's purpose of protecting juror's equal protection rights in the jury selection process and prevent the

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focused on the litigant's equal protection rights. The *Edmonson* case also relies on theories of state action which are outside of the scope of this note.

125. *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986).

126. Since the only challengeable peremptory will be one which excludes a person who is included in the litigant's cognizable group, the number of *Batson* challenges will decrease. This also precludes the state in a criminal case from making a *Batson* challenge since the state has no group characteristics. In other words, the state does not have an identifiable race, religion, or sex.

127. The juror could still have a claim; however, he or she would have to raise it. *See* Carter v. Jury Comm'n of Green County, 396 U.S. 320, 329-330 (1970).

128. *See supra* part V.B.2.

129. *See* Powers v. Ohio, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting) ("'[I]rrelevant' personal characteristics are by definition the basis for using [peremptory challenges] . . . ."); Swain v. Alabama, 380 U.S. 202, 220 (1965) ("It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.").

peremptory challenge jurisprudence from becoming confused and irrational.

VI. Conclusion

The Minnesota Supreme Court misapplied the United States Supreme Court equal protection analysis by not requiring religious neutral explanations to peremptory challenges. The necessary extension of the *Powers* analysis to the *Davis* case demonstrates the unworkability of the United States Supreme Court peremptory challenge jurisprudence. The Court's focus on jurors' equal protection rights ignores the purpose of peremptory challenges and places jurors' rights above defendants. Although one solution to the peremptory challenge would be to eliminate the peremptory challenge, a better approach would be a return to a stricter application of *Batson* by putting the focus of the equal protection analysis back on the litigant. Such an approach would maintain the litigant's equal protection rights while still maintaining the manageability of the peremptory challenge system.

D. Scott Crook