

*Symposium on The New Judicial Federalism: A New Generation*

## Will the Religious Freedom Restoration Act Be Strike Three Against Peremptory Challenges?

Gary C. Furst

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

---

### Recommended Citation

Gary C. Furst, *Will the Religious Freedom Restoration Act Be Strike Three Against Peremptory Challenges?*, 30 Val. U. L. Rev. 701 (1996).

Available at: <https://scholar.valpo.edu/vulr/vol30/iss2/10>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



Furst: Will the Religious Freedom Restoration Act Be Strike Three Against  
**WILL THE RELIGIOUS FREEDOM  
RESTORATION ACT BE STRIKE THREE  
AGAINST PEREMPTORY CHALLENGES?**

I. INTRODUCTION

The right to a trial by an impartial jury<sup>1</sup> has played an extremely important function throughout the history of American jurisprudence.<sup>2</sup> The peremptory

---

1. The Supreme Court has interpreted the phrase "trial by jury" to signify "a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted . . ." *Patton v. United States*, 281 U.S. 276, 288 (1930). The Court further stated that there are three essential elements to a trial by jury. First, the jury should be composed of exactly 12 persons. *Id.* Second, the trial should occur in the presence and under the supervision of a judge that has the power to instruct the jurors "as to the law and advise them in respect of the facts . . ." *Id.* Finally, the jury's "verdict should be unanimous." *Id.* Although the *Patton* Court stated that a petit jury should consist of 12 persons, in subsequent decisions the Court has held that juries of less than 12 persons are constitutional. *See Colgrove v. Battin*, 413 U.S. 149 (1973) (holding that juries consisting of six persons in federal civil cases are constitutional); *Williams v. Florida*, 399 U.S. 78 (1970) (holding that six-person juries in state criminal trials are constitutional).

2. U.S. CONST. amend. VI. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." *Id.* *See also* U.S. CONST. amend. VII (guaranteeing the right to trial by jury in specific types of civil cases); *Duncan v. Louisiana*, 391 U.S. 145, 155-57 (1968) (reasoning that the jury has played a important role in the American justice system by safeguarding the accused from the arbitrary use of power by a judge or prosecutor and by preventing governmental oppression); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) ("the right of trial by jury ranks very high in our catalogue of constitutional safeguards"); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a factfinding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) ("The right of trial by jury . . . is a trial by the peers of every Englishman, and is the grand bulwark of his liberties . . .") (quoting Blackstone). Blackstone referred to the right to a trial by jury as "the most transcendent privilege which any subject can enjoy or wish for, that he not be affected either in his property, his liberty, or his person, but by unanimous consent of twelve of his neighbors and equals." 3 BLACKSTONE, COMMENTARIES, \*387, quoted in JOHN J. COUND ET. AL., CIVIL PROCEDURE: CASE AND MATERIALS 921 (6th ed. 1993). Although our nation's founders disagreed about many aspects of government, they recognized that the right to a trial by jury was a very pivotal aspect of a democracy. Alexander Hamilton stated:

[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them, it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

THE FEDERALIST No. 83 (Alexander Hamilton), reprinted in THE FEDERALIST PAPERS 499 (Clinton Rossiter ed., 1961).

However, some commentators are critical of jury trials. One such critic was Judge Jerome Frank of the Second Circuit. For Judge Frank's criticisms of jury trials, see JEROME FRANK, LAW

challenge<sup>3</sup> provides litigants a means of obtaining the right to a fair trial by an impartial jury.<sup>4</sup> Litigants are entitled to use peremptory challenges to remove jurors that are perceived to be partial or biased against the parties.<sup>5</sup> Although

AND THE MODERN MIND 170-85 (1930).

3. BLACK'S LAW DICTIONARY 1136 (6th ed. 1990) (defining "peremptory challenge" as "the right to challenge a juror without assigning, or being required to assign, a reason for the challenge."). The peremptory challenge should not be confused with a challenge "for cause." A challenge for cause is "a request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons." *Id.* at 230. If it can be shown that a prospective juror is partial, a challenge for cause permits the exclusion of the juror. *See Hoyt v. Utah*, 120 U.S. 430 (1887). The specific reasons that allow a juror to be removed for cause are typically defined by statute. Most statutes allow a juror to be excused for cause when the juror is related to a party in the litigation, if the juror has a special interest in the outcome of the litigation, if the juror has served as a juror in a previous related or similar case, and if the juror possesses a state of mind that prevents him or her from being able to serve as an objective trier of fact. *See, e.g.*, CAL. PENAL CODE §§ 1073-74 (West 1985).

4. Justice Harlan stated:

The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused . . . . [The defendant] may if he chooses, peremptorily challenge 'on his own dislike, without showing cause.' He may exercise that right without reason or for no reason, arbitrarily and capriciously . . . . Any system for the empanelling of a jury that presents [sic] or embarrasses the full unrestricted exercise by the accused of that right, must be condemned.

*Pointer v. United States*, 151 U.S. 396, 408 (1894). Although Justice Harlan refers to the peremptory challenge as a right, peremptories are not constitutionally required. *See infra* note 6.

The selection of a jury is a two-step process. First, a list of potential jurors is gathered (typically jurors are taken from voter registration or tax assessment lists) and the jurors are brought together. *See* COUND ET. AL., *supra* note 2, at 998-99. Prospective jurors are then selected at random equal to the number of jurors that will actually hear and decide the case. *Id.* Second, the prospective jurors are questioned by the litigants or a judge to determine if each juror can serve as an impartial trier of fact. *Id.* The questioning of the prospective jurors is called "voir dire." *Id.*

The purpose of voir dire is to disclose prospective jurors' prejudices and biases that would impede their ability to serve as an impartial trier of fact. The information gathered during the voir dire process is used by the litigants when both peremptory and challenges for cause are exercised. *See United States v. Baker*, 638 F.2d 198, 200 (10th Cir. 1980) ("The function of *voir dire* is to lay the predicate for both the judge's and counsel's judgment about the qualifications and impartiality of potential jurors."). Depending on the jurisdiction, voir dire may be conducted by either the trial court judge or the litigants. In federal cases, the trial court judge is given the discretion to choose whom will conduct the voir dire. FED. R. CIV. P. 47(a). For a discussion addressing the pros and cons of allowing a trial court judge to conduct voir dire rather than the litigants, *see infra* notes 219-23 and accompanying text.

5. Justice Byron White stated that "[t]he function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986). Blackstone stated that peremptory challenges were necessary in criminal cases "[b]ecause, upon failure to establish a challenge for cause, the mere fact of challenging might awaken the resentment of a juror; and to prevent ill consequences therefrom, a prisoner is permitted to peremptorily challenge him." SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 711 (Wm. Hardcastle Browne ed., 1897).

the peremptory challenge plays an important role in the administration of justice, its use is not a constitutional right<sup>6</sup> and it is subject to constitutional limits.<sup>7</sup> In recent years, the Supreme Court has held that peremptory challenges cannot be exercised to remove a prospective juror from a petit jury<sup>8</sup> solely on the basis of race<sup>9</sup> or gender.<sup>10</sup> However, the Court has yet to extend its previous decisions to prohibit the discriminatory use of peremptory challenges against members of other cognizable groups.<sup>11</sup> Until now, the use of peremptory challenges has been limited according to the constitutional restraints of the Fourteenth Amendment's Equal Protection Clause.<sup>12</sup> However, this Note

6. "[P]eremptory challenges are a creature of statute and are not required by the Constitution . . . ." *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988) (citations omitted). "[T]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges . . . ." *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (quoting *Stilson v. United States*, 250 U.S. 583, 586 (1919)). The number of peremptory challenges varies depending on the jurisdiction and often differs from civil to criminal proceedings. Under the Federal Rules of Criminal Procedure, when an individual is charged with a felony the defendant is given 10 peremptory challenges and the government is entitled to six peremptories. FED. R. CRIM. P. 24(b). In federal civil cases, both litigants are granted three peremptory challenges. 28 U.S.C. 1870 § (1988).

7. See *infra* notes 36-76 and accompanying text.

8. "The ordinary jury for the trial of a civil or criminal action . . . ." BLACK'S LAW DICTIONARY 856 (6th ed. 1990). The petit jury is the final group of individuals that will hear and decide a cause of action. The venire, on the otherhand, is "[t]he group of citizens from whom a juror is chosen in a given case." *Id.* at 1556. A venireperson "is a member of a panel of jurors; a prospective juror." *Id.*

9. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a prosecutor's use of peremptory challenges to eliminate jurors solely on the basis of their race violates the Equal Protection Clause); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (holding that a civil litigant's discriminatory use of race-based peremptory challenges violates the Equal Protection Clause); *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (holding that a criminal defendant's use of peremptories to remove jurors because of their race violates the Equal Protection Clause). For a further discussion of the Supreme Court's holdings regarding race and peremptory challenges, see *infra* notes 26-68 and accompanying text.

10. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) (holding that peremptories exercised to remove prospective jurors solely on the basis of their gender violate the Equal Protection Clause). For a further discussion of the Court's holding in *J.E.B.*, see *infra* notes 69-74 and accompanying text.

11. Recently, the Supreme Court declined to decide whether it should forbid peremptory strikes that are based solely upon a juror's religious affiliation. *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994). For a further discussion of *Davis*, see *infra* notes 88-94 and accompanying text.

12. The Fourteenth Amendment provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV. For a discussion of Supreme Court decisions that have limited the exercise of peremptory challenges pursuant to the Equal Protection Clause, see *infra* notes 36-74 and accompanying text.

argues that the Religious Freedom Restoration Act<sup>13</sup> (RFRA) provides a means to restrict the discriminatory use of peremptories that are exercised to exclude jurors solely on account of their religious affiliations.<sup>14</sup> When jurors are excluded solely on the basis of their religious preference, their statutory rights established by RFRA are violated.<sup>15</sup>

RFRA grants persons a statutory right to the free exercise of religion.<sup>16</sup> If a claim is filed under RFRA, government action that impinges upon religious liberty will be subject to strict scrutiny review.<sup>17</sup> To survive strict scrutiny review, the government must justify its infringement upon a person's free exercise of religion by a compelling state interest that is narrowly tailored.<sup>18</sup> Due to RFRA's strict scrutiny standard, RFRA, rather than the Free Exercise Clause or the Equal Protection Clause, provides a preferable and more accurate means for protecting jurors while preventing the discriminatory use of religious-

13. 42 U.S.C. § 2000bb (Supp. V. 1993).

14. To avoid confusion, this note refers to jurors' religious affiliations, rather than their beliefs. A venireperson's religious beliefs, unlike a juror's religious affiliation, often may prevent the juror from acting as an impartial trier of fact. If it is shown that a juror's religious beliefs impair her ability to act objectively, then the juror is not being excluded because of her religious preference, but because she is not impartial. For example, when prospective jurors have religious convictions that would impair them from voting to impose the death penalty in murder cases, without regard to the evidence presented at trial, they are properly removed for cause. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

15. For a discussion of how jurors' rights under RFRA are sacrificed when they are peremptorily removed from a jury because of religious affiliation, see *infra* notes 163-93 and accompanying text.

16. See 42 U.S.C. § 2000bb-1(c) (Supp. V. 1993).

RFRA was enacted by Congress in response to the Supreme Court's erosion of the traditional protection that the Free Exercise Clause of the First Amendment had afforded individuals. See S. REP. NO. 103-111, 103d Cong., 1st Sess. 1 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1893. Traditionally, under the jurisprudence of the Free Exercise Clause, all governmental infringements upon an individual's religious liberty were reviewed under strict scrutiny. Under strict scrutiny review, government actions that burden the free exercise of religion are considered unconstitutional, unless the government demonstrates that its action is the least restrictive means of advancing a compelling governmental objective. See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

However, in *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that laws of general application that are facially neutral towards religion require only a rational justification and do not need to meet the strict scrutiny standard, even if such laws burden the exercise of religion. *Id.* at 893. RFRA responded to the Court's decision in *Smith* and was enacted to restore the compelling interest test set forth in Supreme Court decisions prior to *Smith*. See 42 U.S.C. § 2000bb(b) (Supp. V. 1993); S. REP. NO. 103-111, 103d Cong., 1st Sess. 1 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1898. If a cause of action is filed pursuant to RFRA, the act guarantees that the strict scrutiny standard will be applied to all government action that infringes upon an individual's free exercise of religion. See 42 U.S.C. § 2000bb-1(b) (Supp. V. 1993).

17. See 42 U.S.C. § 2000bb-1 (Supp. V. 1993).

18. See 42 U.S.C. § 2000bb-1(b) (Supp. V. 1993).

based<sup>19</sup> peremptory challenges. Furthermore, a cause of action pursuant to RFRA adequately protects jurors, without further eroding the peremptory challenge under the Equal Protection Clause.

This Note asserts that peremptory challenges used to exclude jurors because of their religious affiliations violate jurors' free exercise rights defined by RFRA, and such a violation creates a cause of action that can be used to preclude religious-based peremptories. Section II of this Note reviews court decisions dealing with peremptory challenges regarding race, gender, and religion.<sup>20</sup> Section II primarily discusses Supreme Court decisions limiting race-based peremptory challenges. Nevertheless, these decisions are important because they illustrate the Court's willingness to erode the traditional nature of the peremptory challenge and emphasize the importance of a citizen's ability to participate on a jury. Additionally, the material discussed in Section II provides authority for who has standing to argue on behalf of jurors when their rights have been violated by the discriminatory use of peremptories.<sup>21</sup>

Section III of this Note briefly discusses RFRA's legislative history.<sup>22</sup> Section IV explains why a cause of action pursuant to RFRA is superior to other potential causes of actions brought on behalf of jurors that have been removed solely on the basis of their religious preference.<sup>23</sup> Section V outlines a proposed cause of action pursuant to RFRA and explains how litigants can argue that RFRA forbids the use of peremptory challenges to strike members of the venire solely on the basis of their religious affiliations.<sup>24</sup>

## II. PEREMPTORIES REGARDING RACE, GENDER, AND RELIGION<sup>25</sup>

### A. Peremptories Regarding Race and Gender

More than a century ago, in *Strauder v. West Virginia*,<sup>26</sup> the Supreme

19. When a religious-based peremptory challenge is referred to in this note, it signifies a peremptory challenge that is used to exclude jurors on the sole account of their religious preference.

20. See *infra* notes 25-114 and accompanying text.

21. See *infra* notes 36-68 and accompanying text.

22. See *infra* notes 115-26 and accompanying text.

23. See *infra* notes 127-47 and accompanying text.

24. See *infra* notes 148-228 and accompanying text.

25. Although section II primarily focuses upon the use of peremptory challenges with respect to race, this information is nonetheless relevant to peremptories exercised with respect to religion. The background information discussed shows the Supreme Court's willingness to erode the peremptory challenge and illustrates how important the Court considers a citizen's opportunity to participate in the jury system. Furthermore, the case precedent provides authority that indicates who has standing to argue on behalf of jurors that have been subjected to the discriminatory use of peremptory challenges.

26. 100 U.S. 303 (1879).

Court held that a state statute limiting jury service exclusively to white males violated the Equal Protection Clause of the Fourteenth Amendment.<sup>27</sup> The *Strauder* Court reasoned that a defendant does not have the right to "a petit jury composed in whole or in part of persons of his own race," but a defendant does have the right to be tried by a jury that is selected in a non-discriminatory manner.<sup>28</sup> The *Strauder* Court recognized that limiting jury selection to only white males not only violated a defendant's constitutional rights, but also harmed the excluded jurors.<sup>29</sup> Thus, the *Strauder* decision laid the foundation for the elimination of discrimination during jury selection.<sup>30</sup>

Subsequently, in *Swain v. Alabama*,<sup>31</sup> the Supreme Court confronted the issue of whether an African-American defendant was denied the equal protection of the laws through the State's use of peremptory strikes excluding members of his own race from the petit jury.<sup>32</sup> The Court rejected the defendant's equal protection claim, reasoning that the defendant had offered no proof beyond the facts of his own case to illustrate the systematic exclusion of African-American jurors.<sup>33</sup> The Court reasoned that a presumption must exist in every case that

27. *Id.* at 305. In *Strauder*, an African-American was tried and convicted for murder by a jury consisting of all white males. *Id.* at 304. The defendant argued that West Virginia's statute that confined jury duty solely to white males violated the newly passed Fourteenth Amendment. *Id.*

28. *Id.* at 305. See also *Ex Parte Virginia*, 100 U.S. 339 (1880) (reasoning that a defendant has the right to be tried by a jury whose members are selected according to non-discriminatory means).

29. *Strauder*, 100 U.S. at 308. The Court reasoned:

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

*Id.*

However, the *Strauder* Court continued to tolerate the exclusion of women from jury service, holding that a state could confine jury service solely to men. *Id.* at 310. The Court reasoned that the Fourteenth Amendment was intended only to prohibit racial discrimination, not gender discrimination. *Id.*

30. Subsequent Supreme Court cases dealing with the discriminatory use of peremptory challenges have cited the Court's decision in *Strauder* as authority for its holdings. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994); *Georgia v. McCollum*, 112 S. Ct. 2348, 2351-53 (1992); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082 (1991); *Powers v. Ohio*, 499 U.S. 400, 402-04 (1991); *Batson v. Kentucky*, 476 U.S. 79, 85-90 (1986). For a further discussion of these cases, see *infra* notes 36-74 and accompanying text.

31. 380 U.S. 202 (1965), *overruled by*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

32. 380 U.S. at 209-10.

33. *Id.* at 224-26. Despite evidence that no African-American had served on a petit jury in criminal cases since approximately 1950, the Court held that the defendant failed to prove African-Americans were systematically excluded from jury service. *Id.* at 206.

the prosecution uses peremptory challenges to obtain a fair and impartial jury.<sup>34</sup> The Court further reasoned that this presumption could not be overcome by the facts of a single case, even when a prosecutor used peremptory challenges to exclude African-American jurors solely because of their race.<sup>35</sup>

In *Batson v. Kentucky*,<sup>36</sup> the Supreme Court was faced with the opportunity to reconsider its holding in *Swain*. In *Batson*, the Court held that a prosecutor's discriminatory use of peremptory challenges to exclude African-Americans from a petit jury violated an African-American defendant's fourteenth amendment right to equal protection of the laws.<sup>37</sup> Relying on the *Strauder* decision,<sup>38</sup> the Court reasoned that the Equal Protection Clause safeguards a defendant against the state's use of race-based peremptory challenges and entitles a defendant to a jury chosen according to racially neutral criteria.<sup>39</sup> The Court also recognized that the discriminatory use of peremptory challenges harms the

---

34. *Id.* at 222.

35. *Id.* To justify its conclusion that race-based peremptories do not violate the Constitution, the *Swain* Court relied upon the traditional understanding of peremptories. The Court noted the historical importance that peremptory challenges had played in the United States and England. *Id.* at 212-16. The Court further reasoned that any curtailment of the unrestrained exercise of the peremptory challenge would severely impair its ability in securing an impartial jury. *Id.* at 219-23.

36. 476 U.S. 79 (1986). In *Batson*, an African-American was charged with second-degree burglary and possession of stolen goods. *Id.* at 82. During voir dire, the prosecutor exercised his peremptory challenges to remove all African-American prospective jurors from the venire. *Id.* at 83. The defense objected and argued that race-based peremptory challenges violated the defendant's right to a jury trial taken from a fair cross section of the community, pursuant to the Sixth Amendment, and violated the defendant's equal protection rights established by the Fourteenth Amendment. *Id.* The trial court judge denied defense counsel's motion that the jury should be discharged due to the discriminatory use of peremptory challenges. *Id.* The jury, consisting of no African-Americans, found the defendant guilty on both charges. *Id.*

37. *Batson*, 476 U.S. at 86.

38. For a discussion of the Court's decision in *Strauder*, see *supra* notes 26-29 and accompanying text.

In *Batson*, the Court noted that although the *Strauder* decision invalidated a state statute that excluded African-Americans from jury duty, the Equal Protection Clause also prohibits racial discrimination during the selection of a petit jury. *Batson*, 476 U.S. at 88. "Since the Fourteenth Amendment protects an accused throughout the [court] proceedings bringing him to justice . . . the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.'" *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

39. *Id.* at 85-86. The Court noted that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Id.* at 86. The Court reasoned that although prior Court decisions primarily dealt "with discrimination during the selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury." *Id.* at 88. The Court further reasoned that the Fourteenth Amendment protects the defendant throughout the entire trial proceedings. *Id.* The Court emphasized that a state's use of peremptory challenges is subject to the limits imposed by the Equal Protection Clause. *Id.* at 89.



excluded juror and the entire community.<sup>40</sup> The Court noted that “[a] person’s race simply ‘is unrelated to his fitness as a juror’ [and] by denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror.”<sup>41</sup> The Court further reasoned that exclusionary jury selection procedures aimed at African-Americans undermine society’s confidence in the fairness of the judicial system.<sup>42</sup> The *Batson* Court’s holding was significant because it allowed defendants to raise an equal protection challenge to the use of peremptory strikes at their own trial.<sup>43</sup> Thus, defendants would no longer have to rely on evidence of discrimination beyond

---

40. *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986).

41. *Id.* at 87 (quoting *Theil v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

All state action that discriminates against a person must be tested against the requirements of the Equal Protection Clause. The Equal Protection Clause mandates that all persons have the “right to equal treatment” and the “right to treatment as an equal.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1437-38 (2d. ed. 1988). When race-based peremptory challenges are exercised, the Equal Protection Clause is violated because the state subjects jurors to disparate treatment solely on the basis of the jurors’ race. See *Batson*, 476 U.S. at 86. Jurors are denied their right to equal protection because the “government classifies . . . between persons who should be regarded as similarly situated . . . .” TRIBE, *supra*, at 1438.

The level of scrutiny that state action will undergo when it classifies individuals so as to treat them differently varies depending upon the nature of the classification. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41 (1985) (describing levels of scrutiny for classifications). Racial classifications are inherently suspect and undergo the strict scrutiny review. See *Hunter v. Erickson*, 393 U.S. 385, 391-92 (1969) (“Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race . . . racial classifications are ‘constitutionally suspect,’ . . . and subject to the ‘most rigid of scrutiny’ . . . . They ‘bear a far heavier burden of justification’ than other classifications . . . .”); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect [and] courts must subject them to the most rigid scrutiny.”).

A racial classification will survive the strict scrutiny test if it meets two requirements: the government’s interest in such a classification must be compelling, and the classification must be narrowly tailored to fulfill the government’s objective. See *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (“[Racial] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be ‘necessary . . . to the accomplishment’ of their legitimate purpose . . . .”). Under the strict scrutiny standard of review, reasonable or rational justifications for the racial classifications will not suffice. Racial classifications rarely serve any governmental interest because the right to equal protection does not depend upon irrelevant classifications such as a person’s race. BERNARD SCHWARTZ, *CONSTITUTIONAL LAW* 294 (1972). “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Discrimination based upon racial classifications is “inherently arbitrary and unreasonable, and it does not change the result that the racial classification is used to accomplish what might otherwise be a compelling governmental interest.” SCHWARTZ, *supra*, at 294. Although the peremptory challenge is a means to secure the government’s compelling interest in an impartial jury, race-based peremptories are unconstitutional because a juror’s race is unrelated to her ability to serve as an impartial trier of fact. See *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

42. *Batson*, 476 U.S. at 89.

43. *Id.* at 96.

the facts of their own case.

Contrary to the holding in *Swain*, the Court in *Batson* rejected the evidentiary formulation of a pattern of systematic exclusion as "inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause."<sup>44</sup> The Court noted the practical difficulty that defendants had in attempting to prove discrimination by applying the rigid evidentiary standard established in *Swain*.<sup>45</sup> The Court replaced the systematic exclusion test with a case-by-case analysis of whether or not a defendant's equal protection claim was valid.<sup>46</sup>

First, a defendant attempting to invoke the Equal Protection Clause to challenge the prosecutor's exercise of its peremptories "must show that he is a member of a cognizable racial group"<sup>47</sup> and must make a prima facie showing

---

44. *Batson v. Kentucky*, 476 U.S. 79, 93 (1986).

45. *Id.* at 92-93. "Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny." *Id.* The Fifth Circuit described the systematic exclusion burden to be "most difficult," and noted that before a defendant could meet the standard, the defendant would need to investigate several cases and record the defendant's race and the racial composition of the jury pool and the petit jury, and then analyze how each party used their peremptory strikes. *Id.* at 93 n.17 (citing *United States v. Pearson*, 448 F.2d 1207, 1217 (5th Cir. 1971)). "American courts only decided three cases in favor of a defendant under the *Swain* [systematic exclusion] rule." J. Christopher Peters, Note, *Georgia v. McCollum: It's Strike Three for Peremptory Challenges, But is it the Bottom of the Ninth?* 53 LA. L. REV. 1723, 1729 n.30 (1993). "In light of Louisiana's discriminatory history, it is not surprising that all of these cases originated in this state. See, e.g., *United States v. McDaniels*, 379 F. Supp. 1243 (E.D. La. 1974); *State v. Brown*, 371 So. 2d 751 (La. 1979); *State v. Washington*, 375 So. 2d 1162 (La. 1979)." *Id.* The *Swain* "systematic exclusion" test has been referred to as a practically impossible barrier for a criminal defendant to overcome when attempting to prove that the prosecution exercised peremptory challenges in a racially discriminatory manner. JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 156 (1977).

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

47. *Id.* The *Batson* Court did not define what comprises a cognizable racial group. *Id.* Instead, the Court borrowed the term from *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). *Batson*, 476 U.S. at 96. In *Castaneda*, the Court reasoned that a cognizable group "is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Castaneda*, 430 U.S. at 494. Various factors are used to determine if a group is cognizable. Generally, a "group's population should be large enough that the general community recognizes it as an identifiable group in the community [and] the group should be distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society." *Joseph v. State*, 636 So. 2d 777, 780-81 (Fla. Dist. Ct. App. 1994).

A substantial amount of litigation has surrounded the issue of what constitutes a cognizable group for *Batson* protection. Lower courts have applied *Batson*'s cognizable group requirement to a multitude of various ethnic groups. See, e.g., *United States v. Biaggi*, 673 F. Supp. 96 (E.D.N.Y. 1987) (holding that Italian-Americans compose a cognizable group), *aff'd*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *United States v. Chalan*, 812 F.2d 1302 (10th

that the prosecution used peremptory challenges to exclude jurors of the defendant's race.<sup>48</sup> Once the defendant establishes a prima facie case, then the state must give a race-neutral explanation for removing the prospective juror.<sup>49</sup> Finally, the trial court will then decide who has prevailed in meeting their respective burdens and rule on the appropriate remedy.<sup>50</sup>

The Supreme Court's decision in *Batson*, although very important,<sup>51</sup> left many unanswered questions concerning the future use of peremptory challenges.<sup>52</sup> However, the Supreme Court soon answered some of the

Cir. 1987) (holding that Native Americans constitute a cognizable group); *Bueno-Hernandez v. State*, 724 P.2d 1132, 1134 (Wyo. 1986) (holding that Mexican nationals compose a distinct ethnic group), cert. denied, 480 U.S. 907 (1987); *Joseph v. State*, 636 So. 2d 777 (Fla. Dist. Ct. App. 1994) (holding that Jewish venirepersons are a cognizable group); *Kline v. State*, 737 S.W.2d 895, 899 (Tex. Ct. App. 1987) (holding that Asians constitute a cognizable group).

48. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). A defendant establishes a prima facie case of discrimination by showing, from the totality of circumstances and facts surrounding his or her particular case, that the prosecution has exercised the use of peremptory challenges in a discriminatory fashion. *Id.* at 93-95.

49. *Id.* at 97. The Court emphasized that the prosecution was not required to explain its use of the peremptory challenge to the level needed to justify a challenge for cause. *Id.* However, the Court stipulated that the State could not rebut the defendant's prima facie showing of discrimination by simply stating that the jurors were excluded on the belief that they would be more sympathetic to the defendant because they share the same race. *Id.* See also *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) (reasoning that an individual's race is entirely unrelated to his or her ability to serve as an impartial juror). But see *Georgia v. McCollum*, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring) ("[S]ecuring representation of the defendant's race on the jury may help overcome racial bias and provide the defendant with a better chance of having a fair trial.").

50. *Batson*, 476 U.S. at 96-98.

51. Many commentators feel that the Court's holding in *Batson* did not go far enough, and have argued that elimination of peremptory challenges is the only sure means to end discrimination during jury selection. Concurring in *Batson*, Justice Thurgood Marshall stated, "I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause . . . . [H]owever, only by banning peremptories entirely can such discrimination be ended." *Batson v. Kentucky*, 476 U.S. 79, 108 (1986) (Marshall, J., concurring). Justice Marshall felt that the prima facie standard articulated by the majority placed too much of a burden on the defense. *Id.* at 105. Justice Marshall argued that the prima facie standard still allowed the prosecution to discriminate against African-Americans up to an "acceptable level." *Id.* For additional commentary calling for the elimination of peremptory challenges, see, Judge Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369 (1992); Jere W. Morehead, *When a Peremptory Challenge is no Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination From Jury Selection*, 43 DEPAUL L. REV. 625 (1994); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517 (1992); Jonathan B. Mintz, Note, *Batson v. Kentucky: A Half Step in the Right Direction*, 72 CORNELL L. REV. 1026 (1987); Peters, *supra* note 45, at 1723.

52. In 1991, the Supreme Court extended *Batson's* holding to protect Latinos from the discriminatory use of peremptory challenges. *Hernandez v. New York*, 111 S. Ct. 1859 (1991). In *Hernandez*, the Court examined the State's race-neutral explanation pursuant to a *Batson* challenge after the State had peremptorily challenged two Latino jurors. *Id.* at 1866. The prosecutor

questions by extending the *Batson* Court's reasoning regarding peremptories.<sup>53</sup> Subsequent Supreme Court decisions used *Batson* to justify holdings to conclude that a white criminal defendant has standing to argue on behalf of an excluded African-American juror,<sup>54</sup> that civil litigants are prohibited from exercising racially discriminatory peremptory challenges,<sup>55</sup> and that gender-based peremptory challenges are also unconstitutional.<sup>56</sup>

In 1991, the Court, in *Powers v. Ohio*,<sup>57</sup> considered whether a white

explained that the "demeanor of the two individuals during voir dire caused him to doubt their ability to defer to the official translation of Spanish-language testimony." *Id.* at 1867. The defense argued that the ability to speak Spanish was so closely related to ethnicity that the prosecutor's explanation violated the Equal Protection Clause because it was merely a pretext for actual discrimination. *Id.* at 1866. However, the trial court accepted the prosecutor's explanation as a sufficient race-neutral justification. *Id.* at 1868. Although the Supreme Court held that *Batson* protects Latinos, the Court reviewed the trial court judge's decision with great deference and concluded that no clear error was committed "in choosing to believe the reasons given by the prosecutor." *Id.* at 1873.

53. For a further discussion of decisions that have extended *Batson's* holding, see *infra* notes 57-74 and accompanying text.

Although the Court's reasoning in *Batson* was soon extended and further eroded the peremptory challenge in an effort to prevent discrimination, the Court rejected an attempt to invalidate the discriminatory use of peremptory challenges pursuant to the fair cross section of the Sixth Amendment. In *Batson*, the Court rested its decision entirely upon the Equal Protection Clause. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). The *Batson* Court avoided the fair cross section issue by stating that it had "never held that the Sixth Amendment requires that 'petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.'" *Id.* (quoting *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975)).

Four years after the *Batson* decision, the Court reaffirmed its decision and held that the discriminatory use of peremptory challenges does not violate the Sixth Amendment's fair cross section requirement. *Holland v. Illinois*, 493 U.S. 474, 480 (1990). In *Holland*, a white criminal defendant objected to the prosecutor's use of peremptory challenges that removed two African-American venire members from the petit jury. *Id.* at 475. The defendant argued that the race-based peremptories violated his Sixth Amendment right to a jury trial comprised of jurors taken from a fair cross section of the community. *Id.* The Supreme Court held that the Sixth Amendment's requirement of a fair cross section did not apply to petit juries, and therefore, the defendant's claim was without merit. *Id.* at 478. In *Holland*, the Court reasoned that the Sixth Amendment's fair cross section requirement "on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it [the Constitution] does)." *Id.* at 480. The Court stated that although petit jurors must be taken from a representative cross section of the community, a defendant does not have the right to be tried by a petit jury that mirrors the community at large. *Id.* at 482-83. The Court further noted that if the Sixth Amendment's fair cross section requirement was extended to preclude race-based peremptory challenges, the peremptory challenge would be virtually eliminated. *Id.* at 484.

54. See *Powers v. Ohio*, 499 U.S. 400 (1991). For a further discussion of *Powers*, see *infra* notes 57-62 and accompanying text.

55. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991). For a further discussion of *Edmonson*, see *infra* notes 63-66 and accompanying text.

56. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). For a further discussion of the Supreme Court's decision in *J.E.B.*, see *infra* notes 69-74 and accompanying text.

57. 499 U.S. 400 (1991).

criminal defendant had standing to object to the exclusion of prospective African-American jurors.<sup>58</sup> The Court held that jurors' equal protection rights are violated when the State excludes otherwise qualified jurors because of their race and that a defendant need not share the same race as the excluded juror to assert an equal protection claim on the jurors' behalf.<sup>59</sup> The Court reasoned that the defendant and excluded jurors have an interest in eliminating discrimination during jury selection, because the discriminatory use of peremptory challenges casts doubt on the objectivity of the judicial system and offends society.<sup>60</sup> The Court further reasoned that a substantial nexus exists

58. *Id.* at 403. In *Powers*, the defendant was charged with one count of attempted aggravated murder and two counts of aggravated murder. *Id.* The State used seven of its nine peremptory challenges to remove African-Americans from the venire. *Id.* The defense objected to the State's use of race-based peremptory challenges and argued that the State should justify its peremptories pursuant to *Batson's* race-neutral standard. *Id.*

59. *Id.* at 406-08. In *Powers*, the State argued that *Batson* did not apply because the defendant was white and not an African-American like the defendant in *Batson*. *Id.* at 406. However, the Supreme Court rejected such a limited interpretation of *Batson* and reasoned that *Batson* was intended "to serve multiple ends." *Id.* (quoting *Allen v. Hardy*, 478 U.S. 255, 259 (1986)).

60. *Id.* at 411-13. The Court stated:

A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the case.

*Id.* at 412.

A very critical element of the Court's decision was its reasoning that a criminal defendant has standing to raise the equal protection rights of excluded jurors. *Id.* at 411. Three basic requirements must be met before a litigant may argue on behalf of a third party. *Id.* First, the litigant must have suffered an "injury-in-fact" giving the litigant an interest in the outcome of the dispute. *Id.* Second, the litigant must demonstrate that he or she has a close relation to the third party, such that the litigant will be a sufficient advocate for the third party's rights. *Id.* Finally, the litigant must show that the third party's ability to protect his or her rights is frustrated. *Id.* The *Powers* Court found that the defendant had met these three requisite requirements.

The Court reasoned that the first requirement for third party standing was satisfied because the race-based peremptory challenge "causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice." *Id.* The Court emphasized that racial discrimination harms the defendant because it sacrifices the fairness that a trial by jury is intended to secure. *Id.* at 411-12. See also *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986) ("[A] defendant does have a right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria."). The second element for third-party standing was satisfied because the excluded juror and the defendant both may lose confidence in the judicial system if patent racial discrimination is allowed to occur. *Powers*, 499 U.S. at 414. The Court noted that the defendant would further be an effective advocate for the excluded juror. *Id.* The Court stated that the defendant "has much at stake in proving that his jury was improperly constituted due to an equal protection violation, for we have recognized that discrimination in the jury selection process may lead to the reversal of a conviction." *Id.* at 414. Finally, the Court emphasized that substantial barriers exist which deter excluded jurors from asserting their own rights. The Court noted that since jurors are not parties to the case before the court, they have no opportunity to raise their rights when they are removed. *Id.* The Court further noted that little incentive exists for jurors to vindicate their own rights due

between a defendant and the excluded juror such that the third party will serve as a sufficient advocate for the excluded juror's rights.<sup>61</sup> The Court recognized that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."<sup>62</sup>

In *Edmonson v. Leesville Concrete Co.*,<sup>63</sup> the Court extended the principles established in *Batson* and *Powers* further and held that civil litigants were prohibited from exercising racially discriminatory peremptory challenges.<sup>64</sup> The Court emphasized that "racial discrimination has no place in the courtroom" and the harm that the excluded venireperson experiences is the same, whether in a civil or criminal case.<sup>65</sup> The Court noted that when race is the only reason for challenging an individual, the esteem and privilege of participating in the judicial system is denied.<sup>66</sup>

In 1992, the Court once again was given the opportunity to extend its previous rulings to further erode the peremptory challenge. In *Georgia v.*

to the large financial costs of subsequent litigation. *Id.*

61. *Powers v. Ohio*, 499 U.S. 400, 414 (1991).

62. *Id.* at 407. Alexis De Tocqueville referred to the jury as an institution that "raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society." ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 334 (Schocken 1st ed. 1961) (cited in *Powers v. Ohio*, 499 U.S. 400, 407 (1991)). See also VAN DYKE, *supra* note 45, at 1 ("The jury is the most democratic of our institutions. The idea itself—that ordinary citizens without experience in judicial decision-making should be impaneled to decide issues of great importance—is an unusual one in the world today.")

63. 111 S. Ct. 2077 (1991). In *Edmonson*, the plaintiff, an African-American construction worker, was injured while he was working at a job-site. *Id.* at 2079. The plaintiff sued Leesville Concrete Company for negligence in a federal district court. *Id.* Pursuant to the Seventh Amendment, the plaintiff chose to have a jury trial. *Id.* During voir dire, the defendant company exercised two of its three peremptory challenges to remove African-Americans from the venire. *Id.* The plaintiff objected to the defendant's race-based peremptory challenges and argued that *Batson* mandated a race-neutral justification for the jurors' removal. *Id.* However, the district court refused the plaintiff's request and reasoned that *Batson* did not apply to civil litigants because the Court's holding in *Batson* had been limited to the criminal context. *Id.*

64. *Edmonson*, 111 S. Ct. at 2087.

65. *Id.* The Court emphasized that race-based peremptory challenges cause greater harm and are very severe because the discrimination occurs in a courtroom "where the law unfolds itself." *Id.*

Since the Fourteenth Amendment applies only to state actors, the Court's reasoning that civil litigants can be classified as state actors was essential to the holding in *Edmonson*. The Court reasoned that because peremptory challenges permit civil litigants to perform a traditional governmental function, that of selecting a jury, and because peremptories have no use outside the courtroom, private litigants qualify as state actors for the application of the Equal Protection Clause. *Id.* at 2080-83. See also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (highlighting factors to consider when determining if a private actor can properly be classified as a state actor).

66. *Edmonson*, 111 S. Ct. at 2082.

*McCullom*,<sup>67</sup> the Court held that a criminal defendant's discriminatory use of peremptory challenges violated the Equal Protection Clause.<sup>68</sup> Recently, in *J.E.B. v. Alabama ex rel. T.B.*,<sup>69</sup> the Court further eroded the peremptory challenge by extending the principles established in *Batson* and its progeny to prohibit litigants from exercising peremptories to exclude jurors solely because of their gender.<sup>70</sup> The Court's decision in *J.E.B.* rested upon the intermediate

67. 112 S. Ct. 2348 (1992). In *McCullom*, the defendants, who were white, were charged with assaulting and battering two African-Americans. *Id.* at 2351. Prior to jury selection, the prosecution moved to preclude the defense from exercising race-based peremptory challenges and argued that *Batson* was applicable to criminal defendants. *Id.* at 2351-52. The prosecution contended that since 43% of the county's population was African-American and since the defense was allowed 20 peremptory challenges, the defense would statistically be able to strike all African-American venire members. *Id.* at 2351. However, the trial court judge refused the prosecution's motion, reasoning that *Batson* did not apply to criminal defendants. *Id.* at 2352. The Supreme Court of Georgia affirmed the trial court's holding. *Id.*

68. *Id.* at 2351. The issue of whether criminal defendants should be subject to the Equal Protection Clause was expressly left undecided by the Court in *Batson*. *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986). For further discussion of the Court's decision in *McCullom*, see Kimberly D. Goodman, Comment, *Constitutional Law - Criminal Defendant's Exercise of Peremptory Challenges as State Action for Equal Protection Purposes - Georgia v. McCollum*, 27 SUFFOLK U. L. REV. 184 (1993) (arguing that the Court was incorrect for relying upon *Edmonson* as authority for extending the protection of the Equal Protection Clause to include a criminal defendant's use of peremptory challenges); J.L. Harvancik, Comment, *Georgia v. McCollum: Eliminating The Race-Based Peremptory Challenge Once And For All*, 27 VAL. U. L. REV. 257 (1992); Michael M. Raeber, Note, *Toward an Integrated Rule Prohibiting All Race-Based Peremptory Challenges: Some Considerations on Georgia v. McCollum*, 26 GA. L. REV. 503 (1992).

69. 114 S. Ct. 1419 (1994). In *J.E.B.*, the respondent, the state of Alabama *ex rel. T.B.*, filed a civil paternity action alleging *J.E.B.* to be the father of *T.B.*'s child. *Id.* at 1421. When the case was called for trial, the trial court proceeded to empanel 36 potential jurors, 24 females and 12 males. *Id.* The court excused two men for cause, leaving 24 females and 10 males from which to choose a jury. *Id.* at 1421-22. Counsel for the state used nine of its 10 peremptory strikes to eliminate male members of the venire, while the petitioner, *J.E.B.*, used one peremptory strike to excuse a male. *Id.* at 1422. As a result of the challenges, an all female jury was empaneled. *Id.* Before the jury was empaneled, *J.E.B.* challenged the state's use of peremptory strikes to exclude male jurors solely on the basis of their gender, claiming that the Supreme Court's reasoning established in *Batson*, which forbids peremptory challenges to be made solely on the basis of one's race, likewise prohibits purposeful discrimination on the basis of gender. *Id.*

70. *J.E.B.*, 114 S. Ct. at 1429. Prior to the Court's decision in *J.E.B.*, both federal circuit courts and state courts were divided on the issue of extending *Batson* to gender-based peremptories. For examples of cases that extended *Batson* to gender-based peremptory challenges, see *United States v. DeGross*, 913 F.2d 1417 (9th Cir. 1990), *aff'd*, 960 F.2d 1433 (9th Cir. 1992) (en banc); *Laidler v. State*, 627 So. 2d 1263 (Fla. Dist. Ct. App. 1993); *State v. Burch*, 830 P.2d 357 (Wash. Ct. App. 1992) (relying upon the federal and state of Washington's Constitutions); *People v. Irizarry*, 560 N.Y.S.2d 279 (N.Y. App. Div. 1990). For examples of cases that declined to extend *Batson* to preclude the discriminatory use of gender-based peremptories, see *United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993); *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991), cert. denied, 112 S. Ct. 989 (1992); *Hamilton v. United States*, 850 F.2d 1038 (4th Cir. 1988), cert. dismissed, 489 U.S. 1094 (1989), cert. denied, 493 U.S. 1069 (1990); *State v. Culver*, 444 N.W.2d 662 (Neb. 1989); *State v. Oliveira*, 534 A.2d 867 (R.I. 1987).

scrutiny standard<sup>71</sup> of the Equal Protection Clause, not the strict scrutiny standard<sup>72</sup> that racial classifications must meet.<sup>73</sup> The Court reasoned that gender-based peremptory challenges violate the Equal Protection Clause, because gender stereotypes, like racial stereotypes, are not an accurate justification for removing jurors.<sup>74</sup> Whether or not the Court will continue to erode the peremptory challenge pursuant to the intermediate scrutiny or rational basis standard<sup>75</sup> of the Equal Protection Clause remains to be seen.<sup>76</sup>

71. The Supreme Court initially employed the conventional rational-basis test to decide the constitutionality of state imposed gender classifications. *See Reed v. Reed*, 404 U.S. 71, 75 (1971) (reasoning that legislation differentiating between the sexes, in order to be constitutional, must rest on some ground of difference that has a rational relation to the goal of the state action). However, Justice Brennan and others pressed for the adoption of a more rigorous test that would afford gender classifications increased constitutional protection. Justice Brennan argued that "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

Although the Court did not adopt a strict scrutiny standard, it did establish an intermediate or heightened scrutiny test that gender classifications are measured against to determine if the classifications are constitutional. Gender-based classifications will survive the intermediate scrutiny test if they meet two requirements: the government's interest must be important, and the classification must be substantially related to the fulfillment of the objective. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 718 (1982) (reasoning that a gender classification will survive the intermediate scrutiny standard if it is substantially related to a sufficiently important governmental interest); *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). The Supreme Court has left open whether gender classifications are inherently suspect. *See Harris v. Forklift Systems*, 114 S. Ct. 367, 373 (1993) ("[I]t remains an open question whether 'classifications based upon gender are inherently suspect.'" (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

72. For a discussion of the strict scrutiny standard of review that racial classifications must meet to be constitutional, *see supra* note 41.

73. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1424 (1994).

74. *Id.* at 1426-27. The Court applied the intermediate scrutiny standard afforded to gender classifications and held that the Equal Protection Clause forbids the discrimination in jury selection on the basis of gender. *Id.* Since gender-based peremptory challenges are based upon gender classifications and the State of Alabama acted on behalf of the petitioner, the Equal Protection Clause was implicated when the state challenged jurors solely on the basis of gender. *Id.* In *J.E.B.*, the court noted how women, much like African-Americans, had historically been denied many of the same rights. *Id.* at 1423-25. The Court noted that it did not matter whether women or racial minorities had been discriminated against more severely, but only that "our Nation has had a long and unfortunate history of sex discrimination . . ." *Id.* at 1425 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)). The Court further reasoned that gender discrimination during jury selection procedures, like racial discrimination, results in harm to the litigants, the community, and the excluded venirepersons. *Id.* at 1427.

75. When the Court reviews state action or legislation according to the rational basis standard, the state's action will survive so long as it is "reasonable." *See TRIBE, supra* note 41, at 1439-40. When the Court applies the rational basis test, it gives great deference to state legislatures. *Id.* at 1440. Classifications subjected to the rational basis standard will be upheld so long as the classification is reasonable in light of the state's intended purpose or goal. *Id.*



The Court's continual erosion of the peremptory challenge raises questions concerning the future existence of peremptories and casts doubt upon the importance that peremptory strikes will play in securing a trial by an impartial jury. Dissenting in *J.E.B.*, Justice Scalia argued that the Court's restriction of the peremptory challenge has harmed the true nature of the peremptory challenge as a means to secure an impartial jury.<sup>77</sup> Whether the Supreme Court will prevent the discriminatory use of peremptory challenges against members of other cognizable groups is not clear. However, the Supreme Court, in its most recent opportunity to extend *Batson*, declined to hear a case in which the issue was whether peremptory challenges exercised solely on the basis of a juror's religious affiliation should be prohibited.<sup>78</sup> Although the denial of certiorari does not express the Court's opinion, part of the Court's reluctance to address the issue may be due to the uncertainty surrounding jurors' religious rights pursuant to RFRA. When jurors are peremptorily removed solely on the basis of their religious affiliation, jurors' rights under RFRA are violated.<sup>79</sup>

### B. Peremptories Regarding Religious Affiliation

Few courts have addressed the issue of the discriminatory use of religious-based peremptory challenges, even though some of the greatest advocates have encouraged the removal of jurors solely on the basis of their religious affiliation.<sup>80</sup> Nonetheless, when jurors are excluded from participation in jury

76. In *J.E.B.*, the majority opinion, penned by Justice Blackmun, stated that parties could still "exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1429 (1994) (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Clark v. Jeter*, 486 U.S. 456 (1988)). In *Cleburne*, the Court held that a municipality's denial of a housing permit for the operation of a home for mentally ill individuals was invalid under the rational basis test. *Cleburne*, 473 U.S. at 440. By citing *Cleburne*, the *J.E.B.* Court seems to suggest that individuals with disabilities may be peremptorily removed from a petit jury so long as there is a rational basis for their removal. For a further discussion of *Batson's* uncertain application to individuals with disabilities and other groups, see *infra* notes 144-47.

77. *J.E.B.*, 114 S. Ct. at 1438. In *J.E.B.*, Justice Scalia stated:

[M]uch damage has been done. It has been done, first and foremost, to the peremptory challenge system, which loses its whole character when (in order to defend against "impermissible stereotyping" claims) "reasons" for strikes must be given . . . . And damage has been done, secondarily, to the entire justice system, which will bear the burden of the expanded quest for "reasoned peremptories" that the Court demands.

*Id.*

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

79. For a discussion of why religious-based peremptory challenges violate jurors' free exercise rights, see *infra* notes 163-93 and accompanying text.

80. Clarence Darrow argued that a juror's religious affiliation was an important factor to consider when selecting a juror. Darrow stated:

If a Presbyterian enters the jury box . . . let him go. He is cold as the grave; he knows right from wrong, although he seldom finds anything right. He believes in John Calvin

service solely because of their religious affiliation, their rights are violated<sup>81</sup> and society should be concerned.<sup>82</sup> Furthermore, because litigants may no longer use gender as a race-neutral explanation to *Batson* challenges,<sup>83</sup> justifications based upon a prospective juror's religious affiliations will no doubt become more frequent.<sup>84</sup>

---

and eternal punishment. Get rid of him with the fewest possible words before he contaminates the others . . . . If possible, the Baptists are more hopeless than the Presbyterians . . . . [Y]ou do not want them on the jury, and the sooner they leave the better. The Methodists are worth considering; they are nearer the soil. Their religious emotions can be transmuted into love and charity. They are not half bad, even though they will not take a drink . . . . If chance sets you down between a Methodist and a Baptist, you will move toward the Methodist to keep warm. Beware of the Lutherans . . . they are almost sure to convict. . . . He learns about sinning and punishing from the preacher, and dares not doubt. A person who disobeys must be sent to Hell; he has God's word for that. As to Unitarians, Universalists, Congregationalists, Jews and other agnostics, don't ask them too many questions; keep them anyhow; especially Jews and agnostics . . . . I have never experimented much with Christian Scientists; they are too serious for me.

Clarence Darrow, *Selecting A Jury*, *ESQUIRE MAG.* (1936), reprinted in JAMES W. JEANS, *TRIAL ADVOCACY* 170-71 (1975).

Jury selection manuals also encourage religious discrimination during jury selection procedures. A manual formerly used to teach prosecutors in Dallas, Texas stated, "Ask veniremen their religious preference. Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused. Lutherans and Church of Christ veniremen usually make good State's jurors." Jon Sparling, *Jury Selection in a Criminal Case* (unpublished, undated) (lettering and headings omitted) (on file with the *University of Chicago Law Review*), reprinted in Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 211 (1989).

Even if these stereotypes concerning prospective jurors are remotely true, discrimination against jurors solely on the basis of their religious preference violates jurors' rights. See *infra* notes 163-93 and accompanying text.

81. For a discussion regarding the violation of jurors' rights pursuant to RFRA when they are removed from a jury solely on the basis of their religious affiliation, see *infra* notes 163-93 and accompanying text.

82. For a discussion of the harm that the society suffers when jurors are excluded on the sole account of their religious preference, see *infra* note 200.

83. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). For a further discussion of the Court's decision in *J.E.B.*, see *supra* notes 69-74 and accompanying text.

84. If courts continue to allow the use of peremptories against jurors with religious affiliations, the goals of *Batson* and *J.E.B.* may be hindered. Because religion, race and gender are overlapping classifications, religion could be used as a pretext for unconstitutional racial or gender discrimination. One of the motivating factors behind the Court's decision in *J.E.B.* to prohibit gender-based peremptories was the concern that litigants could use gender as a means to get around a *Batson* challenge. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1430 (1994). Likewise, attorneys can exploit religious-based peremptories as a loophole around race-neutral or gender-neutral challenges. Many of the cases that have addressed the issue of religious-based peremptories have arisen when a minority juror's religion is proffered as a race-neutral explanation. See *State v. Davis*, 504 N.W.2d 767 (Minn. 1993) (upholding an African-American man's religious preference as a race-neutral justification), *cert. denied*, 114 S. Ct. 2120 (1994); *United States v. Clemmons*, 892 F.2d 1153 (3d Cir. 1989) (permitting a minority juror's religious affiliation to serve as a race-

The quest to end the discriminatory use of religious-based peremptory challenges is not a recent innovation. Almost 150 years before *Batson*, English scholars criticized religious-based peremptory challenges which were used to remove Roman Catholics as jurors.<sup>85</sup> Nevertheless, only one court has extended the principle established in *Batson* and its progeny to prohibit the discriminatory use of peremptory challenges against jurors on the sole account of their religious affiliations.<sup>86</sup> Litigants and judges that have argued for the

---

neutral justification), *cert. denied*, 496 U.S. 927 (1990); *People v. Malone*, 570 N.E.2d 584 (Ill. App. Ct. 1991) (allowing an African-American woman's practice of reading the Bible to serve as a race-neutral explanation); *Salazar v. State*, 745 S.W.2d 385 (Tex. Ct. App. 1987) (upholding a Hispanic woman's religious preference as a race-neutral justification for a peremptory challenge); *Chambers v. State*, 724 S.W.2d 440 (Tex. Ct. App. 1987) (permitting the religious preference of an African-American man and woman to serve as a race-neutral justification for peremptories).

In fact, if peremptory challenges against jurors with religious affiliations are not prohibited, large segments of the minority population will be denied their ability to participate in the judicial system. For example, Catholicism is a major characteristic among the Latino population. Approximately 80 to 95% of all Latinos are Roman Catholic. See Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 18 & n.87 (1992). Depending upon the size of the Latino population in a jurisdiction and the number of peremptory challenges that litigants are given, if a court were to allow Catholicism to serve as a race-neutral justification for peremptory challenges, many Latinos could be excluded from jury service. For example, in a community where 25% of the population is Latino and 75% is white, a 12 person jury would normally consist of three Latinos and nine whites. If the State was entitled to three peremptory challenges, it could exclude all Latino jurors by offering their religion as a race-neutral justification for their removal.

85. *People v. Dent*, 639 N.E.2d 1349, 1352 n.2 (Ill. App. Ct. 1994) (citing MARY HAYDEN & GEORGE MOONAN, *SHORT HISTORY OF IRISH PEOPLE* 495 (1921)).

86. *Casarez v. State*, No. 1114-93, 1994 Tex. Crim. App. LEXIS 140 (Dec. 14, 1994) (en banc). For a discussion of *Casarez*, see *infra* notes 101-10 and accompanying text. The Fifth Circuit implied in dicta that *Batson* prohibits religious-based peremptory challenges. See *United States v. Greer*, 939 F.2d 1076, 1086 n.9 (5th Cir. 1991), *vacated in part*, 968 F.2d 433 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1390 (1993). Nevertheless, state courts may limit the discriminatory use of peremptory challenges pursuant to their own constitution. Prior to *Batson*, the California Supreme Court decided to forbid peremptory challenges on religious grounds. *People v. Wheeler*, 583 P.2d 748 (Cal. 1978) (holding that the use of peremptory challenges to remove prospective jurors solely on the basis of racial, ethnic, or religious grounds violates a criminal defendant's right to a trial taken from a representative cross-section of the community under the California Constitution). North Carolina's Constitution expressly forbids the exclusion of a juror because of religion. "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. CONST. art. I, § 26. The state of Hawaii also forbids litigants from exercising peremptory challenges against individuals on the account of religion. HAW. REV. STAT. § 612-2 (1985) ("A citizen shall not be excluded from jury service in this State on account of race, color, religion, sex, national origin, economic status, or on account of a physical handicap . . ."). See also *State v. Levinson*, 795 P.2d 845, 849 (Haw. 1990) ("[T]he right to serve on a jury is a privilege of citizenship, guaranteed by the constitution, and provided for by statute, and that, under our Constitution, that right cannot be taken away for any of the prohibited bases of race, religion, sex or ancestry.").

The constitutionality of religious-based peremptory challenges has been a recent topic among commentators. See Benjamin Hoorn Barton, Note, *Religious-Based Peremptory Challenges After*

elimination of religious-based peremptories have asserted that the Equal Protection Clause forbids their use.<sup>87</sup>

In *State v. Davis*,<sup>88</sup> the Supreme Court of Minnesota rejected an extension of *Batson* to peremptory strikes based solely upon a prospective juror's religious affiliation.<sup>89</sup> In *Davis*, the prosecution used one of its peremptories to strike an African-American man from the jury panel.<sup>90</sup> When opposing counsel asked for a race-neutral explanation pursuant to *Batson*,<sup>91</sup> the prosecution explained that she struck the juror because he was a Jehovah Witness.<sup>92</sup> The

---

*Batson v. Kentucky and J.E.B. v. Alabama: An Equal Protection and First Amendment Analysis*, 94 MICH. L. REV. 191 (1995) (asserting that religious-based peremptories violate the equal protection clause and the religious clause of the First Amendment); J. Suzanne Bell Chambers, Note, *Applying the Break: Religion and the Peremptory Challenge*, 70 IND. L.J. 569 (1995) (arguing that religious-based peremptory challenges are not unconstitutional); Angela J. Mason, Note, *Discrimination Based on Religious Affiliation: Another Nail in the Peremptory Challenge's Coffin?*, 29 GA. L. REV. 493 (1995) (asserting that religious-based peremptory challenges are unconstitutional); Melissa Roth Tiedman, Note, *Extending Batson v. Kentucky to Religion-Based Peremptory Challenges*, 4 S. CAL. INTERDIS. L.J. 99 (1995) (noting the inconsistent treatment religious-based and race-based peremptories receive by the judiciary); Case Comment, *Equal Protection -- Jury Selection -- Minnesota Supreme Court Holds that Peremptory Challenges Based on Religion do not Violate Equal Protection*, 107 HARV. L. REV. 1164 (1994) (asserting that religious-based peremptory challenges violate the Free Exercise Clause).

87. See *infra* notes 101-11 and accompanying text.

88. 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994).

89. *Davis*, 504 N.W.2d at 770-71. See also *People v. Malone*, 570 N.E.2d 584, 590 (Ill. App. Ct. 1991) (upholding the removal of three prospective jurors because "the characteristic of religion play[ed] a major role in their lives . . .").

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

91. For a discussion regarding the race-neutral explanation for peremptory challenges, see *supra* note 49 and accompanying text.

92. *State v. Davis*, 504 N.W.2d 767, 768 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994). The prosecutor stated that she was familiar with the religious beliefs of Jehovah Witnesses and said:

I would never, if I had a preemptory [sic] challenge left, . . . fail to strike a Jehovah [sic] Witness from my jury. . . . In my experience . . . that faith is very integral to their daily life in many ways . . . . That was re-enforced at least three times a week he [the juror] goes to church for separate meetings. . . . In my experience Jehovah [sic] Witness[es] are reluctant to exercise authority over their fellow human beings in this Court House.

*Id.*

However, the logic of the prosecutor's justification could equally apply to followers of various religions. Believers in the teachings of Jesus Christ would certainly be subject to religious-based peremptory challenges. For example, Jesus Christ stated, "Do not judge, or you too will be judged. For in the same way you judge others, you will be judged, and with the measure you use, it will be measured to you." *Matthew 7:1-2* (New International Version). See also *James 4:12* (New International Version) ("There is only one Lawgiver and Judge . . . . But you—who are you to judge your neighbor?"). These passages taken from the Bible could be used to exclude any juror that confesses a belief in Biblical teachings. Unless and until it can be shown that a juror's religious beliefs actually interfere with her ability to act as an impartial trier of fact, a juror should not be excluded from jury service. When courts allow the discriminatory use of peremptory challenges

Supreme Court of Minnesota reasoned that religious discrimination, unlike racial discrimination, "is not as prevalent, or flagrant, or historically ingrained in the jury selection process" and therefore extending *Batson* was unnecessary.<sup>93</sup> The court also relied upon the fact that up until its decision, the Supreme Court had strictly limited the extension of *Batson* to only racial classifications.<sup>94</sup>

Likewise, in *United States v. Clemmons*,<sup>95</sup> the Third Circuit condoned religious-based peremptory challenges.<sup>96</sup> In *Clemmons*, the prosecution used a peremptory challenge to remove a minority juror.<sup>97</sup> When opposing counsel objected and argued for a race-neutral justification, the prosecutor stated that the juror's appearance suggested that he was a Hindu.<sup>98</sup> The prosecutor further stated that "'Hindus tend . . . to have feelings a good bit different from ours about all sorts of things . . . , [and the excluded juror] may have religious beliefs that may affect his thinking.'"<sup>99</sup> The three judge panel accepted the district court's appraisal of the prosecutor's explanation as a sufficient race-neutral

against jurors with religious affiliations, it effectively condones religious discrimination. For a comprehensive treatment of religious-based peremptories and why their use violates RFRA, see *infra* notes 163-93 and accompanying text.

93. *Davis*, 504 N.W.2d at 771. The Supreme Court of Minnesota further stated, "To extend *Batson* would complicate and erode the peremptory challenge procedure unnecessarily, and it would not serve to remedy any long-standing injustice perpetrated by the court system against specific individuals and classes, as *Batson* clearly does." *Id.*

94. *Id.* at 768. Although Minnesota's high court acknowledged that the Supreme Court had recently granted certiorari to examine peremptory challenges with respect to gender bias, the court continued to strictly apply *Batson's* rationale only to race. *Id.* However, shortly after the court's decision in *Davis*, the Supreme Court extended *Batson* to also forbid litigants from using peremptory challenges in a particular case solely on the basis of that person's gender. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). Although the Supreme Court denied certiorari in *Davis*, Justice Thomas, with whom Justice Scalia dissented, argued that after the Court's recent decision in *J.E.B.*, [i]t is at least not obvious . . . why peremptory strikes based on religious affiliation would survive equal protection analysis . . . . *J.E.B.* itself provided no rationale for distinguishing between strikes exercised on the bias of various classifications that receive heightened scrutiny . . . and the Supreme Court of Minnesota certainly did not develop such a distinction.

*Davis v. Minnesota*, 114 S. Ct. 2120, 2121 (1994).

Justice Thomas further argued that the case should be remanded back to the Supreme Court of Minnesota so the court could reconsider its holding in light of *J.E.B.* *Id.* at 2122.

95. 892 F.2d 1153 (3rd Cir. 1989), *cert. denied*, 496 U.S. 927 (1990).

96. In *Clemmons*, the defendant was convicted for selling stolen United States Treasury Bonds pursuant to federal law. *Id.* at 1154. On appeal, the defendant raised four issues, one of which was that the prosecutor violated his equal protection rights as established by *Batson*. *Id.*

97. *Id.* at 1155.

98. *Id.* at 1156.

99. *United States v. Clemmons*, 892 F.2d 1153, 1156 (3d Cir. 1989), *cert. denied*, 496 U.S. 927 (1990).

justification.<sup>100</sup>

However, in *Casarez v. State*,<sup>101</sup> a Texas appellate court recently extended *Batson* and held that the peremptory exclusion of jurors on the basis of their religious affiliation violates the Equal Protection Clause of the Fourteenth Amendment.<sup>102</sup> In response to a *Batson* challenge, the prosecutor asserted that two African-American jurors were removed on the basis of their Pentecostal religion.<sup>103</sup> The court reasoned that religious classifications, like racial classifications, must meet the strict scrutiny standard of the Equal Protection Clause.<sup>104</sup> The court emphasized that religious discrimination was very prevalent in early America.<sup>105</sup> The court continued to reason that since the right to free exercise of religion is a fundamental right,<sup>106</sup> the Equal Protection Clause is triggered when any governmental action interferes with

---

100. *Id.* at 1157. The Third Circuit upheld the district court's ruling even though the prosecutor never asked the venireperson if he was a Hindu. *Id.* The court gave great deference to the trial court's judgment and reasoned that it was not willing to rule that the prosecutor's justification for the peremptory challenge was clearly erroneous. *Id.*

101. No. 1114-93, 1994 Tex. Crim. App. LEXIS 140 (Dec. 14, 1994) (en banc).

102. *Id.* at \*36.

103. *Id.* at \*2-3.

104. *Id.* at \*32. The *Casarez* court stated that "[a]lmost seventy years ago we recognized the Equal Protection Clause prohibited discriminatory classifications based upon religion." *Id.* at \*25 (citing *Juarez v. State*, 277 S.W. 1091 (Tex. Crim. App. 1925)). In *Casarez*, the Texas appellate court relied heavily upon the Supreme Court's recent decision in *J.E.B.* The *Casarez* court reasoned that the Supreme Court's decision in *J.E.B.* to prohibit gender-based peremptories allowed for the application of *Batson* and its progeny to prohibit the discriminatory use of peremptory challenges against other classifications subject to intermediate or strict scrutiny review. *Id.* at \*21 n.11.

105. *Casarez v. State*, No. 1114-93, 1994 Tex. Crim. App. LEXIS 140, at \*22 (Dec. 14, 1994) (en banc). The court stated that "[o]ur democratic government arose from a period of severe religious discrimination." *Id.* The court noted that many early colonists fled to America to avoid religious discrimination in England. *Id.* The *Casarez* court framed its analysis very much like the Supreme Court did in *J.E.B.* The *Casarez* court focused on religious discrimination in America, just as the *J.E.B.* Court concentrated on the history of gender discrimination. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1423-25 (1994). The court continued to use *J.E.B.* as authority for its decision, reasoning that since religious classifications are subject to strict scrutiny, peremptories "exercised on the basis of religious affiliation is constitutionally indistinguishable from a peremptory challenge exercised on the basis of race or sex." *Casarez*, No. 1114-93, 1994 Tex. Crim. App. LEXIS 140, at \*74 (Dec. 14, 1994) (en banc) (Meyers, J., dissenting) (explaining the majorities' rationale).

106. *Casarez*, No. 1114-93, 1994 Tex. Crim. App. LEXIS 140, at \*74 (Dec. 14, 1994) (en banc) (Meyers, J., dissenting) (explaining the majorities' rationale). To justify its conclusion that the right to free exercise of religion is a fundamental right, the *Casarez* court cited Supreme Court precedent and even relied upon RFRA. *Id.* at \*25-29. Although the court relied upon the jurisprudence of the Free Exercise Clause and RFRA to conclude that the right to free exercise of religion is a fundamental right, its reasoning that religious-based peremptory challenges are unconstitutional was made pursuant to the Equal Protection Clause. *Id.* at \*32-34.

one's right.<sup>107</sup>

After concluding that classifications based upon religion must meet the Equal Protection Clause's strict scrutiny standard,<sup>108</sup> the court rejected the State's argument that religious based peremptory challenges were justified by government's interest in securing an impartial jury.<sup>109</sup> The *Casarez* court acknowledged the importance of the peremptory challenge, but reasoned that religion, like race or gender, does not serve as an accurate indicator of a juror's ability to serve as an impartial trier of fact.<sup>110</sup>

Although it is conceivable that peremptory challenges, when exercised solely on the basis of an individual juror's religious faith, could be restricted according to *Batson* and its progeny,<sup>111</sup> a better and more accurate justification for forbidding the discriminatory use of religious-based peremptories is found within RFRA.<sup>112</sup> In *Casarez*, the court began to explore rights that jurors have under the Free Exercise Clause and RFRA but then justified its conclusion to prohibit religious-based peremptories using *Batson* and its progeny.<sup>113</sup> The

107. The court's reasoning that the Equal Protection Clause is triggered when an individual's right to free exercise is abridged was quite complex. The court reasoned that "[a]t times the rights guaranteed by the First Amendment become fused with those guaranteed by the Fourteenth Amendment . . . . [The Supreme Court] 'itself has occasionally fused the First Amendment into the Equal Protection Clause . . . but at least with the acknowledgement . . . that the First Amendment underlies its analysis.'" *Id.* at \*30 (quoting *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2544 (1992)). Although an individuals's First Amendment and Fourteenth Amendment rights can become fused, the court's reasoning is a good example of why a cause of action pursuant to RFRA is superior. Unlike the *Casarez* reasoning, a cause of action pursuant to RFRA focuses solely upon a juror's rights under RFRA. For a further discussion of a juror's statutory free exercise rights under RFRA, see *infra* notes 163-93 and accompanying text.

108. The Court noted that the jurisprudence under the Free Exercise Clause mandates that when a law burdens an individual's religious liberty, the government must justify the infringement with a compelling government interest that is narrowly tailored. *Id.* at \*30. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2233 (1993) ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

109. *Casarez v. State*, No-1114-93, 1994 Tex. Crim. App. LEXIS 140, at \*32-34 (Dec. 14, 1994) (en banc).

110. *Id.* at \*33. The *Casarez* court continued to follow the Supreme Court's approach in *Batson* and its progeny by reasoning that once a litigant makes a prima facie case showing religious venirepersons were subject to discrimination, the burden shifts to the opposing party to articulate a religious-neutral explanation for the challenge. *Id.* at \*35.

111. See *supra* notes 101-10 and accompanying text. See also *State v. Davis*, 504 N.W.2d 767, 772-73 (Minn. 1993) (Wahl, J., dissenting) (reasoning that the Equal Protection Clause prohibits the purposeful discrimination during jury selection on the sole account of religious affiliation).

112. See *infra* notes 127-47 and accompanying text.

113. *Casarez v. State*, No. 1114-93, 1994 Tex. Crim. App. LEXIS 140, at \*31-37 (Dec. 14, 1994) (en banc).

*Casarez* court took one step in the right direction by emphasizing jurors' free exercise rights, but failed to entirely comprehend the protection that RFRA affords jurors with religious affiliations. A cause of action pursuant to RFRA not only adequately protects jurors that have been removed from a jury solely on the basis of their religious affiliation, but it also gives courts a sound statutory framework to work within, rather than the vague and uncertain religious rights that jurors possess under the Equal Protection Clause.<sup>114</sup>

### III. AN OVERVIEW OF RFRA

On November 16, 1993, President Clinton signed RFRA into law.<sup>115</sup> The act was supported by an extremely broad and diverse group of religious and civil liberties organizations.<sup>116</sup> RFRA<sup>117</sup> was a Congressional response<sup>118</sup> to the

---

114. Unlike the Equal Protection Clause, which can be used to protect religious liberty, RFRA is a clear mandate that when the government burdens religious rights, it must justify the action with a compelling governmental interest that is narrowly tailored. See 42 U.S.C. § 2000bb-1 (Supp. V. 1993). For an analysis of why religious-based peremptory challenges violate a jurors' statutory rights under RFRA, see *infra* notes 163-93 and accompanying text.

115. 139 CONG. REC. D1315 (daily ed. Nov. 16, 1993).

116. The following is a partial list of the organizations that were part of the Coalition for the Free Exercise of Religion. Some of the coalition members included:

Agudath Israel of America; American Association of Christian Schools; American Civil Liberties Union; American Conference of Religious Movements; American Humanist Association; American Jewish Committee; American Jewish Congress; American Muslim Council . . . Americans United for Separation of Church and State . . . Association on American Indian Affairs; Baptist Joint Committee on Public Affairs . . . Central Conference of American Rabbis; Christian Church (Disciples of Christ); Christian College Coalition; Christian Legal Society; Christian Life Commission of the Southern Baptist Convention . . . Church of the Brethren; Church of Jesus Christ of Latter-Day Saints; Church of Scientology International . . . Concerned Women for America . . . Episcopal Church; Evangelical Lutheran Church in America . . . Friends Committee on National Legislation; General Conference of Seventh-day Adventists; Guru Gobind Singh Foundation . . . Japanese American Citizens League; Jesuit Social Ministries, National Office; Justice Fellowship; Mennonite Central Committee U.S.; NA'AMAT USA . . . National Council of Jewish Women . . . National Sikh Center; Native American Church of North America; North America Council for Muslim Women . . . Union of American Hebrew Congregations . . . Unitarian Universalist Association of Congregations . . . United Methodist Church, Board of Church and Society . . .

Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 n.9 (1994).

The bill also received support from both liberals and conservatives in Congress. In fact, the bill that was ultimately signed into law was introduced by Senator Orin Hatch, a conservative Republican from Utah, and Senator Edward Kennedy, a liberal Democrat from Massachusetts. S. REP. NO. 111, 103d Cong., 1st Sess. 1 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1893.

117. Congress stated the following reasons and purposes for enacting RFRA:

(a) Findings. The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the



Supreme Court's holding in *Employment Division v. Smith*.<sup>119</sup> In *Smith*, the Court limited the protection that the First Amendment's Free Exercise Clause<sup>120</sup> had traditionally afforded individuals.<sup>121</sup> The Court held that generally applicable laws that apply to all citizens regardless of their religious beliefs only need to be justified by a rational basis, even though such laws may infringe upon a person's religious beliefs or exercise thereof.<sup>122</sup>

Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justifications;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking a balance between religious liberty and competing prior governmental interests.

(b) Purposes. The purposes of this chapter are--

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where the free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. §§ 2000bb(a)-(b) (Supp. V. 1993).

118. "[T]he Religious Freedom Restoration Act of 1993, responds to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*." S. REP. NO. 111, 103th Cong., 1st Sess. 1 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1893.

119. 494 U.S. 872 (1990). In *Smith*, two men were fired from their jobs because they ingested peyote, a drug, for religious purposes. *Id.* at 874. The men were members of the Native American Church. *Id.* After the two men were discharged from their jobs, they sought unemployment compensation. *Id.* However, they were denied benefits because they had been discharged pursuant to Oregon law that prohibited the intentional possession of controlled substances. *Id.*

120. U.S. CONST. amend. I. The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." *Id.* The First Amendment's Free Exercise Clause applies to the States via the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

121. For a discussion of traditional protection under the Free Exercise Clause, see *infra* note 123 and accompanying text.

122. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). The Court reasoned that "[b]ecause respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug." *Id.*

Prior to the Court's holding in *Smith*, laws, including laws of general application, that substantially infringed upon an individual's free exercise rights were required to advance a compelling governmental interest in a manner that was the least restrictive in furthering that compelling interest.<sup>123</sup> The Court's holding in *Smith* provoked a substantial amount of public outrage because the Court disregarded precedent to reach its conclusion.<sup>124</sup> RFRA, although it did not overrule *Smith*, was a reaction to the Court's holding and established "a statutory prohibition against government action substantially burdening the exercise of religion, even if the burden results from a rule of general applicability."<sup>125</sup> The Act restored the compelling interest test that was applied to free exercise cases prior to the Court's decision in *Smith* so long as the cause of action is brought pursuant to RFRA, rather than under the Free Exercise Clause.<sup>126</sup>

---

123. See *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136 (1987) (holding that a state's denial of unemployment compensation to an employee who refused to work specific hours because of sincerely held religious convictions failed to meet the strict scrutiny standard of the Free Exercise Clause); *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981) (holding that a state's denial of unemployment compensation benefits to a Jehovah's Witness that refused to manufacture war weapons due to religious beliefs violated the Free Exercise Clause); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that a state's interest in a uniform educational system does not overcome Free Exercise Rights of the Amish who do not believe in sending their children to public schools); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that there is no compelling state interest in refusing to grant unemployment benefits to one who refused to work on Saturday due to religious beliefs).

124. The public's disapproval of the Court's decision in the *Smith* case was exhibited by the overwhelming social and political support that RFRA received. See *supra* note 116. Concurring in *Smith*, Justice O'Connor was especially critical of the Court's decision to disregard precedent. See *Employment Div. v. Smith*, 494 U.S. 872, 891 (1990). Criticizing the majority opinion, O'Connor stated:

The Court today extracts from our long history of free exercise precedents the single categorical rule that 'if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended'. . . . To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

*Id.* at 892. See also Michael W. McConnell, *Free Exercise Revisionism and The Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (asserting the Court's decision in *Smith* was based upon limited precedent).

125. S. REP. NO. 103-111, 103d Cong., 1st Sess. 1 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1893.

126. "The Religious Freedom Restoration Act of 1993 is intended to restore the compelling interest test previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a compelling governmental interest." S. REP. NO. 103-111, 103d Cong., 1st Sess. 1 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1898.

## IV. WHY A CAUSE OF ACTION PURSUANT TO RFRA

The jurisprudence under the Free Exercise Clause alone does not serve as a sound basis to prevent litigants from exercising religious-based peremptory challenges. In *Smith*, the Supreme Court held that generally applicable, facially neutral laws that burden the exercise of religion only require a rational justification and do not need to meet the strict scrutiny standard.<sup>127</sup> Thus, after *Smith*, a generally applicable law, even if it burdens the free exercise of religion, will be sustained if it has a rational basis.<sup>128</sup> Since peremptory challenges apply to all prospective jurors for any reason, peremptories are analogous to facially neutral rules of general application.<sup>129</sup> Therefore, if a court was faced with the issue of whether to prohibit religious-based peremptory challenges under the Free Exercise Clause, the court could reason that such peremptories are justified as rational because the infringement upon the jurors' rights flows from generally applicable government action that is facially neutral towards religion.<sup>130</sup> Under the Free Exercise Clause, facially neutral laws of general application only need to be justified by a rational basis, not the strict scrutiny standard that RFRA mandates.<sup>131</sup>

Although the strict scrutiny standard is still applicable under the First Amendment's Free Exercise Clause, the Court in *Smith* attempted to limit its application to the special context of employment cases.<sup>132</sup> However, Congress

127. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). For a further discussion of *Smith*, see *supra* notes 119-24 and accompanying text.

It must be remembered that the Court's holding in *Smith*, although controversial, is still good law for purposes of the Free Exercise Clause of the First Amendment. Nevertheless, most religious liberty litigation will probably occur under RFRA, rather than the Free Exercise Clause, because RFRA mandates that all government action that impinges upon a person's religious liberty must undergo strict scrutiny review. See 42 U.S.C. § 2000bb-1(a) (Supp. V. 1993).

128. *Smith*, 494 U.S. at 890.

129. See *Swain v. Alabama*, 380 U.S. 202, 221 (1965) ("In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."). See also *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1437 (1994) (Scalia, J., dissenting) ("all groups are subject to the peremptory challenge . . .").

130. For a discussion why facially neutral laws do not violate the Free Exercise Clause, see *supra* notes 119-23 and accompanying text.

131. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

If a cause of action was filed under the Free Exercise Clause and RFRA on behalf of an excluded juror, a court could reason that the juror's statutory rights under RFRA have been violated while holding that the juror's traditional free exercise rights were not sacrificed. This dichotomy of results indicates the importance of RFRA's strict scrutiny standard and the protection that it affords individuals.

132. "We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation . . . . In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all." *Smith*, 494 U.S. at 883.

reaffirmed the strict scrutiny standard within RFRA by mandating that all government action that impinges upon the free exercise rights of individuals can only be sustained when the government demonstrates that the action is the least restrictive means of furthering a compelling governmental interest.<sup>133</sup> Therefore, when religious-based peremptories are challenged under RFRA, the state must justify its infringement upon a juror's free exercise rights with a narrowly tailored compelling governmental interest.

In addition to providing adequate protection for jurors whose free exercise rights have been sacrificed, RFRA also provides a sound statutory framework within which a court can comfortably hold that religious-based peremptories should be forbidden, while still preserving the function of peremptory challenges.<sup>134</sup> As indicated by the Supreme Court's recent holding in *J.E.B.*, some Justices are concerned about the future of the peremptory challenge.<sup>135</sup> Much of this concern stems from the Court's decision to prevent gender-based peremptory challenges. While race classifications are subject to a strict scrutiny standard,<sup>136</sup> gender classifications are measured according to the intermediate scrutiny standard.<sup>137</sup> Some Justices see no limit to the further erosion of the peremptory challenge by encompassing all classifications that are measured according to the intermediate scrutiny standard.<sup>138</sup>

However, because RFRA mandates that governmental infringements upon religious liberty are subject to a strict scrutiny review,<sup>139</sup> a cause of action pursuant to RFRA would allow a court to limit the discriminatory use of religious-based peremptories without further eroding the peremptory challenge under the Equal Protection Clause. By utilizing the statutory framework of RFRA, a cause of action under RFRA is similar to the strict scrutiny review that

133. See 42 U.S.C. § 2000bb-1(b) (Supp. V. 1993).

134. See *infra* notes 139-47 and accompanying text.

135. See generally *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1430 (1994) (O'Connor, J., concurring) (emphasizing the negative consequences of prohibiting gender-based peremptories and asserting the future use of peremptory challenges as dubious).

136. Racial classifications are inherently suspect and undergo the most rigid form of scrutiny. See *Palmore v. Sidoti*, 466 U.S. 429 (1984). Racial classification will survive strict scrutiny if it meets two requirements: the government's interest in classifying groups must be compelling and the classification must be narrowly tailored in fulfilling the government's objective. For a further discussion of the strict scrutiny standard in relation to racial classifications, see *supra* note 41.

137. For a discussion of the intermediate standard that gender classifications must meet, see *supra* note 71.

138. See generally *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1436 (1994) (Scalia, J., dissenting) (asserting that the Court's holding to forbid gender-based peremptory challenges places all peremptory challenges at risk, especially peremptories that are based upon classifications that are subject to intermediate scrutiny).

139. See 42 U.S.C. § 2000bb-1(b) (Supp. V. 1993).

racial classifications must meet.<sup>140</sup> Like the jurisprudence under the Fourteenth Amendment which requires that racial classifications be assessed according to strict scrutiny, RFRA mandates that infringements upon religious liberty also be justified according to a strict scrutiny standard.<sup>141</sup> Therefore, if a court were to enjoin religious-based peremptories by reasoning according to RFRA, and not the Equal Protection Clause, a court could avoid future complications when it was faced with additional efforts to further erode peremptories pursuant to the Equal Protection Clause. RFRA only applies to government action that impinges upon an individual's religious liberty.<sup>142</sup> The Equal Protection Clause, however, can potentially prohibit the discriminatory use of peremptory challenges against any cognizable group.<sup>143</sup> For example, courts could apply *Batson's* equal protection analysis to prevent the discriminatory use of peremptory challenges against jurors on the basis of physical disability,<sup>144</sup> age,<sup>145</sup> sexual orientation,<sup>146</sup> or classifications based

140. Racial classifications and governmental infringements upon religious liberty are unconstitutional unless the government can show that the classification or its action is a narrowly tailored means of securing a compelling governmental interest. "Just as we subject to the most exacting scrutiny laws that make classification based on race . . . so too we strictly scrutinize governmental classifications based on religion . . ." *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990). Justice O'Connor reasoned that the "freedom of religion, like freedom from race discrimination . . . [is] a 'constitutional nor[m]'" and must undergo strict scrutiny review. *Id.* at 901 (O'Connor, J., concurring). See also *State v. Davis*, 504 N.W.2d 767, 773 (Minn. 1993) (Wahl, J., dissenting) (reasoning that the Constitution forbids "purposeful discrimination in jury selection on the basis of religious affiliation, since religious classifications, like racial ones, are subject to strict scrutiny.").

141. Under RFRA, infringements upon an individual's free exercise rights will be sustained if the government can demonstrate that its action is the least restrictive means of furthering a compelling governmental interest. See 42 U.S.C. § 2000bb-1(b) (Supp. V. 1993).

142. See S. REP. NO. 111, 103d Cong., 1st Sess. 1 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1893-98.

143. Unlike a cause of action pursuant to *Batson* and its progeny, a cause of action under RFRA does not require showing that religious-based peremptories were exercised against members of a cognizable group. Instead, RFRA applies to any juror that is associated with a religious affiliation. See 42 U.S.C. § 2000bb (Supp V. 1993); S. REP. NO. 111, 103d Cong., 1st Sess. 1 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1893-95. Because proof of a cognizable group is not a requirement under RFRA, a court does not have to decide difficult issues surrounding what is a cognizable group. The issue of what composes a cognizable group became even more complex when the Supreme Court applied *Batson* and its progeny to also prohibit gender-based peremptories. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). Since a cognizable group for purposes of challenging peremptories no longer applies only to racial classifications, litigants are free to argue that other classes of persons comprise a cognizable group for purposes of limiting peremptory challenges. For a discussion of what constitutes a cognizable group, see *supra* note 47.

144. Classifications based upon a physical or mental disability are reviewed under the rational basis test. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985). In *Cleburne*, a municipality refused to grant a permit for the operation of a home for mentally challenged individuals. *Id.* at 435. The Supreme Court subjected the municipality's action to a rational basis standard and held that there was no legitimate reason for the city to deny the permit for the home. *Id.* at 450. As previously noted, in *J.E.B.*, the Supreme Court stated that peremptory challenges

on legitimacy.<sup>147</sup>

---

could still be exercised against persons who are members of a classification subjected to rational review. *J.E.B.*, 114 S. Ct. at 1429 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)). The Court's statement seems to suggest that individuals with disabilities can be peremptorily removed from a jury so long as there is a reasonable explanation for their exclusion. *But see* Thomas A. Hett, *Batson v. Kentucky: Present Extensions and Future Applications*, 24 *LOY. U. CHI. L.J.* 413, 433-36 (1993) (suggesting that the Americans with Disabilities Act may be used as a means to prevent the discriminatory use of peremptory challenges based on a individual's disability).

145. The Court has consistently subjected age classifications to rational review. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). In *Murgia*, a Massachusetts statute required state police officers to retire at the age of 50. The Court subjected the statute to a rational basis standard and held that the statute was constitutional. *Id.* at 314. The intended purpose of the statute was to maintain a physically fit police force. *Id.* at 314-15. The Court conceded that although the State had not chosen the best means of accomplishing a physically fit police force, the State had not violated "the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Id.* at 316 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1971)). In 1991, the Supreme Court reaffirmed its decision in *Murgia*, holding that classifications based upon age are not suspect and only require a rational justification. *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that a state's mandatory retirement age for judges did not violate the Federal Age Discrimination in Employment Act or the Equal Protection Clause). Furthermore, courts that have faced the issue of whether to forbid age-based peremptory challenges have declined to extend *Batson*. *See United States v. Cresta*, 825 F.2d 538 (1st Cir. 1987) (holding that young adults do not constitute a cognizable group for purposes of an equal protection challenge to the composition of a petit jury), *cert. denied*, 486 U.S. 1042 (1988); *United States v. Alvarado-Sandoval*, 997 F.2d 491 (8th Cir. 1993) (holding that a juror's age, combined with her occupation and level of education, were a sufficient race-neutral explanation pursuant to a *Batson* challenge); *State v. Everett*, 472 N.W.2d 864 (Minn. 1991) (holding that *Batson* does not prohibit the use of peremptory challenges to exclude jurors solely on the basis of their age).

146. The rights of homosexuals are a controversial topic both in the political arena and within the legal field. The Supreme Court has never held that the right to engage in a homosexual lifestyle is a fundamental right or that homosexuals as a group deserve special protection. *See Bowers v. Harwick*, 478 U.S. 186 (1986) (holding that homosexual activity is not a fundamental right protected by substantive due process). The Ninth Circuit has held homosexuals do not constitute a suspect or quasi-suspect class requiring strict or intermediate scrutiny. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990). In *High Tech*, the court reasoned that although homosexuals have suffered a history of discrimination, homosexuality is not an immutable characteristic, but a behavioral characteristic, and therefore, classifications based upon sexual orientation only need a rational basis. *Id.* at 573-74. The Ninth Circuit's reasoning suggests that peremptorily challenging homosexuals would withstand constitutional scrutiny because classifications based upon sexual orientation only need a rational justification.

147. Classifications based on illegitimacy, like gender classifications, are subject to an intermediate standard of review. *See Clark v. Jeter*, 486 U.S. 456 (1988). In *Clark*, a unanimous Court held that a state's six-year statute of limitations on paternity suits brought by illegitimate children failed the intermediate scrutiny test under the Equal Protection Clause. *Id.* at 465. The Court reasoned that distinctions between legitimate and illegitimate children were "not substantially related to [the state's important] interest in avoiding the litigation of stale or fraudulent claims." *Id.* at 464.

Recently, the Court held that gender-based peremptory challenges fail the intermediate scrutiny test. *See J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). If the Court were faced with the discriminatory use of peremptories against illegitimate jurors, the Court could reason that the

## V. A PROPOSED CAUSE OF ACTION PURSUANT TO RFRA

The following Section discusses a cause of action for the discriminatory use of peremptory challenges based on religion and analyzes whether RFRA forbids litigants from exercising religious-based peremptory challenges. The cause of action discussed is intended to apply only when it has not been demonstrated through voir dire that the jurors' religion would interfere with their ability to act impartially.<sup>148</sup> Although RFRA is a relatively new piece of legislation, a considerable amount of case precedent has interpreted the statute.<sup>149</sup> However, no court has used RFRA as a means to limit religious-based peremptory challenges. Because RFRA expressly incorporates the jurisprudence of the Free Exercise Clause,<sup>150</sup> much of the following information in this Section discusses precedent that interprets the Free Exercise Clause as it bears on a potential cause of action that could be brought when jurors are excluded solely on the basis of their religious preference.

Before litigants can argue on behalf of an excluded juror, the litigants must establish that they have standing to assert the rights of the juror. Once it is shown that litigants have standing, a cause of action on a juror's behalf pursuant to RFRA entails three elements. First, government action must breach a juror's

---

removal of illegitimate jurors, like the exclusion of jurors solely because of their gender, is not substantially related to an important governmental interest and therefore is unconstitutional. However, the Court has not been called upon to address this issue.

148. Generally, an otherwise competent venireperson is not disqualified as a juror because of religious beliefs or affiliations. *See* 47 AM. JUR. 2D *Jury* § 177 (1995). However, as previously noted, sometimes jurors' religious beliefs may impede their ability to act impartially. *See supra* note 14.

149. Although RFRA was recently passed in 1993, state courts have been inconsistent in its application to whether RFRA can be used as a defense to laws mandating that landlords not discriminate against unmarried cohabitants. The tension is between a landlord's religious belief that it is sinful for unmarried couples to live together and the statutory mandate preventing housing discrimination against unmarried individuals. The issue essentially is whether the government has a compelling interest in preventing housing discrimination against unmarried individuals sufficient to override a landlord's religious belief that it is wrong to rent property to unmarried couples. The Supreme Court of Alaska has held that a state's interest in preventing discrimination against unmarried couples is compelling. *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994). However, California courts have ruled that a state does not have a compelling interest in preventing housing discrimination against unmarried couples. *See Smith v. Fair Employment and Hous. Comm'n*, 30 Cal. Rptr. 2d 395 (Cal. Ct. App. 1994); *Donahue v. Fair Employment and Hous. Comm'n*, 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991). Prior to the passage of RFRA, the Supreme Court of Minnesota held that the State's interest in protecting unmarried couples from housing discrimination does not outweigh a landlord's religious beliefs that it is wrong to lease property to unmarried cohabitants. *State v. French*, 460 N.W.2d 2, 9-10 (Minn. 1990).

150. RFRA states in pertinent part: "the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4) (Supp. V. 1993).

rights under RFRA.<sup>151</sup> Second, the government's action must substantially interfere with the juror's free exercise rights.<sup>152</sup> Finally, once it is shown that the government violated a juror's rights under RFRA, the government must show that religious-based peremptory challenges are the least restrictive means of securing an impartial jury.<sup>153</sup>

#### A. *Standing*

The Supreme Court's holding in *Batson* and its progeny makes it clear that litigants have standing to raise an equal protection claim on behalf of excluded third-party jurors.<sup>154</sup> There is no reason why *Batson* and its progeny would not also apply in situations where litigants argue on behalf of excluded jurors whose free exercise rights have been infringed.<sup>155</sup> It should be noted that although RFRA permits individuals whose rights have been violated to directly challenge governmental action,<sup>156</sup> it is highly unlikely that a juror would raise a claim on his or her own behalf.<sup>157</sup> Therefore, the remainder of this Note

151. See *infra* notes 159-62 and accompanying text.

152. See *infra* notes 163-93 and accompanying text.

153. See *infra* notes 194-201 and accompanying text.

154. See *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (reasoning that civil litigants have standing to raise an excluded juror's equal protection rights); *Powers v. Ohio*, 499 U.S. 400 (1991) (reasoning that criminal defendants have standing to assert the rights of jurors that are excluded from jury service).

In general, litigants may raise the rights of third parties if three elements exist. The litigant must demonstrate that he or she has suffered a concrete, redressable harm; that she or he has a close relation to the third party; and that there exists some hindrance to the third party's ability to protect his or her own rights. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 83-86 (4th ed. 1991). For a discussion of the Supreme Court's reasoning why litigants have standing to assert the rights of third party jurors that are subject to the discriminatory use of peremptory challenges, see *supra* note 60.

155. Clearly one's right to the free exercise of religion is just as critical as one's right to be free from discrimination. In fact, government action that infringes upon an individual's religious liberty is subject to strict review, just as government action that discriminates against individuals because of their race is subject to strict scrutiny. See *supra* note 140.

156. RFRA expressly gives individuals whose rights have been violated standing to challenge governmental action. RFRA states:

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-1(c) (Supp. V. 1993).

157. The Supreme Court has emphasized that litigants should be allowed to argue on behalf of jurors because "[t]he barriers to a suit by an excluded juror are daunting." *Powers v. Ohio*, 499 U.S. 400, 414 (1991). As a practical matter, due to the large costs of litigation, little incentive exists for jurors to assert their rights in a subsequent lawsuit after they have been subject to discriminatory jury selection procedures. See *supra* note 60. See also Albert W. Aischuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 193-95 (1989) (noting the barriers that exist for jurors to protect their



will refer to a cause of action pursuant to RFRA as being brought by a litigant on the juror's behalf.

### B. Government Action

A party challenging a peremptory challenge based on a juror's religious preference must show that governmental action exists in order to trigger protection under RFRA. In RFRA, Congress intended to define "government"<sup>158</sup> and "government action"<sup>159</sup> broadly. Furthermore, the Supreme Court has held that civil litigants<sup>160</sup> and criminal defendants<sup>161</sup> qualify as state actors and are prohibited from exercising racially discriminatory peremptory challenges. Given RFRA's broad definition of government and the case precedent expanding the definition of state actors for purposes of limiting the peremptory challenge, every time a peremptory challenge is exercised, state action exists. Since all litigants, in either a civil or criminal setting, qualify as state actors, potential protection under RFRA is triggered.<sup>162</sup>

### C. Religious-Based Peremptory Challenges Violate Jurors' Free Exercise Rights Established by RFRA.

After establishing government action, a party arguing that discriminatory use of peremptories violates RFRA must show that the exercise of such challenges substantially burdens the excluded jurors' free exercise of religion.<sup>163</sup> A discussion of Supreme Court precedent will illustrate how jurors' free exercise rights are sacrificed when they are excluded because of religious affiliations.

---

rights when they are subject to discriminatory use of peremptory challenges). In fact, no case law exists in which jurors have brought a cause of action on their own behalf, arguing that they were unconstitutionally discriminated against when they were removed from the jury pool with a peremptory challenge.

158. "[T]he term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State. . . ." 42 U.S.C. § 2000bb-2(1) (Supp. V. 1993).

159. "All governmental actions which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill." H.R. DOC. NO. 103-88, 103d Cong., 1st Sess. 1 (1993).

160. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (holding that civil litigants may not use peremptory challenges to racially discriminate against venirepersons). For a further discussion of *Edmonson*, see *supra* notes 63-66 and accompanying text.

161. *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (holding that a criminal defendant's exercise of race-based peremptory challenges violates the Equal Protection Clause). For a further discussion of *McCollum*, see *supra* notes 67-68 and accompanying text.

162. For a discussion why a cause of action pursuant to RFRA forbids the use of religious-based peremptory challenges, see *infra* notes 163-93 and accompanying text.

163. See 42 U.S.C. 2000bb-1 (Supp. V. 1993); S. REP. NO. 103-111, 103d Cong., 1st Sess. 1 (1993), reprinted in 1993 U.S.C.C.A.N. 1892.

In *McDaniel v. Paty*,<sup>164</sup> a plurality of the Supreme Court held that a state's constitutional provision that barred ministers or priests from serving as delegates to the state's constitutional convention violated the Free Exercise Clause of the First Amendment.<sup>165</sup> The Court reasoned that the Free Exercise Clause forbids the government from inhibiting or rewarding religious beliefs.<sup>166</sup> The Court further reasoned that the statute was clearly unconstitutional because it disqualified the plaintiff from participating in the democratic process on the sole account that he was a minister.<sup>167</sup>

The Court's holding and reasoning in *McDaniel* help illustrate how governmental action burdens jurors' exercise of religion when jurors are singled out and removed from a petit jury because of their religious affiliations. When jurors are struck solely because of their religious preference with no further inquiry into their personal views, jurors' rights established under RFRA have been violated by denying individuals a fundamental benefit of citizenship based on nothing more than their religious affiliation.<sup>168</sup> Like the disqualified minister in *McDaniel*, jurors that are struck because of their religious faith are denied a privilege of citizenship because of their religious status.<sup>169</sup> Therefore, religious-based peremptory challenges, like the statute in *McDaniel*,

164. 435 U.S. 618 (1978). In *McDaniel*, the petitioner was a Baptist minister that ran as a candidate to be a representative in a Tennessee constitutional convention. *Id.* at 621. However, Tennessee's Constitution disqualified all clergy or ministers from becoming legislators. *Id.* Nevertheless, *McDaniel* was eventually elected to be a delegate to the convention. *Id.* After the election, the Tennessee Supreme Court ruled that *McDaniel's* election was invalid because it violated the state's constitution. *Id.* at 621-22. The Tennessee Supreme Court reasoned that the state's interest in preventing the establishment of religion, transpiring from clergy involvement in politics, justified the disqualification provision and outweighed any infringement upon *McDaniel's* free exercise rights. *Id.* at 622.

165. *Id.* at 626, 630-33.

166. *Id.* at 626. The Court stated that "[t]he provision imposes a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity." *Id.* at 631.

167. *Id.* at 627.

168. For authority emphasizing that jury duty is a fundamental benefit of citizenship, see *supra* note 62 and accompanying text.

169. In *McDaniel*, Chief Justice Burger stated that "[i]f the Tennessee disqualification provision were viewed as depriving the clergy of a civil right solely because of their religious beliefs, our inquiry would be at an end." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). Although the majority continued to reason that the provision offended the Free Exercise Clause because it conditioned the opportunity for political participation on the relinquishing of one's beliefs and because the provision was directed at acts and conduct performed by religious individuals, the Court's statement indicates how strictly the Court will review government action that deprives persons of civil rights and privileges because of their religious beliefs. *Id.* Like the Tennessee provision that disqualified ministers from participating in the legislative process, peremptory challenges that remove jurors because of their religious affiliations deny persons the full benefits of citizenship and must undergo strict scrutiny review.

penalize persons for the exercise of their religious beliefs.<sup>170</sup>

In *Sherbert v. Verner*,<sup>171</sup> the Supreme Court held that a state's refusal to give the plaintiff unemployment compensation benefits because she refused to work on Saturday due to her religious beliefs<sup>172</sup> violated her rights established under the Free Exercise Clause.<sup>173</sup> The Court reasoned that the government violated the Free Exercise Clause because it forced the plaintiff to choose between receiving benefits and following her religious beliefs.<sup>174</sup> The Court stated that this choice placed "the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."<sup>175</sup>

---

170. Penalizing jurors for exercising their religious beliefs by excluding them from juror service may even fail a rational basis test. After the Court's decision in *Smith*, generally applicable regulatory laws that infringe upon a person's religious liberty only need to be justified by a rational basis. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). Since peremptory challenges are similar to facially neutral laws, if religious-based peremptories were challenged under the Free Exercise Clause, such strikes would be considered valid if their use could be justified by a reasonable explanation. See *supra* notes 127-31 and accompanying text. However, prejudices based upon religious affiliations, like stereotypes concerning race and gender, are often an inaccurate and unreasonable indicator of a juror's attitudes. For example, although the Catholic Church denounces the use of artificial contraceptives, approximately 85% of its members feel that it is permissible to use artificial contraceptive devices. See *Casarez v. State*, No. 1114-93, 1994 Tex. Crim. App. LEXIS 140, at \*31 n.15 (Dec. 14, 1994) (en banc) (citing Gallup, *The Gallup Poll: Public Opinion 1993*, 145 (Wilmington, Del.: Scholarly Resources, 1994)). Since religious stereotypes, like gender and racial stereotypes, are often invalid, when religion alone is used to exclude jurors, the government through its state actors presumes that certain jurors are unequalled "to decide important questions upon which reasonable persons could disagree." *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994). *But see State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (asserting that religious-based peremptory challenges do not violate the Equal Protection Clause because a juror's religious affiliations are an accurate indicator of one's beliefs), *cert. denied*, 114 S. Ct. 2120 (1994); *Casarez v. State*, No. 1114-93, 1994 Tex. Crim. App. LEXIS 140, at \*75 (Dec. 14, 1994) (en banc) (Meyers, J., dissenting) (arguing that religious stereotypes are an accurate indicator of a juror's beliefs and attitudes).

171. 374 U.S. 398 (1963).

172. *Id.* The plaintiff, a Seventh-Day Adventist, was fired by her South Carolina employer because she would not work on Saturday due to her religious convictions that Saturday is the Sabbath Day. *Id.* After she was unable to find subsequent employment, the plaintiff filed a claim for unemployment compensation benefits. *Id.* at 399-400. However, under South Carolina's Unemployment Compensation Act, the Employment Security Commission declared her ineligible for benefits because she refused "to accept 'suitable work when offered . . . by the employment office or the employer . . .'" *Id.* at 400 (quoting S.C. CODE § 68-114(3) (1961)).

173. *Sherbert*, 374 U.S. at 410. See also *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (holding that a state's refusal to give unemployment benefits to an employee who refused to work specific hours because of religious beliefs violated the employee's free exercise rights).

174. *Sherbert*, 374 U.S. at 404.

175. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

When courts allow religious-based peremptory challenges, prospective jurors, like the plaintiff in *Sherbert*, are forced to admit their religious affiliations if asked,<sup>176</sup> and to either forfeit the privilege and opportunity to serve as a juror or deny their religious faith as a prerequisite to jury service. The Court, in *Sherbert* and *McDaniel*, clearly rejected the proposition that sacrificing one's exercise of religion was a necessary precondition for eligibility to participate in a state's political process.<sup>177</sup> When peremptory challenges are used to strike a juror because that juror is religious, that juror is in effect taxed and excluded from participation in the judicial system because of his or her religious faith.

Even though the infringement upon a juror's free exercise rights as established under RFRA may only be indirectly restricted by the discriminatory use of religious-based peremptory challenges, such an interference is substantial.<sup>178</sup> In *McDaniel*, Justice Brennan reasoned that because the state's

---

176. Some practitioner guides encourage lawyers to find out jurors' religious affiliations. "Whenever possible, jurors should be questioned about their religion. Find out what denomination and which church they belong to and whether they attend church regularly. Follow-up questions should be designed to reveal the degree of the individual's involvement in church activities." NATIONAL JURY PROJECT, INC., *JURYWORK: SYSTEMATIC TECHNIQUES*, §17.03[2][f] at 17-44 (Elissa Krauss & Beth Bonora eds., 2d. ed 1993). Legal scholars and jury selection manuals also encourage litigants to find out a juror's religious preference. See *supra* note 80.

177. See *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978).

In *McDaniel*, the Court stated that the disqualification provision violated the minister's free exercise rights because it conditioned the opportunity for participation in the political process upon the surrender of the minister's right to exercise his religion. *McDaniel*, 435 U.S. at 626. The Court stated that "[t]he Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs . . . ." *Id.* Justice Brennan emphasized that "[i]f [the plaintiff] were to renounce his ministry, presumably he could regain eligibility for elective office, but if he does not, he must forgo an opportunity for political participation he otherwise would enjoy." *Id.* at 634 (Brennan, J., concurring).

See also *Torcaso v. Watkins*, 367 U.S. 488 (1961). In *Torcaso*, the Court held that Maryland's refusal to commission the plaintiff as a notary public because he refused to declare his belief in God violated the Free Exercise Clause. *Id.* at 495. The Court reasoned that the offense against the First Amendment lay not simply in requiring an oath, but in "limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept." *Id.* at 494. The Court's holdings in *McDaniel* and *Torcaso* mandate that the government may not condition the receipt of an opportunity to participate in the political process without running afoul of the Free Exercise Clause. Likewise, the government cannot discriminate against jurors solely because of their religious preference without violating their free exercise rights pursuant to RFRA because it conditions the opportunity to participate in the judicial system upon the sacrificing of one's faith.

178. In *McDaniel*, the State of Tennessee argued that its constitutional provision which barred ministers from serving as delegates did not violate the petitioner's free exercise rights. *McDaniel v. Paty*, 435 U.S. 618, 633 (1978) (Brennan, J., concurring). Tennessee argued that the disqualification provision did not violate the rights of the petitioner because it did not directly prohibit religious activity, but it only conditioned participation in the political process upon an

constitution required the minister "to purchase his right" to exercise his religion by forgoing his ability to serve as a delegate, it impaired his free exercise of religion.<sup>179</sup> Likewise, when a Catholic juror is struck from the jury pool by a peremptory challenge, that juror is forced to buy the right to engage in Catholicism by relinquishing her opportunity to participate in the judicial system as a juror. This conditioning of benefits based upon one's religious faith not only "chills" the free exercise of religion, but it substantially burdens the free exercise of religion because jurors are penalized for the exercise of their faith.<sup>180</sup>

Furthermore, when Congress enacted RFRA it recognized that neutral governmental action toward religion may burden religious exercise as much as action that intends to interfere with religious exercise.<sup>181</sup> Although peremptory challenges are neutral in theory because they apply to all prospective jurors,<sup>182</sup> when jurors are struck solely because of their religion, the peremptory challenge is no longer neutral, but is clearly discriminatorily singling out and excluding

individual's decision to forgo his or her exercise of religion. *Id.* However, the Court unequivocally rejected the State's argument and reasoned that government action which conditions benefits upon the relinquishing of one's religious affiliation clearly runs afoul to the Free Exercise Clause. *Id.* at 626, 633. Even though the disqualification provision indirectly prohibited the free exercise of religion, the Court reasoned that the disqualification provision was unconstitutional because it penalized the petitioner's free exercise of his faith. *Id.* See also *Sherbert v. Verner*, 374 U.S. 398 (1963) (reasoning that a state's unemployment compensation law that disqualified a person for refusing to work on Saturday violated the Free Exercise Clause because the State indirectly penalized the individual for the exercise of her religious beliefs); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) ("If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."). Likewise, although a juror is penalized indirectly by state actors exercising peremptory challenges, peremptories that exclude jurors because of their religious faith violate jurors' free exercise rights.

179. *McDaniel*, 435 U.S. at 634 (Brennan, J., concurring).

180. In *McDaniel*, the Court reasoned that the disqualification provision was unconstitutional not only because it discriminated against individuals that were religious, but also because the provision unconstitutionally penalized the petitioner for exercising his faith. *Id.* at 618. See also *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961) (holding that a State's refusal to commission a person as a notary public for his refusal to take an oath expressing belief in God violated the Free Exercise Clause because the oath "limit[ed] public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept.").

181. RFRA states, in pertinent part: "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2) (Supp. V. 1993). Congress further stressed that an individual's free exercise rights "may be undermined not only by Government actions singling out religious activities for special burdens, but also governmental rules of general application . . ." S. REP. NO. 103-111, 103d Cong., 1st Sess. 1 (1993), reprinted in 1993 U.S.C.A.A.N. 1892, 1894. See also *Church of Lukumi Babalu Aye v. Hialeah*, 113 S. Ct. 2217, 2250 (1993) (Souter, J., concurring) ("Neutral, generally applicable' laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government.").

182. See *supra* note 129.

those jurors that are religious. A discriminatory component exists within the government's action because other "non-religious" prospective jurors are not subject to this same treatment.<sup>183</sup>

In *Everson v. Board of Education*,<sup>184</sup> the Court reasoned that the First Amendment "requires the state to be a neutral [party] in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."<sup>185</sup> Others have also suggested that the two religion clauses of the First Amendment, when read together, mandate that governmental action remain entirely neutral towards religion.<sup>186</sup> When peremptory challenges are exercised in a discriminatory fashion against venirepersons solely on the basis of their religious preference, the government's action exercised through the peremptory challenge is not neutral.<sup>187</sup> Rather, when the

---

183. See *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (reasoning that a State's constitutional provision that prohibited clergymen from serving as legislators violated the Free Exercise Clause because the State excluded persons from participation in the political process because they were religious); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (reasoning that a State's denial of unemployment compensation to a Seventh-Day Adventist who refused to work on Saturday because of religious beliefs had a discriminatory effect because persons who worshipped on Sunday were not affected); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (holding that a State's refusal to commission a person as a notary public because he refused to take an oath that he believed in God violated the Free Exercise Clause because the State discriminated against him for not professing particular religious beliefs); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (holding that a city ordinance that was applied in a discriminatory fashion violated a religious group's free exercise rights).

184. 330 U.S. 1 (1947).

185. *Id.* at 18. See also *Bowen v. Kendrick*, 487 U.S. 589, 624 (1988) (Kennedy, J., concurring) (reasoning that benefits from state statutes should be "distributed in a neutral fashion to religious and nonreligious applicants alike . . ."); *Welsh v. United States*, 398 U.S. 333, 372 (1970) (White, J., dissenting) ("[N]either support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment."); *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (reasoning that the relationship between the Establishment Clause and the Free Exercise Clause mandates government neutrality and prevents the government from showing "favoritism among sects or between religion and nonreligion . . .").

186. "[T]he [Free Exercise Clause and Establishment] clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses . . . prohibit classification in terms of religion either to confer a benefit or to impose a burden." PHILIP KURLAND, *RELIGION AND THE LAW* 112 (1962).

187. Although venirepersons have no right to sit on a particular jury, they presumably have the right not to be excluded from jury service solely on account of their religious preference. Cf. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994) ("All persons, when granted the opportunity to serve on a jury, have the right not to be excluded . . . because of discriminatory and stereotypical presumptions . . ."); *Powers v. Ohio*, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on a particular petit jury, but he or she does possess the right not to be excluded from one on account of race."); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("[B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.").

government allows state actors to use religious-based peremptory challenges, it implicitly sanctions hostility towards jurors professing religious beliefs.<sup>188</sup> Hostility toward religion is entirely contrary to the intent of our nation's founders who sought to establish a nation based upon the principle of religious tolerance.<sup>189</sup>

---

188. See generally Edward McGlynn Gaffney, Jr., *Hostility To Religion, American Style*, 42 DEPAUL L. REV. 263 (1992) (discussing how the United States' judicial system has been hostile towards religion).

189. In order to fully understand the Free Exercise Clause, it is helpful to know why religious tolerance was important to the colonists. Although most of the founders were not particularly religious individuals, "practically all were convinced that republican government rests on moral values that spring ultimately from religion." A. James Reichley, *Religion and the Constitution, in RELIGION IN AMERICAN POLITICS* 3, 4 (Charles W. Dunn ed., 1989). During the early stages of settlement in the colonies, England discriminated against religions that were not associated with the Anglican Church. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990). The Test Act of 1672 is one example of the English intolerance towards many religious affiliations. The Test Act of 1672 restricted military and public offices to Anglicans and required all those that held office to "swear an oath in court denying transubstantiation and acknowledging the King's supremacy over the Church and to present proof that they had taken communion within the preceding year in accordance with the rites of the Church of England." *Id.* at 1421-22.

However, religious discrimination also occurred in the colonies. In New England, the Puritans wanted to avoid association with anyone who objected to their religious beliefs. *Id.* at 1422. In Massachusetts, Baptists were exiled by statute, "and four Quakers, who insisted on returning after being expelled, were hanged." *Id.* at 1423. Nevertheless, religious tolerance and acceptance soon became the basis for the First Amendment's Free Exercise Clause. The Maryland Assembly was the first colony to incorporate the term "free exercise" into a statute that stated, "noe person . . . professing to believe in Jesus Christ, shall from henceforth bee any waies troubled . . . for . . . his or her religion nor in the free exercise thereof . . . nor any way [be] compelled to the believe or exercise of any other Religion against his or her consent." *Id.* at 1425 (quoting Act Concerning Religion of 1649, reprinted in 5 THE FOUNDERS' CONSTITUTION 49, 50 (P. Kurland & R. Lerner eds., 1987)). Some of the founders disagreed upon the terminology that would adequately protect religious groups and affiliations. Some of the nation's founders advocated that the free exercise or liberty of conscience should be used rather than the free exercise of religion. One anti-federalist argued that "[t]he right of conscience shall be held inviolable; and neither the legislative, executive, nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitution of the several states, which provide for the preservation of liberty in matters of religion." The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 18, 1787), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 237 (Ralph Ketcham ed., 1986). However, the actual difference between freedom of conscience and freedom of religion is irrelevant. Certainly, religious tolerance was one foundation of the United States' Constitution. Pennsylvania's Constitution of 1776 is an example of a state's free exercise clause at the time of the creation and adoption of the United States First Amendment and illustrates an early attempt to protect religious liberty. "[A]ll men have a natural and unalienable right to worship Almighty God . . . nor can any man who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship . . ." PA. CONST. of 1776, reprinted in STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND AMERICAN HISTORY: CASES AND MATERIALS 114 (1980).

Whether jury service is a right, a privilege, or a duty does not matter in determining whether a juror's rights as established by RFRA have been sacrificed.<sup>190</sup> As the Court reasoned in *McDaniel*, a state may not extend benefits of citizenship to some while denying those same benefits to others because of the latter's religious faith.<sup>191</sup> Concurring in *McDaniel*, Justice Brennan emphasized that the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."<sup>192</sup>

Although exclusion from jury service is something that many jurors would welcome, individual liberties, such as the free exercise of religion, should not depend upon the willingness of others to enforce those rights. All persons value rights, privileges, and freedoms differently. Although many citizens may not aspire to serve on a jury, the Supreme Court has continually stressed that jury service is a fundamental aspect of a democracy.<sup>193</sup> When state actors exercise religious-based peremptory challenges, jurors' free exercise rights are abridged not only because they are disadvantaged for being religious, but because the state conditions participation in jury service upon the forgoing of one's religious liberty.

190. See *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330 (1970) (reasoning that regardless of whether jury service is a right, a privilege, or a duty, a State may not extend it to some of its citizens and deny it to others on racial grounds).

191. *McDaniel v. Paty*, 435 U.S. 618, 626-27 (1978). See also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). In responding to South Carolina's argument that its denial of unemployment benefits to the plaintiff did not violate the Free Exercise Clause, the Court in *Sherbert* reasoned that the State's unemployment statute could not be:

saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

*Sherbert*, 374 U.S. at 404.

192. *McDaniel*, 435 U.S. at 639. See also PHILIP KURLAND, *RELIGION AND THE LAW* 18 (1962) ("[R]eligion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations.").

193. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1430 (1994) ("Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law . . . ."); *Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."); *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting) ("[Jury Service] affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, ones hopes, a respect for law."). For further authority emphasizing that the opportunity to participate as a juror is a fundamental aspect of citizenship, see *supra* note 62.



*D. The Government is Unable to Justify the Use of Religious-Based Peremptory Challenges.*

Once a party establishes that the government has substantially interfered with a juror's free exercise rights under RFRA, the burden then shifts to the government or the party exercising the peremptory challenge.<sup>194</sup> Like other constitutional rights, jurors' free exercise rights are not absolute but must yield to compelling governmental interests. In order for religious-based peremptories to be upheld, the government must justify its infringement of the excluded juror's rights with a compelling state interest that is implemented through the least restrictive means available.<sup>195</sup>

1. Government's Compelling Interest: An Impartial Jury

The government has a compelling interest to provide litigants with an impartial jury of their peers, and the peremptory challenge is a means to secure an impartial jury.<sup>196</sup> However, the Supreme Court's repeated willingness to erode the peremptory challenge calls into question the peremptory challenge's very existence as a means of affording litigants an impartial jury trial.<sup>197</sup> The Court has stated that peremptory challenges are not constitutionally guaranteed<sup>198</sup> and are subject to the constitutional rights of both jurors and litigants.<sup>199</sup> Furthermore, if the peremptory challenge still may be deemed an important aspect of the right to secure a trial by an impartial jury, the benefit that occurs from exercising peremptories against jurors solely on the account of their religious affiliation is surely outweighed by the harm to the juror, the

194. See 42 U.S.C. § 2000bb-1(b) (Supp. V. 1993).

195. "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (Supp. V. 1993).

196. See *supra* notes 3-4 and accompanying text.

197. See *supra* note 77.

Some studies have concluded that peremptory challenges are an ineffective means to secure an impartial jury. See generally Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978) (concluding that peremptory challenges have little to no effect on the outcome of jury verdicts).

198. See *supra* note 6 and accompanying text.

199. See *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that a criminal defendant's use of peremptories to remove jurors solely on the account of their race violates jurors' equal protection rights); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the State's use of race-based peremptory challenges breaches the equal protection rights of the defendant and the excluded juror).

litigants, the community, and the judicial system.<sup>200</sup> Nevertheless, assuming the government's interest in permitting litigants to exercise religious-based peremptory challenges can be termed "compelling," that interest must be accomplished through the least restrictive means available.<sup>201</sup> The government's interest in providing litigants with an impartial jury, although a very important interest, can be accomplished through a less restrictive means other than allowing the use of religious-based peremptories.

## 2. A Less Restrictive Means: Liberalization of Voir Dire

In determining the constitutionality of gender-based peremptory challenges, the *J.E.B.* Court stated that "we do not weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious discrimination from the courtroom. Instead, we consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury."<sup>202</sup> Likewise, the stereotypes underlying the use of religious-based peremptories must be scrutinized when the constitutionality of such peremptories is questioned. Stereotypes surrounding a juror's religious affiliation, like stereotypes

200. Jurors are harmed by religious-based peremptory challenges because their free exercise rights are abridged and they are denied a fundamental benefit of citizenship on the sole account that they are religious. For a more detailed discussion of how religious-based peremptories violate jurors' rights, see *supra* notes 163-93 and accompanying text.

The discriminatory use of religious-based peremptories harms the litigants as well. In *Batson*, the Court noted that defendants are entitled to be tried by a jury that is selected pursuant to non-discriminatory criteria. *Batson*, 476 U.S. at 85-86. Litigants have an interest in fair judicial proceedings. Religious-based peremptory challenges cast doubt upon jury verdicts because the neutrality of judicial proceedings is sacrificed due to discrimination. *Cf. Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991) (reasoning that racial discrimination in the courtroom "raises serious questions as to the fairness" of judicial proceedings); *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (noting that preventing race-based peremptories protects a "defendant's interest in neutral jury selection . . . [and] may have some bearing on the truthfinding function of a criminal trial.").

Religious-based peremptories also harm the community and the integrity of the judicial system. The community is harmed because untested stereotypes regarding the ability of religious jurors are reinforced by state actors. *Cf. J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994) (asserting that gender-based peremptory challenges reinforce the stereotypes regarding the relative abilities of men and women). Religious-based peremptories also undermine the public's confidence in the judicial system. *Cf. Georgia v. McCollum*, 112 S. Ct. 2348, 2354 (1992) (reasoning that race-based peremptories undermine public confidence in judicial proceedings); *Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."). Although *Batson* and its progeny deal primarily with racial discrimination, religious discrimination during jury selection also undermines public confidence, especially because religion is an important aspect of many Americans' lives. *See, e.g., GEORGE GALLUP, JR. & JIM CASTELLI, THE PEOPLE'S RELIGION: AMERICAN FAITH IN THE 90's* (1989); *THE PERSISTENCE OF RELIGION* (Andrew M. Greeley & Gregory Baum eds., 1973).

201. *See* 42 U.S.C. § 2000bb-1(b) (Supp. V. 1993).

202. *J.E.B.*, 114 S. Ct. at 1425-26 (citations omitted).

concerning race and gender, are often inaccurate.<sup>203</sup> Consequently, peremptory challenges exercised solely on stereotypes surrounding religious affiliations are overbroad because excluded jurors may not personally adhere to the teachings of their religious affiliation.<sup>204</sup> Furthermore, when religious-based peremptories are permitted, the government, through its state actors, condones religious discrimination that the Free Exercise Clause and RFRA seek to preclude.<sup>205</sup>

In *J.E.B.*, the Court emphasized that if voir dire was conducted properly, additional information would enable litigants to exercise peremptories on grounds other than "stereotypical and pejorative notions . . . ."<sup>206</sup> Voir dire provides litigants a means of discovering juror biases<sup>207</sup> and serves as a foundation for the intelligent use of peremptory challenges.<sup>208</sup> However, voir dire procedures often limit and restrict the amount of information gathered during voir dire. The limited information gathered during voir dire often

203. See *Casarez v. State*, No. 1114-93, 1994 Tex. Crim. App. LEXIS 140, at \*31 n.15 (Dec. 14, 1994) (en banc) (noting that "although the Catholic Church condemns the use of artificial contraceptives . . . 84% of the members of the Catholic Church believe catholics should be allowed to use artificial contraceptives.") (citations omitted); Brenda D. Hofman, *Political Theology: The Role of Organized Religion in the Anti-Abortion Movement*, 28 J. CHURCH & ST. 225, 229-30 (1986) (noting that many members of pro-life religious denominations are personally pro-choice); Samuel A. Mills, *Abortion and Religious Freedom: The Religious Coalition for Abortion Rights (RCAR) and the Pro-Choice Movement, 1973-1989*, 33 J. CHURCH & ST. 569 (1991) (same); Shirley Salemy, *Ex-Episcopal Bishop Faces Heresy Trial for Supporting Gays; Clergyman, 72, Forces Debate Into the Open*, CHI. TRIB., Dec. 17, 1995, Metro §, at 3 (noting that although the Episcopal Church opposes homosexuality, some of the Church's leaders condone homosexual lifestyles).

204. Religious-based peremptories are also underinclusive. "They are underinclusive insofar as challenges on the basis of religious affiliation overlook nonreligious potential jurors who may hold beliefs similar to those of a religious potential juror." Barton, *supra* note 86, at 210.

205. Cf. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1426 (1991) ("We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'") (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). For historical information illustrating why the founders' desire for religious tolerance led to the passage of the Free Exercise Clause, see *supra* note 189.

206. *J.E.B.*, 114 S. Ct. at 1429.

207. See *supra* note 4.

208. *J.E.B.*, 114 S. Ct. at 1429. See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 602 (1976) (Brennan, J., concurring) (reasoning that voir dire "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause."); *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965) ("The voir dire in American trials tends to be extensive and probing, operation as a predicate for the exercise of peremptories, and the process of selecting a jury . . . ."); *United States v. Greer*, 939 F.2d 1076, 1085 (5th Cir. 1991) (reasoning that "voir dire . . . provide[s] defendants with the opportunity to make reasonable use of their peremptory challenges."); *United States v. Baker*, 638 F.2d 198, 200 (10th Cir. 1977) ("Without an adequate foundation [produced by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges . . . ."); *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977) ("Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes."), *cert. denied*, 434 U.S. 902 (1977).

encourages litigants to exercise peremptory challenges in a discriminatory fashion.<sup>209</sup> The combination of additional questions during voir dire once a juror's religious affiliation is disclosed<sup>210</sup> and attorney-conducted voir dire<sup>211</sup> could curb the discriminatory effects of religious-based peremptory challenges while securing the government's interest in providing litigants with an impartial jury trial.

In general, trial court judges should require litigants to ask additional questions during voir dire once a juror's religious affiliation is disclosed.<sup>212</sup> Rather than allowing litigants to presume that certain individuals are unable to serve as impartial jurors, judges should require a litigant's assumptions about jurors' religious affiliations to be tested through voir dire.<sup>213</sup> One means of testing litigants assumptions regarding jurors' religious affiliations is to require

209. One commentator has stated:

Because litigants do not know prospective jurors personally and are provided with only limited information about the jurors during voir dire, they often have no choice but to exercise peremptories on the basis of stereotypes. No doubt, absent limitations on the use of peremptories, there is ample room for reliance on prejudices—negative biases conceived independently of experience or reason . . . .

Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 837 (1989).

210. See *infra* notes 212-18 and accompanying text.

211. See *infra* notes 219-23 and accompanying text.

212. A juror's religious preference is not a proper subject for inquiry during voir dire unless the religious organization that the juror is associated with is directly related to the subject matter of the suit, or if it can be shown that the jurors' religious preference will impair the juror's ability to act objectively. See *State v. Davis*, 504 N.W.2d 767, 772 (Minn. 1993) ("Ordinarily at common law, inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper."), *cert. denied*, 114 S. Ct. 2120 (1994); *Hornsby v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 758 P.2d 929 (Utah 1988); *Coleman v. United States*, 379 A.2d 951 (D.C. 1977); *Casey v. Roman Catholic Archbishop of Baltimore*, 143 A.2d 627 (Md. 1958).

However, neutral questions during voir dire may prompt jurors to disclose their religious affiliations. See *State v. Eason*, 445 S.E.2d 917 (N.C. 1994). In *Eason*, a juror disclosed his religious affiliation in response to a neutral question regarding crime and punishment. *Id.* at 923. See also *Commonwealth v. Carleton*, 629 N.E.2d 321, 327 n.10 (Mass. 1994) (noting that during a colloquy with the judge, a prospective juror stated he was a Roman Catholic).

A juror's religious preference may also be discovered as a result of attorney research in preparation for voir dire. See generally VAN DYKE, *supra* note 45, at 183-89. The Government can gather information about a juror's religious affiliations by using police officers and FBI investigators on an "informal" basis. See Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 561 (1975). Regardless of how jurors' religious affiliations are disclosed, rather than permitting litigants to simply exclude a juror solely because they are religious, judges should require litigants to show how venirepersons' religious preferences may make them undesirable.

213. Cf. Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1934 (1992) (arguing that gender stereotypes should be tested with more questions during voir dire).

litigants to show a nexus between the jurors' religious faith and their ability to serve as an impartial trier of fact.

A nexus requirement is similar to what courts employ when they determine if a jurors' religious beliefs will prevent them from recommending a death penalty sentence regardless of the facts of the case. In *Wainwright v. Witt*,<sup>214</sup> the Supreme Court held that potential jurors may be excused for cause when their opposition to the death penalty due to personal or religious beliefs is such that it would "prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instruction and . . . oath."<sup>215</sup> Although the nexus requirement discussed in *Wainwright* dealt with challenges for cause, a similar showing could be utilized to justify religious-based peremptory challenges. Instead of requiring litigants to show that a venireperson's religious affiliation "substantially" impairs the ability to serve as an impartial trier of fact, judges could require litigants to show that a juror's religion would prevent impartiality.<sup>216</sup> Therefore, so long as the judge could determine that the explanation for the removal of a juror was reasonable in light of the circumstances surrounding the case, even though the explanation did not rise to the level for challenging a juror for cause, litigants would be able to remove an undesirable juror.<sup>217</sup> By forcing litigants to test their assumptions about specific "religious" jurors, litigants will then be able to exercise their

---

214. 469 U.S. 412 (1985).

215. *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). See also *Darden v. Wainwright*, 477 U.S. 168 (1986) (reasoning that a juror who had moral beliefs against the death penalty was properly removed for the cause).

216. For example, in a case involving an alleged violation of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994), the attorney general could not strike a Roman Catholic juror on the sole account of the juror's religious affiliation, but might be able to do so if the attorney general could show that the juror held religious beliefs opposed to abortion.

217. Cf. *State v. Davis*, 325 S.E.2d 607 (N.C. 1989) (reasoning that when a potential juror has religious reservations about the death penalty which are not so grave as to merit removal for cause, the juror may be peremptorily removed). See also *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (reasoning that a race-neutral explanation for the removal of African-American jurors need not rise to the level justifying the exclusion of a juror for cause); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1429 (1994) (reasoning that a gender-neutral explanation "need not rise to the level of a 'for cause' challenge . . .").

A nexus test would also avoid some of the complications surrounding the exercise of religious-based peremptories. Although religious-based peremptories violate a jurors' rights, litigants should not be required to offer a "religious-neutral" justification for peremptories that are challenged under RFRA. Often it may be impossible for a litigant to justify the exclusion of a juror with religious affiliations on an entirely "religious-neutral" ground. Instead, when religious-based peremptories are challenged, litigants should be required at least to show a nexus between the juror's religious faith and the juror's ability to act objectively. Upon a showing that a juror's religious faith is likely to impair his or her ability to act impartially, the court should allow the juror to be excluded for cause or for some level short of cause.

limited number of peremptory challenges more effectively.<sup>218</sup>

In addition to requiring litigants to further question jurors once their religious affiliations are disclosed, attorneys could be allowed to conduct voir dire rather than trial court judges. Efficiency concerns<sup>219</sup> and the fear that lawyers will abuse the privilege by asking improper questions are reasons used to justify the trend towards judge-conducted voir dire.<sup>220</sup> However, when judges conduct voir dire, the amount of information that is gathered is often limited and the parties are encouraged to exercise peremptory challenges based

218. Effective voir dire procedures facilitate the intelligent use of peremptory challenges. See *supra* note 208.

219. See Babcock, *supra* note 212, at 548.

The reason for the time savings is that judges are neither inclined nor as able to ask the appropriate next question when answers are evoked from the prospective jurors . . . . This is true partly because the judge does not have the . . . advocate's awareness that soon he will be making peremptory challenges based on inferences from what prospective jurors have said, and partly because the judge does not know the case of either party in detail, so that he cannot realize when responses have opened areas for further inquiry.

*Id.* at 548-49.

"If the judge asks the voir dire questions, the prospect is that the total selection time will be drastically shortened." DR. JAMES RASICOT, *JURY SELECTION, BODY LANGUAGE AND THE VISUAL TRIAL* 88 (1983).

Most studies conclude that judge-conducted voir dire, rather than attorney-conducted voir dire, is more efficient. For example, one study revealed that federal judges take approximately 30 minutes to conduct voir dire. JOHN GUINTEA, *THE JURY IN AMERICA* 52 (1988). However, statistics on a New York court proceeding indicate that attorney-conducted voir dire averages about 12.5 hours. *Id.* Nevertheless, other surveys suggest that there is little difference in the amount of time for judge conducted voir dire versus attorney conducted voir dire. See VAN DYKE, *supra* note 45, at 165. In fact,

[s]urveys by the California Judicial Council in the early 1970s produced the seemingly incongruous conclusion that judge-conducted voir dire in civil cases actually takes 2 minutes longer than attorney-conducted voir dire when the time for the pre- and post-examination conferences is included—as it must be if the real concern is time.

*Id.* at 165 n.h.

Another study found that in federal civil cases judges took an average of 36 minutes to conduct voir dire, while lawyers took approximately 45 minutes. Brent J. Gurney, Note, *The Case For Abolishing Peremptory Challenges In Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 272-73 n.217 (1986).

220. In recent years, the trend is towards judge-conducted voir dire rather than allowing litigants to question potential jurors. VAN DYKE, *supra* note 45, at 164. Proponents argue that attorneys abuse their privilege because they:

frequently attempt to explain elements of their case in a sympathetic manner to the prospective jurors or to influence the jurors on questions of law while they are trying to establish 'rapport,' and it is this subtle indoctrination that has offended many judges and commentators, who argue that such adversary arguments have no place in the jury-selection phase and should wait until the trial actually begins.

*Id.* at 165.

upon discriminatory notions.<sup>221</sup> Attorneys, rather than judges, are more likely to ask questions that will enable them to effectively exercise peremptories because attorneys typically understand the case in more detail than judges.<sup>222</sup> Thus, an attorney's familiarity with the case will encourage narrowly tailored and focused questions aimed at revealing a venireperson's prejudices.<sup>223</sup> Ideally, further questions will enable the litigants to obtain a sufficient amount of information that will allow them to intelligently exercise peremptory challenges without having to rely on religious stereotypes that result in the discriminatory use of peremptory challenges.

The combination of additional questioning once a juror's religious affiliation is disclosed and attorney-conducted voir dire will lengthen the trial process. Nevertheless, effective voir dire proceedings will help to disclose impartial jurors.<sup>224</sup> Furthermore, the general liberalization of voir dire may actually save judicial resources in the long run. The liberalization of voir dire would reduce the ability of a litigant to argue on appeal that the jury selection procedures were unconstitutional due to the discriminatory use of religious-based

---

221. See *supra* note 209 and accompanying text.

222. In fact, the Fifth Circuit has criticized the federal approach of judge-conducted voir dire. "The 'federal' practice of almost exclusive voir dire examination by the court does not take into account that it is the parties, rather than the court, who have the full grasp of the nuances and the strength and weaknesses of the case." *United States v. Ible*, 630 F.2d 389, 394 (5th Cir. 1980). See also *Babcock*, *supra* note 212, at 548-49.

223. See NATIONAL JURY PROJECT, INC., *JURYWORK: SYSTEMATIC TECHNIQUES*, § 2.05[3][b] at 2-33 (Elissa Krauss & Beth Bonora eds., 2d. ed. 1995).

When judges conduct voir dire the questions asked to the jurors are often abstract and unlikely to elicit useful responses. See *Babcock*, *supra* note 212, at 548. One commentator has used the following example to illustrate the practical differences between judge-conducted and attorney-conducted voir dire.

[W]hen a potential juror responds that she has been the victim of a crime, the judge will typically ask whether this would tend to prejudice her in evaluating the testimony to be given in the case. An attorney conducting voir dire would probe the nature of the crime, her evaluation of police investigation and conduct toward her, whether she made an identification and testified in court. Such questions spring to the mind of the advocate, but would occur less often to the judge.

*Id.* at 548-49.

224. See *supra* note 5. Furthermore, limited voir dire proceedings are unequally shouldered by poor litigants that cannot afford adequate legal representation. See *Babcock*, *supra* note 212, at 558.

The poor litigant is left with the answers to a few short questions as the basis for exercising his challenges. The wealthy makes his jury selection on much sounder grounds. For a substantial fee, jury investigation services will compile dossiers on all of the prospective jurors, including information such as party, church, social and other affiliations, family configurations, employment records, and financial standing. Very rich litigants eschew these services and hire their own investigators to find out even more revealing information . . . .

*Id.* at 558-59.

peremptories. For example, once a juror's religious affiliation is disclosed and additional questions are asked regarding the juror's religious faith, information will be gathered that either will permit a litigant to remove the juror for cause<sup>225</sup> or will reveal that the litigant's stereotypes regarding the juror's religious affiliation were invalid. Because litigants would be required to question jurors beyond general religious affiliations, a party's ability to argue that jurors' rights pursuant to RFRA were violated is substantially decreased. Trial court records would show that jurors with religious affiliations were not removed because they were religious, but were removed when it was revealed that their religious faith impaired their ability to act impartially.<sup>226</sup> The increased amount of information resulting from voir dire not only aids the litigants,<sup>227</sup> but protects jurors from being excluded solely on the basis of their religious affiliations.<sup>228</sup>

## VI. CONCLUSION

*Batson* and its progeny have substantially altered the traditional nature of the peremptory challenge.<sup>229</sup> In the future, the Supreme Court will likely address the issue of whether to prohibit religious-based peremptory challenges.<sup>230</sup> Although the exercise of race-based and gender-based

225. Additionally, if the trial judge decides that not enough information has been gathered to justify the removal of a juror for cause, litigants could still remove a juror pursuant to *Batson's* rational of a heightened peremptory challenge. See *supra* note 217.

226. A nexus test would be a useful means to disclose a juror's biases and prejudices that stem from his or her religious preference. For a discussion of the nexus test, see *supra* notes 213-17 and accompanying text.

227. Extensive voir dire proceedings aid the litigants because additional information gathered allows for the intelligent use of peremptory challenges. See *supra* note 208. See also note 4.

228. When litigants conform to RFRA's strict scrutiny standard, additional questions beyond a juror's religious preference should be asked. Due to RFRA's strict scrutiny standard, the government must secure an impartial jury trial through the least restrictive means available. See 42 U.S.C. § 2000bb-1(b) (*Supp. V.* 1993). Other less restrictive means exist to secure the government's compelling interest in impartial jury trials rather than permitting the use of religious-based peremptories. See *supra* notes 202-23 and accompanying text.

229. See *supra* notes 36-74 and accompanying text.

230. When the Court does address the issue of religious-based peremptory challenges, the issue will likely divide the Court. The Court's decision to prohibit gender-based peremptory challenges caused controversy among many of the current Court's members. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). Concurring in *J.E.B.*, Justice O'Connor expressed concern about the future of the peremptory challenge. *Id.* at 1431-32. Justices Rehnquist, Scalia, and Thomas have consistently opposed the erosion of the peremptory challenge. See, e.g., *id.* at 1434-35 (Rehnquist, J., dissenting) (reasoning that the Court's decision to prohibit gender-based peremptories places all peremptory challenges at risk); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 644 (1991) (Scalia, J., dissenting) (asserting that the Court's continual erosion of the peremptory challenge is unnecessary and impairs the ability of litigants to obtain an impartial jury); *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992) (Thomas, J., concurring) (arguing that the Court's holding to prohibit defendants from exercising race-based peremptories, "while protecting jurors, leaves



peremptory challenges has been limited according to the Equal Protection Clause, the application of RFRA to jury selection procedures stands as a barrier in opposition to religious-based peremptories. When state actors exclude jurors solely due to their religious affiliations, the jurors' free exercise rights under RFRA are violated.<sup>231</sup> In the future, courts must take greater notice of jurors' free exercise rights secured by RFRA's strict scrutiny mandate when the validity of religious-based peremptory challenges is analyzed.

Gary C. Furst

---

defendants with less means of protecting themselves.”).

Nevertheless, both Justice Scalia and Justice Thomas have suggested that after the Court's decision in *J.E.B.*, classifications based upon religion may also be unconstitutional. Justice Thomas has stated:

In breaking the barrier between classifications that merit strict equal protection scrutiny and those that receive what we have termed “heightened” or “intermediate” scrutiny, *J.E.B.* would seem to have extended *Batson*'s equal protection analysis to all strikes based on the latter category of classifications a category which presumably would include classifications based on religion . . . . It is at least not obvious, given the reasoning in *J.E.B.*, why peremptory strikes based on religious affiliation would survive equal protection analysis.

*Davis v. Minnesota*, 114 S. Ct. 2120, 2121 (1994) (Thomas, J., dissenting).

See also *J.E.B.*, 114 S. Ct. at 1438 (Scalia, J., dissenting) (suggesting that religious-based peremptories may fail intermediate scrutiny).

Although Justices Scalia and Thomas have asserted that religious-based peremptories may be limited under the Equal Protection Clause's intermediate scrutiny standard, RFRA's strict scrutiny standard forbids the exclusion of jurors solely on the account of their religious preference. See *supra* notes 163-93 and accompanying text. See also 42 U.S.C. § 2000bb-1(b) (Supp. V. 1993) (stating RFRA's strict scrutiny standard).

231. See *supra* notes 163-93 and accompanying text.