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Could Jesus Serve on a Jury - Not in the Third Circuit: Religion-Based Peremptory Challenges in *United States v. Dejesus and Bronshtein v. Horn*

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COULD JESUS SERVE ON A JURY? NOT IN THE THIRD CIRCUIT:
RELIGION-BASED PEREMPTORY CHALLENGES IN
UNITED STATES v. DEJESUS AND
BRONSHTEIN v. HORN

*"Far from being rivals or enemies, religion and law are twin sisters, friends, and mutual assistants. Indeed, these two sciences run into each other. The divine law, as discovered by reason and the moral sense, forms an essential part of both."*¹

—Justice James Wilson,
United States Supreme Court (1789-98)

I. INTRODUCTION: GENESIS

Peremptory challenges are a cornerstone of American jurisprudence.² Theoretically, peremptory challenges help secure a fair trial by allowing lawyers to exclude presumptively biased jurors based on intuition.³ In practice, they have been misused to exclude suspect classes from juries, including African-Americans.⁴ The past two decades have been a tumultuous time for the use of peremptory challenges in jury selection.⁵ Before then, parties had the right to exclude any person from a jury pool

1. 1 JAMES WILSON, *THE WORKS OF THE HONORABLE JAMES WILSON* (Bird Wilson ed., Lorenzo Press 1804), reprinted in 1 JAMES WILSON, *THE WORKS OF JAMES WILSON*, at 125 (Robert Green McCloskey ed., Belknap Press 1967) (1804) (commenting on relationship between law and religion). Justice Wilson was one of America's Founding Fathers: he was a signer of the Declaration of Independence, twice elected to the Continental Congress, a major influence in drafting the nation's Constitution, an erudite legal theoretician and one of the six original associate justices appointed by George Washington to the United States Supreme Court in 1789. See 1 JAMES WILSON, *THE WORKS OF JAMES WILSON* 1-2 (summarizing Justice Wilson's biography).

2. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 147 (1994) (O'Connor, J., concurring) (noting that peremptory challenges existed in Blackstone's time); *Holland v. Illinois*, 493 U.S. 474, 481 (1990) (tracing peremptory challenges to 1790); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 819 (1997) (recalling that peremptory challenges first appeared in England between 1220 and 1270 and courts allowed unlimited peremptory challenges for Crown in capital cases); Adam P. Rosen, *Factors Affecting Juror Decisionmaking in Repressed-Memory Cases* (Dec. 1996) (unpublished Ph.D. thesis, Allegheny University), microformed on UMI Dissertation Abstracts Database (UMI Dissertation Serv.) (dating peremptory challenges back to Romans).

3. For a further discussion of peremptory challenges, see *infra* notes 28-34 and accompanying text.

4. For a further discussion of how peremptory challenges have been used to exclude jurors based on race and gender, see *infra* notes 40-52 and accompanying text.

5. For a further discussion of how the use of peremptory challenges has changed, see *infra* notes 40-55 and accompanying text.

without stating a reason.⁶ In 1986, though, the United States Supreme Court outlawed peremptory challenges based on race.⁷ Later, in 1994, the Court expanded this protection to gender.⁸ Recently, some lawyers have argued that additional suspect groups should be entitled to the same protection.⁹

Why not protect religion?¹⁰ The courts have not reached a consensus regarding whether religion-based peremptory challenges are constitutional and the Supreme Court has declined to resolve the issue.¹¹ American jurisprudence suggests that religion should be protected.¹² While on the Third Circuit, Justice Samuel Alito suggested that religious affiliation-based peremptory challenges are unconstitutional in *Bronshstein v. Horn*.¹³ In *United States v. DeJesus*,¹⁴ however, the Third Circuit created an unusual dichotomy: “[A]ssuming that the exercise of a peremptory strike on the basis of religious affiliation is unconstitutional, the exercise of a strike based on religious beliefs is not.”¹⁵ The *DeJesus* court used “religious affiliation” to denote membership in a particular religious faction, as opposed

6. See *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (holding West Virginia statute unconstitutional because it banned African-Americans from juries).

7. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that eliminating jurors based on race violates juror’s constitutional rights).

8. See generally *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (admonishing peremptory challenges based on gender). “Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.” *Id.* at 140 (citing Court’s reasoning for extending *Batson* to gender).

9. See generally *United States v. DeJesus*, 347 F.3d 500 (3d Cir. 2003) (arguing in favor of extending *Batson* protections to religion-based peremptory challenges); *United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998) (same); *State v. Davis*, 504 N.W.2d 767 (Minn. 1993) (noting that lawyer argued to extend *Batson* protections to religion-based peremptory challenges, but court declined to do so).

10. See Robert T. Miller, *A Jury of One’s Godless Peers*, *FIRST THINGS*, Mar. 2004, at 11, 12 (explaining that *Batson* committed courts to justify theory of morally acceptable prejudices).

11. For a further discussion of the circuit split regarding religion-based peremptory challenges and the Supreme Court’s denials of certiorari on the issue, see *infra* notes 57-58, 134 and accompanying text.

12. See, e.g., U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”); *Am. Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900):

[D]iscrimination . . . [that is] purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens . . . would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes.

Id. (noting example of Supreme Court protecting religion).

13. 404 F.3d 700 (3d Cir. 2005). For a detailed analysis of the Third Circuit’s opinion in *Bronshstein*, see *infra* notes 100-18 and accompanying text.

14. 347 F.3d 500 (3d Cir. 2003).

15. *Id.* at 510 (stating holding of case); see also *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

to subscribing to specific religious beliefs.¹⁶ This is a critical issue in jury selection because attorneys fear deeply religious people: defense lawyers worry that deep religious beliefs signal a conservative, law-and-order orientation, while prosecutors are concerned that intensely religious jurors will be overly compassionate and hesitant to sit in judgment of others.¹⁷

This Casebrief considers the Third Circuit's interpretation of religion-based peremptory challenges.¹⁸ Part II provides a brief overview of the law governing peremptory challenges and the Equal Protection Clause.¹⁹ Part III focuses on the Third Circuit's decision in *DeJesus*, particularly how the court distinguished religious affiliation from religious belief.²⁰ Part IV analyzes the Third Circuit's suggestion in *Bronshtein* that religious affiliation-based peremptory challenges are unconstitutional.²¹ Part V examines the Third Circuit's approach to religion-based peremptory challenges.²² Finally, Part VI concludes that all religion-based peremptory challenges should be held unconstitutional.²³

II. THE NATIVITY: PEREMPTORY CHALLENGES AND THE EQUAL PROTECTION CLAUSE

The Sixth Amendment to the United States Constitution guarantees every criminal defendant the right to a jury trial.²⁴ Prior to trial, the ve-

Jew, a Muslim, etc.," but holding that "peremptory challenges based on religion is unsettled").

16. See *DeJesus*, 347 F.3d at 510-11 (quoting *Stafford*, 136 F.3d at 1114) (defining "religious affiliation" and "religious belief").

17. Cf. 28 U.S.C. § 1863(b)(5)(a) (2006) (allowing clergy to be excused from jury service); TENN. CODE ANN. § 22-1-103(a) (2006) (exempting clergy from jury service); *United States v. Arnett*, 342 F. Supp. 1255, 1257 (D. Mass. 1970) (excusing ministers and other religious clergy arbitrarily from jury selection process); *Johnson v. Comm'r of Corr.*, 589 A.2d 1214, 1225 (Conn. 1991) (same). Compare Randy D. Fisher et al., *Religiousness, Religious Orientation, and Attitudes Towards Gays and Lesbians*, 24 J. APPLIED SOC. PSYCHOL. 614, 619-29 (1994) (noting that religious fervor correlates with sexism, anti-homosexual beliefs and racism), with *DeJesus*, 347 F.3d at 503 (indicating that deeply religious people are unable to reach verdict), and *Stafford*, 136 F.3d at 1113-14 (same).

18. For a further discussion of the Third Circuit's analysis in *DeJesus* and *Bronshtein*, see *infra* notes 62-118 and accompanying text.

19. For a further discussion of the law governing peremptory challenges and the Equal Protection Clause, see *infra* notes 24-58 and accompanying text.

20. For a further discussion of the Third Circuit's decision in *DeJesus*, see *infra* notes 59-98 and accompanying text.

21. For a further discussion of the dicta in *Bronshtein*, see *infra* notes 99-118 and accompanying text.

22. For a further discussion of religion-based peremptory challenges in the Third Circuit, see *infra* notes 119-63 and accompanying text.

23. For a further discussion explaining why all religion-based peremptory challenges should be held unconstitutional, see *infra* notes 164-74 and accompanying text.

24. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State").

nire, a pool of potential jurors, is formed when the court issues a jury summons and divides the pool into smaller groups for specific trials.²⁵ The judge and attorneys for each side then question the potential jurors on various topics, including their background, personal opinions and life experiences through a process referred to as “voir dire.”²⁶ During this process, an attorney may challenge a prospective juror either “for cause,” or without cause by exercising a peremptory challenge.²⁷

A. Peremptory Challenges

Peremptory challenges are an American common-law tradition and play an integral role in empanelling a fair and impartial jury.²⁸ William Blackstone evangelized the peremptory challenge as a “provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous [T]he law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.”²⁹ These discretionary challenges made their way into American law from England and were codified in federal statutes as early as 1790.³⁰ Since then, peremptory challenges have

25. See BLACK’S LAW DICTIONARY 1590 (8th ed. 2004) (defining “venire” as “[a] panel of persons selected for jury duty and from among whom the jurors are to be chosen”); Voir Dire: Creating the Jury, http://www.crfc.org/americanjury/voir_dire.html (last visited Feb. 24, 2006) (describing how venire is divided into different groups for trial).

26. See FED. R. CIV. P. 47 (outlining federal voir dire procedure); FED. R. CRIM. P. 24 (same); BLACK’S LAW DICTIONARY, *supra* note 25, at 1605 (defining “voir dire” as “[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury”); Sherry F. Colb, *Too Religious for the Jury?: A Federal Court Upholds Peremptory Challenges Based on Religious Involvement* (Nov. 5, 2003), <http://writ.news.findlaw.com/colb/20031105.html> (explaining voir dire process).

27. See Peter Michael Collins, *Taking Batson One Giant Step Further: The Court Prohibits Gender-Based Peremptory Challenges in J.E.B. v. Alabama ex rel. T.B.*, 44 CATH. U. L. REV. 935, 937-38 (1995) (listing attorneys’ choice of methods to exclude jurors); see also BLACK’S LAW DICTIONARY, *supra* note 25, at 245 (defining “challenge for cause” as “[a] party’s challenge supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror”).

28. See *United States v. DeJesus*, 347 F.3d 500, 505 (3d Cir. 2003) (explaining historical importance of peremptory challenges). *But cf.* *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (reminding that peremptory challenge is not constitutionally protected fundamental right); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (“[The] sole purpose [of the peremptory challenge] is to permit litigants to assist the government in the selection of an impartial trier of fact.”).

29. WILLIAM BLACKSTONE, 4 COMMENTARIES *353.

30. 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, 575 (1996) (citing Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119) (tracing peremptory challenges in United States back to 1790); Pamela R. Garfield, *J.E.B. v. Alabama ex rel. T.B.: Discrimination by Any Other Name . . .*, 72 DENV. U. L. REV. 169, 172 (1994) (stating that Framers did not include peremptory challenges in Constitution).

been used as an “arbitrary and capricious” method to challenge the seating of prospective jurors without reason or inquiry into motive.³¹

Peremptories are intended for situations in which an attorney cannot articulate a specific reason for objecting to a prospective juror, but has some reason to believe a juror may be undesirable.³² Attorneys usually exercise peremptory challenges based on intuition, making educated guesses with the limited information that is available about the prospective jurors.³³ The danger of peremptory challenges is that they also permit a lawyer to stereotype when exercising the allotted challenges.³⁴

B. *The Equal Protection Clause*

The Fourteenth Amendment to the United States Constitution guarantees all persons equal protection under the law.³⁵ Courts use three stan-

31. See *Swain v. Alabama*, 380 U.S. 202, 221-22 (1965) (holding that Constitution does not require explanation of motives for peremptory challenges); *Lewis v. United States*, 146 U.S. 370, 378 (1892) (quoting *Lamb v. State*, 36 Wis. 424, 427 (1874)) (describing peremptory challenge as “arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose”); *DeJesus*, 347 F.3d at 505 (“The decision to exercise a peremptory strike need not be supported by any reason.”); Collins, *supra* note 27, at 938 (commenting that, unlike for cause eliminations, peremptory challenges allow attorneys to strike jurors without justification); John H. Mansfield, *Peremptory Challenges to Jurors Based Upon or Affecting Religion*, 34 SETON HALL L. REV. 435, 447 (2004) (citing *Holland v. Illinois*, 493 U.S. 474, 480 (1990)) (arguing that allowing lawyers to strike jurors without rationale makes verdicts more acceptable to all parties).

32. See *United States v. Uwaezhoke*, 995 F.2d 388, 394 n.5 (3d Cir. 1993) (illustrating circumstance where peremptory challenge is useful). See generally John P. Marks, *Bader v. State: The Arkansas Supreme Court Restricts the Role Religion May Play in Jury Selection*, 55 ARK. L. REV. 613 (2002) (noting importance of peremptory challenge when concern about potential juror’s fairness does not warrant challenge for cause).

33. See *DeJesus*, 347 F.3d at 505 (demonstrating that lawyers base peremptory challenges on probabilities and limited information); Bader, *supra* note 30, at 576 (citing *State v. Gilmore*, 511 A.2d 1150, 1167 (N.J. 1986)) (commenting that peremptory challenges are often based on intuition and past experiences).

34. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141 (1994) (“All persons . . . have the right not to be excluded summarily because of discriminatory and stereotypical presumptions”); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (discussing damaging effects of peremptory challenges based on discriminatory motives); *Powers v. Ohio*, 499 U.S. 400, 412 (1991) (same); cf. *McCray v. New York*, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting from denial of certiorari) (quoting *Ballard v. United States*, 329 U.S. 187, 195 (1946)) (arguing that harm from discriminatory jury selection extends beyond defendant and excluded juror and undermines public confidence in fairness of American justice system); *Ballard v. United States*, 329 U.S. 187, 195 (1946) (stating that excluding minorities produces “injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts”).

35. See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (“[The Fourteenth Amendment’s purpose was] securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the

dards of review to examine the constitutionality of government action that impacts the guarantees of the Equal Protection Clause: rational basis test, intermediate scrutiny and strict scrutiny.³⁶ Rational basis review is enormously deferential; a court will uphold a law that is rationally related to a legitimate government purpose.³⁷ Under intermediate scrutiny, a court will uphold a law if it is substantially related to an important government purpose.³⁸ Finally, under strict scrutiny, a court will uphold a law if it is necessary to achieve a compelling government purpose.³⁹

C. *Batson v. Kentucky: Race-Based Peremptory Challenges Struck Down by the High Court*

The Supreme Court's decision in *Batson* marked the first time the Court placed a serious limitation on the use of peremptory challenges.⁴⁰ In *Batson*, the Court held that the Equal Protection Clause forbids a prosecutor from peremptorily challenging potential jurors based on race.⁴¹

[majority] race enjoy.”); *Dyszel v. Marks*, 6 F.3d 116, 124-25 (3d Cir. 1993) (stating that Equal Protection Clause bars governing body from applying law dissimilarly to people who are similarly situated); *Bratton v. City of Florence*, 688 So. 2d 233, 235 (Ala. 1996) (same).

36. For a further discussion of the standards of review used in equal protection analysis, see *infra* notes 37-39 and accompanying text.

37. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (employing rational basis review); *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (same); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175 (1980) (same); *Allied Stores v. Bowers*, 358 U.S. 522, 527-28 (1959) (same); *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955) (same); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 427 (1952) (Jackson, J., dissenting) (same).

38. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 266 (1983) (explaining situations where courts apply intermediate scrutiny review); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (same); Lawrence Schlam, *Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. ILL. U. L. REV. 425, 446-47 (2004) (illustrating that gender, alienage and illegitimacy warrant intermediate scrutiny).

39. See, e.g., *Adarand Constructors v. Pena*, 515 U.S. 200, 222 (1995) (describing circumstances in which courts apply strict scrutiny); *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (same); *Sherbert v. Verner*, 374 U.S. 398, 406-08 (1963) (same); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 575 (4th ed. 1991) (same); Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 867-68 (2004) (same); Marianne E. Kreisher, *Religion: The Cognizable Difference in Peremptory Challenges*, 5 WIDENER J. PUB. L. 131, 165-68 (1995) (“Strict scrutiny is the highest level [of scrutiny] and applies to classifications based on suspect classes and fundamental rights.”); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (“Under strict scrutiny the means chosen to accomplish the State’s asserted purpose must be specifically and narrowly tailored to accomplish that purpose.”).

40. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that Equal Protection Clause forbids race-based peremptory challenges).

41. See *id.* at 85-89 (holding that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . .”). Previously, in *Strauder v. West Virginia*, the Court held that the Fourteenth Amendment’s purpose was to ensure that African-Americans were subject to, and granted protection by, the same laws as their white counterparts. See 100 U.S. 303, 310 (1879) (announcing rule prohibiting states from excluding individuals from juries

The case involved the trial of an African-American man charged with burglary and receipt of stolen goods.⁴² At trial, the prosecutor used the state's peremptory challenges to strike all four African-Americans from the venire, creating an all-white jury.⁴³ In response, the Court developed a three-step process, known as a "*Batson* hearing," to evaluate whether a prosecutor exercised a peremptory challenge in violation of the Equal Protection Clause.⁴⁴ First, the defendant must make a *prima facie* case that

because of race); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 172-80 (1997) (acknowledging that, although *Strauder* served to outlaw statutes excluding African-Americans from juries, states still managed to preclude African-Americans). After *Strauder* outlawed the statutory racial ban on juries, prosecutors began to rely on peremptory challenges to create a similar exclusionary effect. See *Swain v. Alabama*, 380 U.S. 202, 211-12 (1965) (acknowledging that parties used peremptory challenges as exclusionary tool); Michael W. Kirk, *Sixth and Fourteenth Amendments—The Swain Song of the Racially Discriminatory Use of Peremptory Challenges*, 77 J. CRIM. L. & CRIMINOLOGY 821, 823-27 (1986) (discussing *Swain* and states' use of peremptory challenges to specifically remove African-Americans from jury in case with African-American defendant); George Bundy Smith, *Swain v. Alabama: The Use of Peremptory Challenges to Strike Blacks from Juries*, 27 How. L.J. 1571, 1572-95 (1984) (same). While the Court recognized that using peremptory challenges as a pretext for racial discrimination violates one's constitutional rights, it established an exceedingly high evidentiary burden for the party to prove discrimination, leaving many defendants unable to challenge the state's use of the strikes. See *Swain*, 308 U.S. at 224 (requiring defendant to demonstrate history or trend of discrimination from other cases).

42. See *Batson*, 476 U.S. at 82 (stating facts of case).

43. See *id.* at 82-83 (detailing composition of jury).

44. See *id.* at 89-96 (establishing *Batson* test). But see Miller, *supra* note 10, at 12 (arguing that *Batson* hearings are absurd because lawyers try to explain unexplainable and justify actions previously allowed without justification). In a *Batson* hearing:

[T]he defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, 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 from the petit jury on account of their race.

Batson, 476 U.S. at 96-97 (citations omitted) (outlining requirements for making *prima facie* case under *Batson*). For example, "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Id.* at 97 (demonstrating that stark pattern of peremptorily striking numerous African-American jurors and no others is sufficient for *prima facie* showing). The Supreme Court held that a criminal defendant may establish a *prima facie* case of purposeful racial discrimination based solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial, without showing repeated instances of such discriminatory conduct over a number of cases. See *id.* at 89-96 (rejecting portion of *Swain* concerning evidentiary burden placed on defendant).

the prosecutor exercised the peremptory challenge on the basis of race.⁴⁵ Second, once the defendant establishes a prima facie case, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror in question.⁴⁶ Finally, the trial court must determine whether the defendant satisfied the burden of proving purposeful discrimination.⁴⁷ This procedure represented the first exception to the universal rule that lawyers may use peremptory challenges for any reason or no reason at all.⁴⁸

D. J.E.B. v. Alabama *ex rel.* T.B.:

The Supreme Court Expands Batson to Protect Gender

In *J.E.B.*, the Supreme Court extended the rule from *Batson* to include peremptory challenges based on gender.⁴⁹ *J.E.B.* involved a paternity suit, in which the state of Alabama used nine of its ten peremptory challenges to remove male jurors, empanelling an all-female jury.⁵⁰ This case presented the issue of whether the Court should read *Batson* to prohibit intentional discrimination premised on gender, just as it prohibited discrimination on the basis of race.⁵¹ The Court held that gender, like race, is an unconstitutional proxy for juror competence and impartiality because “[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes.”⁵²

45. See *Batson*, 476 U.S. at 96-97 (listing first step for making prima facie case under *Batson*); see also *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991) (same).

46. See *Batson*, 476 U.S. at 96-97 (detailing second requirement of prima facie showing under *Batson*); see also *Hernandez*, 500 U.S. at 358-59 (same). The prosecutor may not rebut a prima facie showing on the assumption that the jurors would be partial to the defendant because of their shared race or by attesting to one’s good faith in the selection process. See *Batson*, 476 U.S. at 96-98 (citing examples of inappropriate reasons for striking jurors).

47. See *Batson*, 476 U.S. at 96-97 (explaining third step necessary to make prima facie case under *Batson*); see also *Hernandez*, 500 U.S. at 358-59 (same); *United States v. Uwaezhoke*, 995 F.2d 388, 394 (3d Cir. 1993) (quoting *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 92 (3d Cir. 1992)) (“[T]he appellate court must accept the factual determination of the fact finder unless that determination ‘either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data’”).

48. See Stephen I. Shaw, *Batson v. Kentucky: The Court’s Response to the Problem of Discriminatory Use of Peremptory Challenges*, 36 CASE W. RES. L. REV. 581, 582 (1986) (highlighting *Batson* as Supreme Court’s response to racially motivated peremptory challenges).

49. See generally *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (stating holding of case).

50. See *id.* at 129 (stating facts of case).

51. See *id.* (presenting defendant’s argument that *Batson* should apply to gender).

52. *Id.* at 130-31.

Since *J.E.B.*, the Court has broadened *Batson's* basic constitutional rule beyond peremptory challenges that the prosecution asserts in criminal cases.⁵³ The Court has ruled that the *Batson* anti-discrimination test applies to both criminal defendants' and private litigants' use of peremptory challenges.⁵⁴ Furthermore, the Court ruled that *Batson* applies to federal criminal proceedings through the Due Process Clause of the Fifth Amendment, which affords safeguards similar to the Equal Protection Clause.⁵⁵

But what about religion?⁵⁶ There is no consensus among the circuit courts with respect to the use of peremptory challenges based on religion.⁵⁷ State courts also are not uniform in their approach to this issue.⁵⁸

53. For a further discussion of how the Court has expanded the holding in *Batson*, see *infra* notes 54-55 and accompanying text.

54. See *Georgia v. McCollum*, 505 U.S. 42, 48 (1992) (applying *Batson* to criminal defendants); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (extending *Batson* to civil cases).

55. See *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (applying *Batson's* antidiscrimination test to federal court criminal proceedings based on Due Process Clause); *United States v. Townsley*, 856 F.2d 1189, 1192 (8th Cir. 1988) (Henley, J., dissenting) (same); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (allowing *Batson* challenges in federal criminal proceedings based on Due Process Clause); *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987) (same).

56. For a further discussion of the reasons why the Supreme Court should extend *Batson* to include religion-based peremptory challenges, see *infra* notes 124-59 and accompanying text.

57. See, e.g., *United States v. Berger*, 224 F.3d 107, 120 (2d Cir. 2000) (declining to decide whether *Batson* extends to challenges based on religious affiliation because prosecutor provided another reason for strike); *Fisher v. Texas*, 169 F.3d 295, 303 (5th Cir. 1999) (noting lack of clarity regarding whether *Batson* applies to religious affiliation); *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) (stating in dicta that "it 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 "status of peremptory challenges based on religion is unsettled"); *United States v. Greer*, 939 F.2d 1076, 1086 n.9 (5th Cir. 1991) (holding that *Batson* extends to religion), *aff'd by an equally divided court*, 968 F.2d 433, 437 n.7, 445 (5th Cir. 1992) (en banc) (avoiding issue of whether *Batson* applies to religion); *United States v. Clemmons*, 892 F.2d 1153, 1158 (3d Cir. 1989) (implying that *Batson* does not cover religion, although defendant did not properly preserve issue); *United States v. Somerstein*, 959 F. Supp. 592, 596 (E.D.N.Y. 1997) (holding that *Batson* covers religious affiliation); *United States v. Williams*, 44 M.J. 482, 485 (C.A.A.F. 1996) (rejecting defendant's claim that *Batson* applies to religion).

58. Compare *State v. Purcell*, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) (holding that *Batson* encompasses peremptory challenges based on religious affiliation), *Fields v. People*, 732 P.2d 1145, 1153 (Colo. 1987) (concluding that peremptories based on religious affiliation violate at least state constitution), *State v. Hodge*, 726 A.2d 531, 553 (Conn. 1999) (holding that federal law prohibits peremptories based on religious affiliation), *State v. Levinson*, 795 P.2d 845, 848 (Haw. 1990) (concluding that peremptories based on religious affiliation violate at least state constitution), *Thorson v. State*, 721 So. 2d 590, 594 (Miss. 1998) (ruling that state law prohibits exercising peremptory challenges based solely on religion), *State v. Gilmore*, 511 A.2d 1150, 1159 (N.J. 1986) (concluding that peremptories based on religious affiliation violate at least state constitution), *State v. Fuller*, 812 A.2d 389, 397 (N.J. Super. Ct. App. Div. 2002) (excluding jurors based on religious affiliation

III. THE CRUCIFIXION: THE THIRD CIRCUIT REJECTS EXTENDING BATSON TO PEREMPTORY CHALLENGES BASED ON HEIGHTENED RELIGIOUS BELIEFS

Religion is a divisive subject that courts often seek to avoid.⁵⁹ The lack of consensus among courts concerning religion-based peremptory challenges has created widespread confusion.⁶⁰ Nevertheless, in light of the recent decisions in *DeJesus* and *Bronshtein*, the analysis has become well-defined in the Third Circuit.⁶¹

A. *United States v. Jesus?: Facts and Procedural History*

In an ironically-named case, *United States v. DeJesus*, the government charged Jerry DeJesus with possession of a firearm by a convicted felon.⁶² During jury selection, prospective juror Ronald McBride revealed that much of his life centered on his religion and that he learned to forgive his cousin's killer.⁶³ Prospective juror James Bates also indicated a similar re-

violates state constitution's Equal Protection Clause), *People v. Langston*, 641 N.Y.S.2d 513, 514-15 (N.Y. Sup. Ct. 1996) (ruling that state law prohibits exercising peremptory challenges based solely on religion), and *State v. Eason*, 445 S.E.2d 917, 920 (N.C. 1994) (concluding that peremptories based on religious affiliation violate at least state constitution), with *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to strikes based on religious affiliation), *State v. Gowdy*, 727 N.E.2d 579, 586 (Ohio 2000) (allowing attorney to strike juror for wearing cross), *Casarez v. State*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (en banc) (holding that state interests in peremptory challenges justify excluding jurors based on their religious affiliation), and *James v. Commonwealth*, 442 S.E.2d 396, 398 (Va. 1994) (same).

59. See, e.g., *United States v. DeJesus*, 347 F.3d 500, 510 (3d Cir. 2003) (deeming it unnecessary for court to address whether peremptory challenge based solely on religious affiliation would be constitutional because government's challenges were based on jurors' heightened religious involvement rather than their religious affiliation); *Berger*, 224 F.3d at 120 (declining to decide whether *Batson* extends to religious affiliation-based challenges because prosecutor provided independent reason for strike).

60. For a further discussion of the diversity of opinion among courts regarding religion-based challenges, see *supra* notes 57-58 and accompanying text.

61. For a further discussion outlining the Third Circuit's analysis of religion-based peremptory challenges, see *infra* notes 62-118 and accompanying text.

62. See *DeJesus*, 347 F.3d at 502 (stating facts of case). *DeJesus*'s first trial ended in a mistrial after the jury was unable to reach a verdict. See *id.* (stating facts of case). After a three-day retrial, the jury found *DeJesus* guilty and sentenced him to prison for 110 months, three years of supervised release and a special assessment of \$100. See *id.* (stating procedural history of case).

63. See Transcript of Jury Selection on Oct. 9, 2001 at 52, 85-86, *United States v. DeJesus*, 347 F.3d 500 (3d Cir. 2003) (Crim. No. 99-728) (D.N.J. Jan. 24, 2002) (indicating that McBride participates in civic activities through his church, reads *Christian Book Dispatch*, holds several biblical degrees, is deacon and Sunday School teacher in local church and sings in two church choirs). The district court conducted jury selection in *DeJesus* in three phases: (1) prospective jurors completed a questionnaire; (2) district court conducted individual voir dire of prospective jurors; and (3) attorneys exercised their allotted peremptory strikes. See *DeJesus*, 347 F.3d at 502 (summarizing jury selection procedure).

ligious proclivity.⁶⁴ The government then exercised peremptory challenges against McBride and Bates, both of whom were African-American.⁶⁵ Defense counsel responded with two race-based *Batson* challenges.⁶⁶ Although both jurors stated that they would follow the law and consider only the evidence presented at trial, the prosecution argued that their strong religious beliefs outweighed their desire to serve as fair and impartial jurors.⁶⁷

Defense counsel argued that religion-based peremptory challenges are just as improper as those based on race and urged the district court to grant a *Batson* challenge on that ground.⁶⁸ The district court denied the defendant's *Batson* challenges, explaining that the defendant's challenges were not "based on some denomination of religion, but [were] challenge[s] based upon how the jurors chose to spend their time, reading the bible."⁶⁹ The district court opined that "[w]hile *Batson* may extend to protect against striking a potential juror based upon the juror's membership in a particular religious denomination having no relevance to the issues in the case, none of these jurors were struck by the government upon an impermissible ground."⁷⁰

64. See Transcript of Jury Selection, *supra* note 63, at 50, 89 (indicating that Bates is officer and trustee for church, he reads Bible and related literature and his hobbies include church activities).

65. See *id.* at 85 (noting race of challenged jurors).

66. See *id.* at 84 (explaining defense's challenges to constitutionality of peremptory challenge under *Batson*). Although the government was not called upon to explain its reasoning, it also used another peremptory challenge to remove prospective juror George B. Pressey, a Caucasian man, who cited being active in his church, including serving on the board of trustees, organizing the construction of a new sanctuary and being in charge of the ushering department. See *id.* at 101-05 (neglecting to challenge government's strike against Pressey because defendant did not object to strike when it was exercised).

67. See *id.* at 85-95 (explaining that strike against McBride was based on potential juror's high degree of religious involvement and ability to forgive his cousin's murderer, both of which might make him reluctant to convict). The government explained that Bates's "fairly strong religious beliefs" might prevent him from passing judgment against another person and that he appeared unwilling to make eye contact with the prosecution, demonstrating a possible anti-government bias. See *id.* at 89 (indicating that Bates "looked the government's way and then turned his eyes away several times").

68. See *id.* at 87 (stating defendant's argument).

69. *Id.* at 94 (noting that although both Bates and McBride indicated that "they studied and read the Bible," which indicates that they were both Christian, government was unaware of jurors' particular religious affiliation).

70. *United States v. DeJesus*, Crim. No. 99-728, slip op. at 2 (D.N.J. Jan. 24, 2002) (stating holding of case and reasoning for denial of defendant's mistrial application).

B. *The Praetorium*.⁷¹ *The Third Circuit's Analysis*1. *Carrying the Cross—Destination Golgotha*.⁷² *The Majority Opinion*

In a two-to-one decision, the United States Court of Appeals for the Third Circuit affirmed the district court's decision.⁷³ Circuit Judge Fuentes framed the issue in *DeJesus* as whether the government violated the Equal Protection Clause when it peremptorily struck two African-American jurors, who were presumably Christian, from the venire.⁷⁴ While the defendant raised *Batson* challenges on both race and religion, the analysis at issue focused on the religion-based challenge.⁷⁵ The Third Circuit af-

71. See *John* 18:28 (referring to court where Jesus was brought to trial before Pontius Pilate); *Mark* 15:16 (same); *Matthew* 27:27 (same). All biblical quotations contained in this Casebrief are taken from *The Holy Bible*, Revised Standard Version, Oxford University Press, 1977.

72. Golgotha (Gûlgaltâ in Aramaic), or the place of the skull, refers to the hill outside Jerusalem on which Jesus was crucified, as is mentioned in all four accounts of Jesus's crucifixion in the Christian canonical Gospels. See, e.g., *John* 19:17 ("So they took Jesus, and he went out, bearing his own cross, to the place called the place of a skull, which is called in Hebrew Gol'gotha."); *Luke* 23:33 ("And when they came to the place which is called The Skull, there they crucified him, and the criminals, one on the right and one on the left."); *Mark* 15:22 ("And they brought him to the place called Gol'gotha (which means the place of a skull)."); *Matthew* 27:33 ("And when they came to a place called Gol'gotha (which means the place of a skull) . . .").

73. See *United States v. DeJesus*, 347 F.3d 500, 505 (3d Cir. 2003) (affirming decision of United States District Court for District of New Jersey that prosecution did not utilize peremptory challenges in violation of *Batson*). Circuit Judge Fuentes delivered the opinion of the court and was joined by Judge William C. O'Kelley, United States District Judge for the Northern District of Georgia, sitting by designation. See *id.* (holding that it is unconstitutional to exercise peremptory challenge on basis of religious affiliation, but it is constitutional to base challenge on strength of religious beliefs). Judge Stapleton provided the dissenting opinion. See *id.* at 513 (Stapleton, J., dissenting) (opining that prosecution discriminated against jurors based on practice of their religion because Equal Protection Clause bars use of stereotypes based on religion when exercising peremptory challenges).

74. See *id.* at 501-02 (majority opinion) (framing issue of case); see also *Davis v. Minnesota*, 511 U.S. 1115, 1117 (1994) (Thomas, J., dissenting from denial of certiorari) (applying *Batson* to religious affiliation); *United States v. Brown*, 352 F.3d 654, 668-69 (2d Cir. 2003) (same); *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) (same); *State v. Hodge*, 726 A.2d 531, 553 (Conn. 1999) (same). *Bul see State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to religious affiliation); *Casarez v. State*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (en banc) (same). In his appeal before the Third Circuit, *DeJesus* argued that *Batson* extends to peremptory challenges based on religious affiliation and that the government impermissibly struck McBride and Bates on the basis of their Christian affiliation. See *id.* at 505 (stating appellant's cause of appeal). *DeJesus* did not challenge the government's strike against Pressey on appeal because religious affiliation was not the primary reason for that strike and the defendant did not make a prima facie case when it was exercised. See Brief for Appellant at 31 n.6, *United States v. DeJesus*, 347 F.3d 500 (3d Cir. 2003) (No. 02-1394) (explaining why *DeJesus* failed to challenge Pressey's strike).

75. See *DeJesus*, 347 F.3d at 506-11 (noting that defendant pled in alternative for both race and religion). In *DeJesus*, the issue of whether the government exercised peremptory challenges to remove members of a particular race was moot

firmed the district court's determination that the government based its peremptory strikes on the jurors' "heightened religious involvement" and not on either race or a specific religious affiliation and, therefore, acted constitutionally.⁷⁶

According to the district court, "the categorical striking of a juror based upon denomination affiliation . . . would be constitutionally offensive to the guarantee of free religious affiliation."⁷⁷ Nevertheless, according to the district court, the prosecution's concerns derived from the potential jurors' unusual degree of religious involvement.⁷⁸ The district court held that the jurors' extraordinary amount of religious activity suggested strong religious beliefs that may affect the jurors' judgment, but were not linked to a specific religion.⁷⁹ The record supported the prosecution's argument that both excluded jurors heavily participated in religious activities.⁸⁰

because the government offered an explanation for its peremptory strikes before the district court addressed the adequacy of the prima facie showing. *See id.* at 506 (quoting *United States v. Uwaezohoke*, 995 F.2d 388, 392 (3d Cir. 1993)) (explaining that when government offers explanation for its peremptory strikes before district court addresses adequacy of prima facie showing, any issue regarding existence of prima facie showing of discrimination becomes moot).

76. *See id.* at 502 (stating holding of case in *DeJesus*). The Seventh Circuit reached a similar conclusion when faced with the same question. *See Stafford*, 136 F.3d at 1114:

[I]t is necessary to distinguish among religious affiliation, a religion's general tenets, and a specific religious belief It would be proper to strike [a juror] on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing

Id. (bifurcating analysis between religious affiliation and heightened religious belief). Several state courts have made a similar distinction between challenges premised on religious beliefs and affiliation. *See, e.g.*, *State v. Purcell*, 18 P.3d 113, 122 (Ariz. Ct. App. 2001) (holding challenge constitutional when based on juror's personal beliefs and not religious affiliation); *State v. Fuller*, 862 A.2d 1130, 1138 (N.J. 2004) (finding peremptory challenge permissible when based on prosecutor's inference from juror's traditional Muslim clothing that juror was religiously devout and, therefore, likely to be defense-oriented); Brian H. Bornstein & Monica K. Miller, *Does Religion Predict Juror Decisions?*, MONITOR ON PSYCHOLOGY, May 2005, at 92 (explaining that many lawyers believe religiosity affects decision-making).

77. *United States v. DeJesus*, Crim. No. 99-728, slip op. at 18 (D.N.J. Jan. 24, 2002) (noting district court's opposition to peremptory challenges based on religious affiliation).

78. *See id.* at 22 (citing that prosecution was not concerned with religious affiliation, but with heightened religiosity).

79. *See id.* (implying that jurors' heightened religiosity affects jurors' judgment).

80. For a further discussion of the jurors' strong religious proclivity, see *supra* notes 63-64 and accompanying text. The district court elaborated that:

[F]aced with a prospective juror whose answers to neutral questions regarding hobbies, pastimes, reading materials, television programs and the like reveal a rather consuming propensity to experience the world through the prism of religious beliefs, it is rational for a prosecutor to act upon the concern about reluctance to convict.

According to the Third Circuit, the distinction between a challenge motivated by religious beliefs and one motivated by religious affiliation was valid and proper.⁸¹ The common thread among the government's challenges was the concern that the jurors' religious beliefs—as reflected by their reading choices, hobbies, statements and demeanor in court—would tend to make them unable or unwilling to pass judgment on another human being.⁸² Therefore, even if the exercise of a peremptory challenge on the basis of religious affiliation is unconstitutional, the exercise of a challenge based on strong religious beliefs is not.⁸³ Because the Third Circuit held that the government's challenges derived from the jurors' heightened religious involvement rather than their religious affiliation, it was unnecessary for the court to address whether a peremptory challenge based solely on religious affiliation would be constitutional.⁸⁴ Therefore, the question remains open in the Third Circuit.⁸⁵

2. *The Voice of One Crying in the Wilderness*:⁸⁶ *The Dissenting Opinion*

In his dissent, Judge Stapleton urged that it was discriminatory for the prosecution to exercise peremptory challenges against McBride and Bates on account of their religious practice.⁸⁷ A classification based on height-

DeJesus, Crim. No. 99-728, at 19-20 (justifying peremptory challenges based on heightened religiosity).

81. See *DeJesus*, 347 F.3d at 511 (holding that district court's finding that government struck jurors because their heightened religiosity would render them unable or unwilling to convict was not erroneous).

82. See *id.* at 508 (stating that prosecutor exercised peremptory challenge because of religious beliefs and not religious affiliation). *Contra* Miller, *supra* note 10, at 12 (“[T]he usual stereotype about religious people is just the opposite—namely, that they tend to impose their values on others.”).

83. See *DeJesus*, 347 F.3d at 510 (stating holding of case); see also Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 BUFF. CRIM. L. REV. 139, 144 (2005) (arguing that Constitution forbids using peremptory challenges based solely on stereotypes about religions, but juror's actual stated beliefs are proper basis for exclusion even if those beliefs are religiously inspired).

84. See *DeJesus*, 347 F.3d at 510 (circumventing issue whether it is constitutional to exercise peremptory challenges based on religious affiliation because Third Circuit limited holding to religious belief).

85. For a further discussion of Justice Alito's analysis in *Bronstein* concerning religion-based peremptory challenges, see *infra* notes 107-18 and accompanying text.

86. See *John* 1:23 (“He said, ‘I am the voice of one crying in the wilderness, ‘Make straight the way of the Lord,’ as the prophet Isaiah said.”).

87. See *DeJesus*, 347 F.3d at 515 (Stapleton, J., dissenting) (stating that government believed McBride and Bates would be reluctant to convict or pass judgment on another human because of their religious faith). Judge Stapleton also recognized that neutral grounds for striking McBride and Bates may have played a role in the prosecutor's decisions. See *id.* (indicating that McBride learned to forgive his cousin's killer and Bates diverted his eyes from prosecution during voir dire). Judge Stapleton otherwise concurred with the court's disposition of *DeJesus*'s race-based peremptory challenge. See *id.* at 513 (noting that non-religious grounds for striking jurors may have played role in prosecutor's decisions).

ened religious involvement is no less based on religion than a classification based on religious affiliation.⁸⁸ Therefore, a juror's religious practice cannot be used as the sole basis for attributing a particular belief to the juror and exercising a peremptory challenge.⁸⁹

The Third Circuit previously noted, in *Rico v. Leftridge-Byrd*,⁹⁰ that *J.E.B.* held that the "'Equal Protection Clause bars peremptory challenges based on gender and, it strongly suggested, on any classification otherwise receiving 'heightened scrutiny' under the Clause.'"⁹¹ Furthermore, when state action "establishes 'a classification . . . drawn upon inherently suspect distinctions such as race, religion, or alienage' . . . , it must meet the strict scrutiny standard"⁹² Therefore, Judge Stapleton reasoned that the "Equal Protection Clause bars the use of stereotypes based upon religion in exercising peremptory challenges."⁹³

Although a prosecutor may strike a juror for being unwilling to judge another person, a prosecutor may not—consistent with the Equal Protection Clause—infer solely from a prospective juror's race, gender or religion that he or she would be unwilling to judge another.⁹⁴ While a litigant may peremptorily strike a juror because of a potential religious bias, a juror's religious affiliation or practice cannot be used as the sole basis for

88. See *id.* at 515 (refuting majority's holding that striking juror based on religious affiliation may violate Equal Protection Clause, but striking juror based on heightened religious involvement does not).

89. See *id.* at 514 (stating that sole basis for government's belief that McBride and Bates would be reluctant to convict or pass judgment on another person is their religious practice).

90. 340 F.3d 178 (3d Cir. 2003).

91. *DeJesus*, 347 F.3d at 514 (Stapleton, J., dissenting) (quoting *Rico*, 340 F.3d at 182) (proffering that Equal Protection Clause bars use of stereotypes based on religion when attorneys exercise peremptory challenges). For a further discussion of the standards of review, see *supra* notes 37-39 and accompanying text.

92. *DeHart v. Horn*, 227 F.3d 47, 61 (3d Cir. 2000) (en banc) (citing *Maldonado v. Houston*, 157 F.3d 179, 184 (3d Cir. 1998)) ("[C]lassification[s] that draw [] upon suspect distinctions, such as religion, '[are] subject to strict scrutiny and will pass constitutional muster only if it is narrowly tailored to serve a compelling state interest.'"); *Schumacher v. Nix*, 965 F.2d 1262, 1266 (3d Cir. 1992) (quoting *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976)) (holding that when state action establishes classification that is drawn on inherently suspect distinctions, it must meet strict scrutiny standard); see also *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)) ("[A] suspect class is one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.").

93. *DeJesus*, 347 F.3d at 514 (Stapleton, J., dissenting) (referring to *J.E.B.*, in which Court strongly suggested that Equal Protection Clause bars peremptory challenges based on any classification receiving heightened scrutiny).

94. See *id.* (arguing that basing peremptory challenge on inference that juror will be unwilling to sit in judgment of another person violates Equal Protection Clause).

attributing such a particular belief to the juror.⁹⁵ In *DeJesus*, the voir dire transcript reveals no indication that either McBride or Bates would have been reluctant to convict or pass judgment on another person.⁹⁶ Had they exhibited any such reluctance, the government would have been justified in exercising the peremptory challenges, regardless of the religious overtone.⁹⁷ Conversely, both McBride and Bates indicated that they would follow the law and base their decision upon the evidence presented at trial.⁹⁸

IV. THE RESURRECTION: JUST DICTA OR A SIGN FROM ABOVE? JUSTICE ALITO'S OPINION IN *BRONSHTEIN V. HORN*

A. *The Chosen People*:⁹⁹ Jury Selection in *Bronshstein*

Shortly after *DeJesus*, in *Bronshstein*, the Third Circuit again addressed whether religion-based peremptory challenges are constitutional.¹⁰⁰ In *Bronshstein*, Antuan Bronshstein was convicted in Pennsylvania state court of first-degree murder and sentenced to death.¹⁰¹ During jury selection, when Jan Eidelson, a potential juror, came up for voir dire, the prosecutor stated that he wanted to inquire into her religion “only because of the educational background” noted on her juror questionnaire.¹⁰² Ms. Eidelson stated that, although she was a graduate of Friends Central High

95. *See id.* (noting that exercising peremptory challenge based solely on religious affiliation violates Equal Protection Clause).

96. For a further discussion of the information gathered during voir dire, see *supra* notes 63-64 and accompanying text.

97. *See DeJesus*, 347 F.3d at 515 (Stapleton, J., dissenting) (justifying peremptory challenge against juror if juror is reluctant to convict or pass judgment on another person).

98. *See id.* (noting that McBride and Bates were not reluctant to convict or pass judgment on another person).

99. *See, e.g., Amos* 3:2 (“You only have I known of all the families of the earth; therefore I will punish you for all your iniquities.”); *Deuteronomy* 7:6 (“For you are a people holy to the LORD your God; the LORD your God has chosen you to be a people for his own possession, out of all the peoples that are on the face of the earth.”); *Deuteronomy* 14:2 (“For you are a people holy to the LORD your God, and the LORD has chosen you to be a people for his own possession, out of all the peoples that are on the face of the earth.”); *Exodus* 19:5-6 (“[Y]ou shall be my own possession among all peoples; for all the earth is mine, and you shall be to me a kingdom of priests and a holy nation. These are the words which you shall speak to the children of Israel.”).

100. *See Bronshstein v. Horn*, 404 F.3d 700, 724 (3d Cir. 2005) (holding that petitioner failed to make prima facie case under *Batson*). For a further discussion of the facts and analysis in *Bronshstein*, see *infra* notes 101-18 and accompanying text.

101. *See id.* at 703-04 (stating facts of case).

102. *See id.* at 720 (noting that juror attended Quaker high school). The trial judge stated that this inquiry was legitimate because “it cannot be disputed that if someone is a Quaker they hold a religious belief that would prevent them, probably, from serving on this jury” because it was a death penalty case. *See id.* at 721 (noting that Quakers would likely be unable to impose death sentence).

School, she was not a Quaker, but rather a Jew.¹⁰³ Eidelson indicated that, although it “would [not] be easy,” she could vote to impose the death penalty and stand up in open court to state that she voted to impose that sentence.¹⁰⁴ The prosecutor, however, still exercised a peremptory challenge against Eidelson.¹⁰⁵ Defense counsel objected, claiming that the challenge violated *Batson*.¹⁰⁶

B. *The Eleventh Commandment?:
Thou Shalt Not Peremptorily Challenge
Thy Neighbor Based on Religion*

In a unanimous decision written by Judge, now Supreme Court Justice, Samuel Alito, the Third Circuit suggested that it is improper to strike a juror based on religion.¹⁰⁷ In dicta, Justice Alito favorably quoted the district court: “[I]t is likely that the trial judge was wrong on the issue of whether Jews were a cognizable group under *Batson*,” referring to the state trial judge’s remarks that Judaism is “a religion, it’s not a nationality,” and peremptory challenges based on Judaism do not present “a *Batson* issue.”¹⁰⁸ Justice Alito’s support of the district court’s analysis that religion is protected by *Batson* is implicit throughout his opinion.¹⁰⁹ This conclusion is further supported by the fact that Justice Alito’s opinion was joined by Judge Stapleton, the author of the dissent in *DeJesus*, which advocated expanding *Batson* to include religion.¹¹⁰ Because the court’s analysis of religion-based peremptory challenges was unnecessary for purposes of the court’s holding, a strong argument can be made that Justice Alito used his opinion in *Bronshstein* to frame the *Batson* analysis to be applied in later cases involving religion-based peremptory challenges.¹¹¹ This implication

103. See *id.* (recalling that Eidelson demonstrated no bias or prejudice toward defendant for being Russian-Jew, stating that her father’s parents were Russian-Jews and her mother was Jewish).

104. See *id.* (stating dialogue between defense counsel and Eidelson during questioning).

105. See *id.* (acknowledging cause of appeal).

106. See *id.* (claiming that *Batson* extends to religion, but trial judge rejected objection without explanation).

107. For a further discussion of Justice Alito’s analysis, see *infra* notes 108-14 and accompanying text.

108. *Bronshstein*, 404 F.3d at 720 (noting that district court found Jews to be cognizable group under *Batson*); see *United States v. DeJesus*, 347 F.3d 500, 504 (3d Cir. 2003) (Stapleton, J., dissenting) (“*Batson* may extend to protect against striking a potential juror based upon the juror’s membership in a particular religious denomination . . .”).

109. For a further discussion of Justice Alito’s support of the district court’s analysis in *Bronshstein*, see *supra* note 108 and accompanying text.

110. For a further discussion of Judge Stapleton’s dissent in *DeJesus*, see *supra* notes 87-98 and accompanying text.

111. For a further discussion that, in *Bronshstein*, Justice Alito framed the analysis for its future application to later decisions in order to expand *Batson* to include religion-based peremptory challenges, see *supra* notes 108-10 and accompanying text.

is not surprising: Justice Alito consistently protected religious liberty in his opinions while on the Third Circuit.¹¹² Finally, *Bronshstein* held that the rigid *Batson* requirements set forth by the Pennsylvania Supreme Court in *Commonwealth v. Simmons*¹¹³ are merely illustrative and not compulsory,

112. See, e.g., *Blackhawk v. Pennsylvania*, 381 F.3d 202, 207 (3d Cir. 2004) (holding that Native American's free exercise rights were violated when he was denied religious exemption from permit fees required for keeping wildlife in captivity); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004) (ordering preliminary injunction for school district to treat child evangelism group like other community groups regarding distribution of literature because group was likely to succeed on viewpoint discrimination claim under Free Speech Clause); *Fraise v. Terhune*, 283 F.3d 506, 521-22 (3d Cir. 2002) (finding that New Jersey prison policy that allowed correctional officials to designate security threat groups did not violate equal protection in view of greater propensity for violence demonstrated by members of groups); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 289-90 (3d Cir. 2001) (Alito, J., concurring) (reversing summary judgment in religious discrimination suit because employee established prima facie case for hostile work environment, religious discrimination and retaliation); *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 264-65 (3d Cir. 2001) (finding that taxpayer plaintiffs failed to establish standing based on non-economic injuries in their First Amendment claim because record established that both nativity display and menorah at issue were donated to defendant Township); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215-16 (3d Cir. 2001) (holding that public school district's student-on-student anti-harassment policy was unconstitutionally overbroad because it prohibited nonvulgar, nonsponsored student speech and did not satisfy substantial disruption test); *C.H. v. Olivia*, 226 F.3d 198, 210-11 (3d Cir. 2000) (Alito, J., dissenting) (dissenting from court's decision supporting school's removal of kindergarten student's Thanksgiving poster because it included religious themes, including "I'm thankful for Jesus," arguing that for government to permit some points of view, but to exclude other views, violates First Amendment); *ACLU of N.J. v. Schundler*, 168 F.3d 92, 98-101 (3d Cir. 1999) (holding that, while city's display of predominantly religious symbols was unconstitutional under Establishment Clause, adding secular and cultural symbols diluted display's endorsement of religion); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (holding that police department's policy, which prohibited beards, violated Free Exercise Clause of First Amendment because it refused to make exemptions for religious reasons, even though medical exemptions were made); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 493 (3d Cir. 1998) (holding that university professor did not have First Amendment right to choose classroom materials and subjects in contravention of university's dictates, and his suspension with pay did not violate procedural due process where he was not deprived of employment); *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1497 (3d Cir. 1996) (Alito, J., dissenting) (dissenting from majority opinion that prevents public high school seniors from voting on whether to include prayer at school-sponsored graduation ceremony). Justice Alito's critics portray him as a sponsor of unwarranted government endorsement of faith, while his supporters describe him as a champion of religious expression under the Constitution. See David G. Savage, *Alito Put Faith in the 1st Amendment; The Nominee Upheld the Rights of Many Religions, a Subject of Perpetual Disputes in the Courts*, L.A. TIMES, Nov. 26, 2005, at A1 ("If there is a sure winner in the cases decided by Samuel A. Alito Jr., it is freedom of religion-any religion."); Bruce Hausknecht, *Samuel Alito on Religious Freedom*, CITIZENLINK, (Jan. 3, 2006), <http://www.family.org/cforum/fosi/government/courts/supreme/a0039070.cfm> ("Judge Alito's judicial opinions stand in sharp contrast to the ever-increasing anti-God din.").

113. 662 A.2d 621 (Pa. 1995).

lending further support to the notion that the court was determined to expand *Batson*.¹¹⁴

The Third Circuit's holdings in *Bronshtein* and *DeJesus* are not contradictory: *Bronshtein* suggests that a peremptory challenge cannot be exercised based on religious affiliation, whereas *DeJesus* condones peremptory challenges based on heightened religious involvement.¹¹⁵ Even if Justice Alito did not use *Bronshtein* as a pulpit to criticize religion-based peremptories, at a minimum, his decision in *Bronshtein* crystallizes the fact that this is a toxic issue which courts try to circumvent via procedural loopholes.¹¹⁶ In the final disposition, the court determined that *Bronshtein* failed to make a prima facie case.¹¹⁷ For that reason, Justice Alito remarked: "We therefore have no need to address the question whether *Bronshtein* would be entitled to relief if he had shown that the peremptory challenge at issue was based on 'religious affiliation.'"¹¹⁸

114. See *Bronshtein v. Horn*, 404 F.3d 700, 722 (3d Cir. 2005) (holding that procedural requirements in *Simmons* represent interpretation of *Batson's* requirements, not state procedural rule). To sustain a prima facie case of improper use of peremptory challenges under *Simmons*, a defendant must establish:

(1) the defendant is a member of a cognizable racial group and the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; (2) the defendant can then rely on the fact that the use of peremptory challenges permits "those to discriminate who are a mind [sic] to discriminate; and, (3) the defendant, through facts and circumstances, must raise an inference that the prosecutor excluded members of the venire on account of their race

662 A.2d at 631 (quoting *Commonwealth v. Dinwiddie*, 529 Pa. 66, 70-71 (1992)) (enumerating prima facie *Batson* requirements according to Pennsylvania Supreme Court).

115. Compare *Bronshtein*, 404 F.3d at 720 (quoting App. II at 424-25) (suggesting, in dicta, that it is improper to challenge juror based on religious belief), with *United States v. DeJesus*, 347 F.3d 500, 510 (3d Cir. 2003) (holding that even if peremptory challenges based on religious affiliation are unconstitutional, challenges based on religious beliefs are not).

116. For a further discussion explaining that religion-based peremptory challenges are a highly controversial issue that courts avoid, see *supra* note 59 and accompanying text.

117. See *Bronshtein*, 404 F.3d at 725 n.10 (quoting *DeJesus*, 347 F.3d at 510) (reserving decision on question because *Bronshtein* failed to make prima facie case).

118. *Id.* at 724 n.10 (determining that *Bronshtein* failed to make prima facie case under *Batson*); accord *United States v. Chandler*, 12 F.3d 1427, 1431 (7th Cir. 1994) (requiring timely, specific objection to peremptory challenge as requisite for *Batson* claim); *Doe v. Burnham*, 6 F.3d 476, 481 (7th Cir. 1993) (same); *United States v. Clemmons*, 892 F.2d 1153, 1158 n.6 (3d Cir. 1990) (declining to consider whether peremptory challenge was based on religious discrimination because issue was raised for first time on appeal); *Thomas v. Moore*, 866 F.2d 803, 804 (5th Cir. 1989) (requiring timely objection to peremptory challenge); see also *Batson v. Kentucky*, 476 U.S. 79, 99-100 (1986) (evaluating prosecutor's use of peremptory challenges following defendant's "timely objection"); *Virgin Islands v. Forte*, 806 F.2d 73, 75-76 (3d Cir. 1986) (noting that contemporaneous objection is imperative for *Batson* claims because timely objection delineates points that may be appealed and avoids unnecessary reversals of errors that could have been averted at trial); cf. *United States v. Neely*, 980 F.2d 1074, 1084 (7th Cir. 1992) (requiring that timely,

V. TWELVE TRIBES OF ISRAEL, THIRTEEN COURTS OF APPEAL:
THE THIRD CIRCUIT RESPONDS TO INTERCIRCUIT CONFLICTS

There is no consensus among the circuit courts on the use of religion-based peremptory challenges.¹¹⁹ State courts are similarly balkanized in their approaches.¹²⁰ There is also a lively debate among commentators.¹²¹ In *DeJesus*, the Third Circuit clarified the difference between peremptories based on religious affiliation and peremptories based on religious beliefs by bifurcating the court's treatment of the two groups.¹²²

A. *Splitting the Baby*:¹²³
Religious Affiliation and Religious Belief

The Third Circuit's opinion in *DeJesus* is groundbreaking because it divides religion-based *Batson* challenges into two separate factions—religious affiliation and religious belief.¹²⁴ This is revolutionary because the Third Circuit is the first circuit court to proclaim that it will not extend *Batson* to “heightened religiosity” or “heightened religious belief.”¹²⁵ “Heightened religiosity” is now a proxy for religion-based peremptory challenges to allow lawyers to exclude jurors based on their religious affiliation.¹²⁶ For example, few lawyers would challenge a non-practicing Cath-

specific objections on correct grounds be made at trial to preserve issue for appeal); *United States v. Chaidez*, 919 F.2d 1193, 1202 (7th Cir. 1990) (demanding that specific ground for objection be identified at trial); *United States v. Wynn*, 845 F.2d 1439, 1442 (7th Cir. 1988) (quoting *United States v. Laughlin*, 772 F.2d 1382, 1392 (7th Cir. 1984)) (“To preserve an issue for appellate review, a party must make a proper objection at trial that alerts the court and opposing party to the specific grounds for the objection.”).

119. For a further discussion of the divergent holdings issued by the circuit courts on religion-based peremptory challenges, see *supra* note 57 and accompanying text.

120. For a further discussion of the varied opinions of state courts concerning religion-based peremptory challenges, see *supra* note 58 and accompanying text.

121. See Hinkle, *supra* note 83, at 147 (reporting that those who support “extending *Batson* to religious affiliation either rely on First Amendment or argue that religious affiliation is virtually indistinguishable from race and gender in its moral irrelevance,” while “those against extending *Batson* to religious affiliation express dismay at any further inroads against peremptory challenges and argue that religious affiliation is fundamentally unlike race or gender because it is mutable paradigm”).

122. See *United States v. DeJesus*, 347 F.3d 500, 510 (3d Cir. 2003) (stating holding of case); see also *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) (“[I]t is necessary to distinguish among religious affiliation, a religion’s general tenets, and a specific religious belief.”).

123. See 1 *Kings* 3:16-28 (relating King Solomon’s wisdom in judgment).

124. For a further discussion of how the Third Circuit bifurcated religion-based peremptory challenges in *DeJesus*, see *supra* note 83 and accompanying text.

125. For a further discussion of why the Third Circuit will not extend *Batson* to “heightened religiosity” or “heightened religious belief,” see *supra* notes 81-82 and accompanying text.

126. See Hinkle, *supra* note 83, at 193 (suggesting that it is impossible to police lawyers because they can always argue that juror was struck for depth of beliefs and

olic or Protestant on a jury, but *Batson* issues will often arise with Orthodox Jews,¹²⁷ Jehovah's Witnesses¹²⁸ and Muslims.¹²⁹ By definition, these groups exhibit "heightened religious involvement," and now, according to the Third Circuit, a lawyer may exercise a peremptory challenge against nearly any member of these groups on the basis of heightened religious belief.¹³⁰ This effectively destroys any protection for religious affiliation because the groups most in need of protection are the same groups that can be excluded in light of *DeJesus's* "heightened religious involvement" analysis.¹³¹ While this is settled law in the Third Circuit, it is unlikely to be upheld if appealed to the Supreme Court, as one should not "split the baby."¹³²

not religious affiliation); *see also* Miller, *supra* note 10, at 12 (quoting United States v. DeJesus, Crim. No. 99-728, slip op. at 19 (D.N.J. Jan. 24, 2002)) (arguing that when person displays "propensity to experience the world through a prism of religious beliefs," constitutional protections disappear).

127. *See, e.g.*, Tatum v. Cockrell, No. 3-01-CV-0262-R, 2001 U.S. Dist. LEXIS 17780, at *10 n.3 (D. Tex. Nov. 1, 2001) (suggesting that prosecutors routinely use peremptory challenges to exclude Jews from jury service because Jews favor defense in criminal cases); *People v. Kagan*, 420 N.Y.S.2d 987, 989-90 (N.Y. Sup. Ct. 1979) (alleging that state deliberately excluded jurors because of their Jewish faith); Hinkle, *supra* note 83, at 193 (arguing that problem with wearing yarmulke is not that it signals that wearer is Jewish, but that wearer is *very* Jewish).

128. *See, e.g.*, *State v. Martin*, 75 Cal. Rptr. 2d 147, 148 (Cal. Ct. App. 1998) (exercising peremptory challenge because juror was Jehovah's Witness); *State v. Davis*, 504 N.W.2d 767, 772 (Minn. 1993) (same).

129. *See, e.g.*, *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (permitting peremptory challenges based on juror's appearance because it suggested that juror practiced Muslim faith); *Card v. United States*, 776 A.2d 581, 588-90 (D.C. Cir. 2001) (involving prosecutor who struck juror, claiming that juror's appearance meant he belonged to Nation of Islam, and thus had deeply held religious views); *State v. Fuller*, 862 A.2d 1130, 1146 (N.J. 2004) (allowing peremptory challenge based on prosecutor's inference that juror's traditional Muslim clothing signaled religious devotion and, therefore, defense-orientation); *State v. Gowdy*, 727 N.E.2d 579, 586 (Ohio 2000) (striking juror for wearing religious-oriented clothing was acceptable).

130. *See* *United States v. DeJesus*, 347 F.3d 500, 502 (3d Cir. 2003) (holding that peremptory challenge based on going to church was not based on religious affiliation and, hence, was constitutional); *see also* Fisher et al., *supra* note 17, at 619-29 (noting from studies that intense religious beliefs can be predictor of variety of attitudes); Hinkle, *supra* note 83, at 190 (noting that person who carries Bible conveys that religion is important part of person's life and perhaps indicates high likelihood of certain viewpoints, so person is being judged for actions and not membership in group). *But see* Miller, *supra* note 10, at 12 (criticizing Third Circuit's analysis because it presumes that devout Catholics, Jews and Muslims are identical).

131. For a further discussion concerning how *DeJesus* encroaches upon the protection of religious affiliation, see *supra* notes 126-30 and accompanying text.

132. For a further discussion explaining why the Third Circuit should not have applied the analysis differently to religious affiliation and religious belief, see *infra* notes 135-59 and accompanying text.

B. *Judgment Day:*
"The Unanswered Prayer for a
*Supreme Court Opinion"*¹³³

The Supreme Court has denied certiorari in numerous cases in which it would have resolved the question whether religion is a cognizable group under *Batson*.¹³⁴ Nevertheless, other Supreme Court precedent supports the Third Circuit's analysis in *Bronshstein*.¹³⁵ Peremptory challenges based on religious affiliation are unconstitutional because they involve the state playing favorites among religions.¹³⁶ *Batson* should, therefore, be extended to religion-based peremptory challenges to eviscerate the type of religion-based stereotypes that were the impetus for protection of race- and gender-based strikes.¹³⁷

133. Courtney A. Waggoner, Note, *Peremptory Challenges and Religion: The Unanswered Prayer for a Supreme Court Opinion*, 36 LOY. U. CHI. L.J. 285, 287 (2004) (calling for Supreme Court to resolve debate over religion-based peremptory challenges).

134. See generally *DeJesus v. United States*, 541 U.S. 1086 (2004) (denying certiorari on case dealing with religion-based peremptory challenges); *Stafford v. United States*, 525 U.S. 849 (1998) (same); *Hodge v. Connecticut*, 528 U.S. 969 (1999) (same); *Eason v. North Carolina*, 513 U.S. 1096 (1995) (same); *Davis v. Minnesota*, 511 U.S. 1115 (1994) (same).

135. For a further discussion explaining why *Batson* should be extended to apply to all religion-based peremptory challenges, see *infra* notes 136-59 and accompanying text.

136. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985) (noting that, under Establishment Clause, government is supposed to remain neutral among religions and also between religion and non-religion); *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968) (same); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947) (same); Paul E. Salamanca, *Quo Vadis: The Continuing Metamorphosis of the Establishment Clause Toward Realistic Substantive Neutrality*, 41 BRANDEIS L.J. 575, 575 (2003) (commenting that government should minimize extent to which it either encourages or discourages religious belief or disbelief).

137. See Richard Wronski, *Fear of Hate Crime Lingers*, CHI. TRIB., Sept. 5, 2002, at A9 (discussing religion-based discrimination). Some faiths have stereotypes surrounding them, which if allowed to influence a prosecutor's decision as to which juror to exclude, would have the same effect as basing a peremptory challenge on race or gender. See REID HASTIE ET AL., *INSIDE THE JURY* 123 (1983) ("On the matter of religion, attorneys who are defending are advised that Presbyterians are too cold; Baptists are even less desirable; and Lutherans, especially Scandinavians, will convict. Methodists may be acceptable. Keep Jews, Unitarians, Universalists, Congregationalists, and agnostics."); J. Suzanne Bell Chambers, *Applying the Break: Religion and the Peremptory Challenge*, 70 IND. L.J. 569, 592-93 (1995) (discussing relationship between religion and juror bias and addressing whether equal protection principles should be applied to peremptory challenges based on religion in light of past Court decisions barring use of peremptories based on race or gender).

1. Batson's *Holy Trinity: Race, Sex . . . and Religion?*

In an effort to thwart racial discrimination, the Supreme Court has repeatedly held race to be a per se suspect class, demanding a legitimate government purpose before upholding a law.¹³⁸ The Supreme Court's treatment of gender parallels that of race when dealing with peremptory challenges.¹³⁹ The Court has also urged that gender-based discrimination is as damaging as race-based discrimination.¹⁴⁰ Both race and gender are immutable characteristics that can serve to impose stigmas on certain sectors of the population.¹⁴¹ Some argue that because religion is not by definition inherent and unchangeable, it does not merit the same protection as race and gender.¹⁴² Yet some government bodies have deemed religion an immutable characteristic.¹⁴³ Religion should, and does, enjoy many of the same protections as other suspect classes because the freedom to

138. See *McCleskey v. Kemp*, 481 U.S. 279, 294-95 (1987) (scrutinizing Georgia death penalty cases and statistical evidence surrounding disproportionate death penalty sentencing of African-Americans); *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (discussing whether Florida court should award sole custody of child to father because mother was cohabitating with African-American man); *Vill. of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252, 265-66 (1977) (discussing zoning decision and its relation to racial discrimination); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (declaring law facially neutral, but discriminatory in effect against members of certain races); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (analyzing whether antimiscegenation laws are within constitutional boundaries); *Gomillion v. Lightfoot*, 364 U.S. 339, 346-47 (1960) (holding law unconstitutional because it changed voting boundaries to remove African-American voters from district).

139. See *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (striking down law that allowed women over eighteen years of age to consume alcohol, but required men to be at least twenty-one years old); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (discussing woman's right to claim spouse as dependent to obtain medical benefits equal to males claiming their spouses); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (striking down law that gave males preferential treatment regarding estate administration).

140. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (quoting *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting)) (“[G]ender-based classifications too often [have] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society.”).

141. See JEROME A. BARRON ET AL., *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY—CASES AND MATERIALS* 594 (6th ed. 2002) (describing detrimental effects of class-based societies).

142. See *Kreisher*, *supra* note 39, at 165 (quoting *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993)) (“[R]eligious affiliation (or lack thereof) is not as self-evident as race or gender.”).

143. See *id.* (presenting that some legislatures have provided by statute that religion is immutable); see also *Galloway v. Louisiana*, 817 F.2d 1154, 1159 (5th Cir. 1987) (holding that to support civil rights violation, plaintiff must show membership in some group with inherited or immutable characteristic to meet burden of proof); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 61 (10th Cir. 1979) (finding that plaintiff established prima facie case of age discrimination).

choose one's religion is a right guaranteed by the Constitution.¹⁴⁴ By failing to recognize the similar discriminatory motive behind religion-based challenges, courts are failing to protect the individual rights of potential jurors.¹⁴⁵

Furthermore, in his dissent in *J.E.B.*, Justice Scalia advocated that heightened scrutiny should apply to peremptory challenges based on religious affiliation under the majority's logic, yet the majority did not refute that notion.¹⁴⁶ Moreover, the Court also repeatedly indicated, albeit in dicta, that religious affiliation is a suspect classification under the Equal Protection Clause.¹⁴⁷ Indeed, in *United States v. Carolene Products Company*,¹⁴⁸ the seminal case for strict scrutiny review under the Equal Protection Clause, the Court suggested that strict scrutiny was warranted when the law was "directed at particular religious or national or racial minori-

144. For a further discussion of the many protections afforded to religion in the United States, see *supra* note 12 and accompanying text.

145. See Scot Leaders, *Unresolved Differences: Constitutionality of Religion-Based Peremptory Strikes, the Need for Supreme Court Adjudication*, 3 TEX. F. ON C.L. & C.R. 99, 107-08 (1997) (stating that some courts mistakenly believe "that because members of a religious faith share the same doctrinal convictions by definition, then moral, social, political and philosophical beliefs characteristic of the faith may fairly be attributed to all of them"); see also Susan Hightower, Note, *Sex and the Peremptory Strike: An Empirical Analysis of J.E.B. v. Alabama's First Five Years*, 52 STAN. L. REV. 895, 903-04 (2000) (discussing impact of *J.E.B.* as accomplishing little to extend restrictions on peremptory challenges).

146. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 161-63 (1994) (Scalia, J., dissenting) (advocating that heightened scrutiny should apply to peremptory challenges based on religious affiliation). But see *State v. Davis*, 504 N.W.2d 767, 770-72 (Minn. 1993) (distinguishing religious affiliation from race and gender to explain why peremptory challenges based on religious affiliation should not be subject to heightened scrutiny); *Casarez v. State*, 913 S.W.2d 468, 491 (Tex. Crim. App. 1995) (same); Chambers, *supra* note 137, at 592 (same).

147. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal citations omitted) ("[A] prosecutor's discretion is 'subject to constitutional constraints.' One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, is that the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'"); *Burlington N. R.R. v. Ford*, 504 U.S. 648, 651 (1992) (finding race and religion suspect); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (emphasis and internal quotation marks omitted) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 885 (1985) (O'Connor, J., dissenting) (recommending strict scrutiny when "inherently suspect distinctions such as race, religion, or alienage" are implicated); *Zobel v. Williams*, 457 U.S. 55, 81-82 (1982) (Rehnquist, J., dissenting) (requiring rational basis review, unless classification is drawn on inherently suspect distinctions such as religion); *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) (finding that religion cannot be basis for decision to prosecute); *Friedman v. Rogers*, 440 U.S. 1, 19 (1979) (classifying religion as inherently suspect); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (same).

148. 304 U.S. 144 (1938).

ties.”¹⁴⁹ Since *Carolene Products*, the Supreme Court has strongly suggested that religious affiliation is a suspect class subject to heightened scrutiny.¹⁵⁰ In *J.E.B.*, the Court stated that there is a historical pattern of gender discrimination that justifies heightened scrutiny.¹⁵¹ Like gender and race discrimination, religious discrimination has existed throughout American history.¹⁵² Although our history of religious discrimination has not been as direct or severe as our history of race or gender discrimination, it is still very significant and merits heightened scrutiny.¹⁵³

149. *Id.* at 153 n.4 (internal citations omitted) (proposing that any law directed at particular religious, national or racial minority warrants strict scrutiny review).

150. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) (“Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits.”); Larson v. Valente, 456 U.S. 228, 246 (1982) (“In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.”); *cf.* Burson v. Freeman, 504 U.S. 191, 197-98 n.3 (1992) (plurality opinion) (observing interchangeability of Equal Protection Clause and First Amendment rationales in applying strict scrutiny review).

151. *See J.E.B.*, 511 U.S. at 130-36 (justifying why gender warrants heightened scrutiny).

152. *See, e.g.*, MD. CONST. art. XXXVI (forbidding jury service for people who do not believe in God); County of Allegheny v. ACLU, 492 U.S. 573, 589-90 (1989) (counting that some representatives at Constitutional Convention intended First Amendment to only apply to Christians); State v. Floyd, 577 S.E.2d 215, 216 (S.C. 2003) (reversing trial court for disqualifying juror for refusal to take religious oath); JEROME A. CHANES, *Antisemitism and Jewish Security in America Today: Interpreting the Data*, in ANTISEMITISM IN AMERICA TODAY 4-5 (1995) (describing anti-Semitism as large problem in modern era); DAVID A. GERBER, ANTI-SEMITISM IN AMERICAN HISTORY 15 (1996) (reporting that right to vote and other civil rights were not granted to non-Christians by many states until late nineteenth century); James Hennesey, *Roman Catholics and American Politics, 1900-1960: Altered Circumstances, Continuing Patterns*, in RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE 1980s, 302-22 (Mark A. Noll ed., 1990) (describing U.S. history as full of anti-Catholic episodes); Benjamin Hoorn Barton, Note, *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, 205 n.64 (1995) (stating that, despite being held unconstitutional, five states’ constitutions still require oath to God in order to hold public office); Susan Sachs, *A Nation Challenged: Relations; For Many American Muslims, Complaints of Quiet but Persistent Bias*, N.Y. TIMES, Apr. 25, 2002, at A16 (discussing post-9/11 anti-Muslim prejudice); Michael Schwartz, Statement to U.S. Commission on Civil Rights (Apr. 9, 1979), in RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUE (1979) (describing bias against Catholics in business and academic communities).

153. *See, e.g.*, Barton, *supra* note 152, at 204-07 (arguing that history of religious discrimination justifies extending *Batson* to peremptories based on religious affiliation); Amy Gendelman, Comment, *The Equal Protection Clause, the Free Exercise Clause, and Religion-Based Peremptory Challenges*, 63 U. CHI. L. REV. 1639, 1654-55 (1995) (same); *see also J.E.B.*, 511 U.S. at 136 (internal quotation and citation omitted) (declining to contrast history of racial and gender discrimination, Court noted that “[i]t is necessary only to acknowledge that our Nation has had a long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today”); Hinkle, *supra* note

2. *The Meek Shall Inherit the Earth*,¹⁵⁴ but All Groups Are Protected Under Batson

Batson involved an African-American defendant and African-American jurors, and required that the defendant be part of the same racial group as the challenged juror.¹⁵⁵ The implication, however, that the rejected juror must be a member of a religious group that has historically faced discrimination is nullified by *J.E.B.*¹⁵⁶ Importantly, although *J.E.B.* catalogued the historical discrimination against women, the case was actually about a paternity suit, in which the state exercised peremptory challenges against all the male jurors.¹⁵⁷ In light of *J.E.B.*, it is impossible to argue that equal protection restraints on peremptory challenges are limited to groups that have historically suffered discrimination.¹⁵⁸ In other words, under the Equal Protection Clause, once it is shown that there is a history of invidious stereotypes (e.g., against women) based on a classification (e.g., gender), then any discrimination based on that classification is subject to heightened scrutiny, whether against the historically oppressed group or the dominant group.¹⁵⁹

C. *Walking Through the Valley of the Shadow of Death*:¹⁶⁰
Guidance for Practitioners in the Third Circuit

It is vital for practitioners in the Third Circuit who wish to preserve a *Batson* claim for appellate review to make a prima facie case by timely and specifically objecting to peremptory challenges on the ground that they are motivated by purposeful discrimination.¹⁶¹ If, however, timely objec-

83, at 174 (advocating subjecting peremptories based on religious affiliation to strict scrutiny). *But see* State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (citing lack of history of religious discrimination as reason not to extend *Batson* to religious affiliation-based strikes).

154. *See* Matthew 5:5 (“Blessed are the meek, for they shall inherit the earth.”).

155. *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986) (borrowing “cognizable racial group” requirement from Sixth Amendment cases). To the extent that *Batson* appears to rely on the “cognizable racial group” language to limit its application to minority groups, that limitation has been overruled by *Powers v. Ohio*. *See* 499 U.S. 400, 402 (1991) (holding that defendant can raise *Batson* claim even if he or she is different race than excluded juror).

156. For a further discussion of why equal protection restraints on peremptory challenges protect both the dominant and historically oppressed groups within a classification, see *infra* notes 157-59 and accompanying text.

157. *See J.E.B.*, 511 U.S. 127, 156 (Scalia, J., dissenting) (“The hasty reader will be surprised to learn, for example, that this lawsuit involves a complaint about the use of peremptory challenges to exclude *men* from a petit jury.”).

158. *See id.* at 156-57 (noting that *J.E.B.* involved exclusion of men, yet Court only addressed historical discrimination against women).

159. *See* Hinkle, *supra* note 83, at 144 (explaining that discrimination is subject to heightened scrutiny for both oppressed and dominant group).

160. *See* Psalm 23:4 (“Even though I walk through the valley of the shadow of death, I fear no evil; for thou art with me; thy rod and thy staff, they comfort me.”).

161. For a further discussion of the importance of making a timely prima facie case under *Batson*, see *supra* notes 116-18 and accompanying text.

tions are not made, the court will dispense with the *Batson* analysis.¹⁶² Furthermore, objections must clearly and distinctly challenge the strike as being based on the challenged juror's specific religious affiliation and not heightened religiosity.¹⁶³

VI. CONCLUSION: REVELATION

A. *So, Could Jesus Serve on a Jury?*

As hyperbolic as this question may seem, it is a droll illustration of how the Third Circuit's analysis in *DeJesus* and *Bronshtein* will apply in practice.¹⁶⁴ Jesus was Jewish.¹⁶⁵ Justice Alito's opinion in *Bronshtein* cites the district court's view favorably that Judaism is a cognizable group under *Batson*.¹⁶⁶ Therefore, in the Third Circuit, religion should receive strict scrutiny review subject to *Batson*, protecting Jesus's religious affiliation.¹⁶⁷ Jesus, however, is a definitive example of "heightened religiosity," so under *DeJesus*, Jesus could be stricken from a jury by a peremptory challenge.¹⁶⁸

B. *What Would DeJesus Do?*

What would *DeJesus* do . . . or rather what does *DeJesus* mean?¹⁶⁹ Peremptory challenges have become increasingly contentious in our judicial

162. For a further discussion explaining the importance of timely objections, see *supra* notes 116-18 and accompanying text (avoiding question whether defendant would be entitled to relief because requisite prima facie case was not made). Cf. *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 independent reason for strike).

163. For a further discussion of the Third Circuit's differing treatment between religious affiliation and heightened religiosity, see *supra* notes 81-83 and accompanying text.

164. For a further discussion illustrating how *DeJesus* and *Bronshtein* apply to religion-based peremptory challenges in the Third Circuit, see *infra* notes 165-68 and accompanying text.

165. See WEBSTER'S DICTIONARY 672 (11th ed. 2003) (defining Jesus as "the Jewish religious teacher whose life, death, and resurrection as reported by the Evangelists are the basis of the Christian message of salvation"); see also *Luke* 2:21-22 (noting that Jesus was circumcised on eighth day after birth in Jewish tradition); *Matthew* 1:21 ("[S]he will bear a son, and you shall call his name Jesus, for he will save his people from their sins.").

166. For a further discussion explaining why Judaism is a cognizable group under *Batson*, see *supra* note 108 and accompanying text.

167. For a further discussion of why religion should receive strict scrutiny subject to *Batson*, see *supra* notes 146-53 and accompanying text.

168. For a further discussion arguing that, even if peremptory challenges based on religious affiliation are unconstitutional, peremptory challenges based on heightened religious beliefs are not, see *supra* note 83 and accompanying text.

169. See, e.g., Mike Burke, *Little Reminders of Faith: Teens Can't Get Enough of WWJD Paraphernalia*, CHI. DAILY HERALD, Mar. 1, 1998, at Neighbor 1 (surveying phrase "What Would Jesus Do?"—often abbreviated to "WWJD"—which became popular in United States in 1990s as form of *imitatio dei* for thousands of Christians

system.¹⁷⁰ Religion is nearly universally afforded the same protections as both race and gender—and peremptory challenges should be no exception.¹⁷¹ Although the number of devoutly religious persons excluded from juries will likely be small, the political and symbolic importance of *DeJesus* and *Bronstein* is enormous.¹⁷² The discord among courts can be resolved only by a Supreme Court decision determining the constitutionality of peremptory challenges based on both religious affiliation and heightened religious beliefs.¹⁷³ *DeJesus* will rise again.¹⁷⁴

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who used phrase as reminder of their belief that Jesus is supreme model for morality, and to act in manner that Jesus would approve).

170. See *Miller-El v. Dretke*, 545 U.S. 231, 232-33 (2005) (explaining that Court has expanded *Batson*, but use of race- and gender-based stereotypes in jury selection is still greater than ever before).

171. For a further discussion of how the law protects religion, see *supra* note 12 and accompanying text.

172. See Miller, *supra* note 10, at 12-13 (arguing that holding in *DeJesus* is ridiculous insofar as it bifurcates religious affiliation from religious belief).

173. For a further discussion of why the Supreme Court should grant certiorari on this issue, see *supra* notes 133-37 and accompanying text.

174. See, e.g., *John* 20:9 (“[F]or as yet they did not know the scripture, that he must rise from the dead.”); *Luke* 18:33 (“[T]hey will scourge him and kill him, and on the third day he will rise.”); *Luke* 24:6-7 (“Remember how he told you, while he was still in Galilee, that the Son of man must be delivered into the hands of sinful men, and be crucified, and on the third day rise.”); *Mark* 8:31 (“And he began to teach them that the Son of man must suffer many things, and be rejected by the elders and the chief priests and the scribes, and be killed, and after three days rise again.”); *Mark* 10:34 (“[A]nd they will mock him, and spit upon him, and scourge him, and kill him; and after three days he will rise.”); *Matthew* 20:19 (“[A]nd deliver him to the Gentiles to be mocked and scourged and crucified, and he will be raised on the third day.”); *Matthew* 27:62-63 (“Next day, that is, after the day of Preparation, the chief priests and the Pharisees gathered before Pilate and said, ‘Sir, we remember how that impostor said, while he was still alive, ‘After three days I will rise again.’”).