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Religion-Based Peremptory Challenges After *Batson v. Kentucky* and *J.E.B. v. Alabama*: An Equal Protection and First Amendment Analysis

Benjamin Hoorn Barton

INTRODUCTION

During voir-dire¹ examination in a criminal trial, the prosecutor notices that a black venire person is wearing a cross. Without asking any further questions, the prosecutor uses one of her peremptory challenges² to remove this venire person from the jury panel. In response to this strike, the defense counsel raises an objection under *Batson v. Kentucky*³ that the peremptory challenge is race-based and therefore impermissible. The court asks the prosecutor to state a race-neutral explanation for the challenge. The prosecutor explains that the defendant is Christian and that the venire person may be biased.

This explanation is likely to be found legitimate under current law. *Batson* and its progeny eliminated race-based peremptory challenges, but courts have generally limited *Batson* to race and

1. A jury is selected from the venire — a panel of prospective jurors — and voir dire is the questioning process used in the selection of jurors. “[I]t is necessary to select from the panel of prospective jurors those individuals who will actually serve as jurors in [the] case. The examination of prospective jurors for this purpose is commonly referred to as the voir dire” 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3, at 718 (1985).

2. Challenges for cause and peremptory challenges are the two methods of preventing a potential juror from being impanelled. “Challenges for cause, the Supreme Court has noted, ‘permit rejection of jurors on narrowly specified, provable and legally cognizable bases of partiality.’ Both the defense and the prosecution may challenge an unlimited number of jurors for cause Usually, not many prospective jurors are lost in this way.” 2 LAFAVE & ISRAEL, *supra* note 1, § 21.3, at 728 (1985) (footnote omitted) (quoting *Swain v. Alabama*, 380 U.S. 202, 220 (1965)). Peremptory challenges, however, formerly were “exercised without a reason stated, without inquiry and without being subject to the court’s control.” *Swain*, 380 U.S. at 220. However, the Supreme Court cases of *Batson v. Kentucky*, 476 U.S. 79 (1985), and *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), among others, have curtailed the arbitrary nature of the peremptory challenge by ruling that it is unconstitutional to remove potential jurors solely on the basis of race (*Batson*) or sex (*J.E.B.*).

3. 476 U.S. 79, 86-87 (1985). *Batson* held that race-based peremptory challenges violate the rights of the defendant and the potential juror: “The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race [B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.” 476 U.S. at 86-87.

Once a litigant objects to a peremptory challenge as unconstitutional under *Batson*, the striking party must give a race-neutral explanation for the challenge. For a discussion of this procedure and *Batson* in general, see *infra* text accompanying notes 13-22.

permitted religion-based peremptories.⁴ Courts have allowed peremptory challenges of black potential jurors⁵ because of the juror's "fringe religious group preference,"⁶ the juror's choice to "omit [] an answer to the religious preference question on the juror information card,"⁷ and on the basis that the juror "carried a Bible."⁸ In all of these cases, the lawyer who exercised the peremptory challenge failed to present any connection between the potential juror's religious affiliation and the case at hand, nor was there any information about the potential juror's specific beliefs.

The analysis relied upon by these courts must be reassessed, however, in light of the Supreme Court's ruling in *J.E.B. v. Alabama ex rel. T.B.*,⁹ which extended *Batson*'s protections to gender-based peremptory challenges. *J.E.B.* opens the question whether *Batson* should be extended further to eliminate religion-based peremptory challenges. At present there is a split in authority concerning the constitutionality of religion-based peremptory challenges.¹⁰

4. See, e.g., *State v. Davis*, 504 N.W.2d 767, 769-71 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994); *State v. Lundgren*, Nos. 90-L-15-140, 91-L-036, 1993 WL 346444, at *39 (Ohio Ct. App. Sept. 14, 1993), *aff'd*, 653 N.E.2d 304 (1995).

5. This Note uses "venire person" and "potential juror" interchangeably.

6. *Chambers v. State*, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987). The religious groups at issue were the Church of Christ and the Jehovah's Witnesses. 724 S.W.2d at 442.

7. *Grady v. State*, 730 S.W.2d 191, 195 (Tex. Ct. App. 1987), *vacated*, 761 S.W.2d 19 (Tex. Ct. App. 1988).

8. *State v. Worthy*, 532 So. 2d 541, 553 (La. Ct. App. 1988).

9. 114 S. Ct. 1419 (1994).

10. Only one case has squarely held that under *Batson* and *J.E.B.* religion-based peremptory challenges are unconstitutional. See *Casarez v. State*, No. 1114-93, 1994 WL 695868 (Tex. Crim. App. Dec. 14, 1994) (en banc). One federal circuit court has intimated in dicta that *Batson* extends to religion. See *United States v. Greer*, 939 F.2d 1076, 1086 n.9 (5th Cir. 1991), *vacated in part on reh'g. en banc*, 968 F.2d 433 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1390 (1993).

The Third Circuit, however, has allowed religion as a race-neutral explanation for a *Batson* objection. *United States v. Clemmons*, 892 F.2d 1153, 1157 (3d Cir. 1989), *cert. denied*, 496 U.S. 927 (1990). Numerous state courts have ruled similarly. See, e.g., *People v. Malone*, 570 N.E.2d 584, 588-89 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 135 (Ill. 1991) (allowing a strike because religion played a major role in the juror's life); *State v. Worthy*, 532 So. 2d 541, 553 (La. Ct. App. 1988) (allowing a strike because the juror carried a Bible); *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994); *Johnson v. State*, 529 So. 2d 577, 583 (Miss. 1988) (allowing dismissal of a juror because of "non-committal" responses to religious questions); *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. 1987) (stating that in exercising peremptory challenges "[c]ounsel must rely upon perceptions of attitudes based upon demeanor, gender . . . religion, and many other fundamental background facts").

Some state courts have eliminated certain types of peremptory challenges of potential jurors under their state constitutions. See *People v. Sanders*, 797 P.2d 561, 574 (Cal. 1990) (holding that peremptories based on an identifiable group, such as race or religion, violate the state constitution); *Fields v. People*, 732 P.2d 1145, 1153 n.15 (Colo. 1987) (noting decisions of other state courts); *Joseph v. State*, 636 So. 2d 777, 780-81 (Fla. Dist. Ct. App. 1994) (holding the peremptory challenge of Jews unconstitutional under the state constitution); *State v. Levinson*, 795 P.2d 845, 850 (Haw. 1990) (holding gender-based peremptory challenges unconstitutional); *Commonwealth v. Carleton*, 629 N.E.2d 321, 325 (Mass. App. Ct. 1993) (holding peremptory challenges based on bias inferred from membership in a discrete community group unconstitutional); *State v. Gilmore*, 511 A.2d 1150, 1154 (N.J. 1986) (hold-

This Note argues that under *Batson*, *J.E.B.*, the First Amendment,¹¹ and the Equal Protection Clause,¹² religion-based peremptory challenges are unconstitutional. This Note asserts that the analysis of governmental religious discrimination, such as a peremptory challenge, is the same under either the First Amendment or the Equal Protection Clause because both apply strict scrutiny to purposeful government discrimination.

Part I examines *Batson* and *J.E.B.* in greater detail and states a model for analyzing discriminatory peremptory challenges in which such challenges are treated as intentional governmental discrimination subject to heightened scrutiny. Part II argues that under the First Amendment, intentional governmental religious discrimination, such as a peremptory challenge, is strictly scrutinized. Part III asserts that strict scrutiny is applied to religious discrimination under the Equal Protection Clause as well. Part IV applies the strict scrutiny standard to religion-based peremptory challenges and concludes that such challenges are not narrowly tailored and therefore are unconstitutional. Part V addresses the practical difficulties involved in finding religion-based peremptory challenges unconstitutional and argues that they are not significant enough to preserve the use of religion-based peremptory challenges.

I. THE *BATSON*-*J.E.B.* MODEL

In assessing the constitutionality of religion-based peremptory challenges, it is important first to understand the Court's precedents concerning race- and gender-based peremptory challenges and the Court's general approach under the Equal Protection Clause. Section I.A argues that *Batson* did not apply traditional equal protection analysis and left the possibility of expanding *Batson* beyond race unclear. Section I.B argues that the cases following *Batson* es-

ing peremptory challenges based solely on membership in a cognizable group unconstitutional).

There is also a split among recent commentators. Compare J. Suzanne Bell Chambers, Note, *Applying the Break: Religion and the Peremptory Challenge*, 70 IND. L.J. 569 (1995) (arguing religion-based peremptory challenges are constitutional) with Angela J. Mason, Note, *Discrimination Based on Religious Affiliation: Another Nail in the Peremptory Challenge's Coffin?*, 29 GA. L. REV. 493 (1995) (arguing the opposite) and David G. Hart & Russell D. Cawyer, *Batson and its Progeny Prohibit the Use of Peremptory Challenges Based Upon Disability and Religion: A Practitioner's Guide for Requesting a Civil Batson Hearing*, 26 TEX. TECH. L. REV. 109 (1995) (arguing the same from a Texas practitioner's point of view).

11. The First Amendment states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" U.S. CONST. amend. I.

12. Section One of the Fourteenth Amendment states: "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, § 1.

tablish that peremptory challenges are subject to traditional equal protection analysis and that *J.E.B.* sets the model for such analysis.

A. *Batson* and Traditional Equal Protection Jurisprudence

Batson did not apply traditional equal protection analysis to race-based peremptory challenges. *Batson* departed from traditional equal protection analysis in two ways. First, *Batson* created a unique structure for establishing intentional governmental discrimination in the use of peremptory challenges, and second, once intentional discrimination was established, *Batson* did not apply strict scrutiny to race-based peremptories.

Batson's treatment of peremptory challenges was unusual because of the mechanism the Court used to establish purposeful government discrimination. Under traditional equal protection analysis, the Court requires proof of intentional discrimination to invalidate government race discrimination.¹³ To find intentional discrimination, the Court usually differentiates between government acts that facially discriminate¹⁴ and government acts that are facially neutral but have a disparate impact¹⁵ upon a racial group. If an act is facially discriminatory, the Court infers intent to discriminate.¹⁶ If the government act is facially neutral but disparately impacts a racial group, the Court requires a separate showing of intent.¹⁷ *Batson* never stated whether race-based peremptory challenges constituted facial discrimination.¹⁸

13. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); see also *Washington v. Davis*, 426 U.S. 229, 239-41 (1976).

14. A government act facially discriminates if it explicitly singles out a group for different treatment. The antimiscegenation law struck down in *Loving v. Virginia*, 388 U.S. 1 (1967), is an example of facial discrimination.

15. If a government act does not facially classify according to race but disproportionately affects one racial group, it is said to have disparate impact. See *Arlington Heights*, 429 U.S. at 265-66. An example of disparate impact is a government job test that disproportionately eliminates black candidates. See *Davis*, 426 U.S. at 232-33.

16. See *Personnel Admr. v. Feeney*, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."); cf. *Arlington Heights*, 429 U.S. at 266 (describing the standard for establishing invidious intent for legislation which is "neutral on its face").

17. See *Arlington Heights*, 429 U.S. at 265. This focus on discriminatory intent has been widely criticized. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-20, at 1509-10 (2d ed. 1988); Gayle Binion, "Intent" and *Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397; Catharine A. MacKinnon, *Reflection on Sex Equality Under Law*, 100 YALE L.J. 1281, 1321 n.170 (1991).

18. Peremptory challenges are not facially discriminatory. A peremptory challenge can be used to strike potential jurors of any race for any reason. See *Swain v. Alabama*, 380 U.S. 202, 221-22 (1965) ("In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."). Although the use of the peremptory challenge has had a disparate impact on minorities, a showing of disparate impact is insufficient proof of intentional discrimination. See *Davis*, 426 U.S. at 239-42 (using jury selection cases as support for requiring a separate showing of intent beyond a showing of

Instead, *Batson* stated a three-part test to establish purposeful discrimination in the use of a peremptory challenge.¹⁹ First, the defendant must establish a *prima facie* case of race discrimination.²⁰ Then the burden shifts to the prosecutor to state a race-neutral explanation.²¹ Finally, the trial court must determine whether the peremptory challenge is race-based and improper.²²

disparate impact). Therefore, intentional discrimination must be demonstrated before a peremptory challenge can be invalidated. See *Batson*, 476 U.S. at 93 ("[The] 'invidious quality' of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.'" (quoting *Davis*, 426 U.S. at 240)). Prior to *Batson*, a showing of purposeful discrimination was practically impossible because the peremptory challenge had been wholly unexplained.

In *Swain v. Alabama*, 380 U.S. 202 (1965), the Court attempted to eliminate race-based peremptory challenges and leave the peremptory challenge unexplained. *Swain* required the defendant to prove a systematic history of racial discrimination by a prosecutor in order to invalidate any peremptory challenge as racially discriminatory. *Swain*, 380 U.S. at 220-22. At the same time, *Swain* refused to force litigants to explain any particular peremptory challenge. *Swain*, 380 U.S. at 220-22. *Swain*'s burden of proof proved crippling, however, and *Swain* was widely criticized as an ineffective remedy for discriminatory peremptory challenges. See, e.g., *Commonwealth v. Soares*, 387 N.E.2d 499, 510 n.12 (Mass. 1979), *cert. denied*, 444 U.S. 881 (1979) ("In light of the extensive criticism of *Swain*, and in recognition of the negligible protection that decision offers to a defendant asserting the right to trial by jury of peers, we take this opportunity to depart from applying its rule perfunctorily . . ."); *State v. Crespin*, 612 P.2d 716, 717 (N.M. Ct. App. 1980) ("[T]he challenge allowed in *Swain* may be too limited. . . . [T]he California experience with the *Swain* rule has resulted in numerous attempts to meet the *Swain* burden with no success" (citations omitted)); 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, 164 (1989) ("Under *Swain*, the Constitution guaranteed minorities only an opportunity to reach the finals before a government officer discriminated against them."); Mary A. Lynch, *The Application of Equal Protection to Prospective Jurors with Disabilities: Will Batson Cover Disability Based Strikes?*, 57 ALB. L. REV. 289, 306-09 (1993) (describing *Swain* as "powerful in principle, pathetic in practice"); John Andrew Martin, *The Fifth Circuit and Jury Selection Cases: The Negro Defendant and his Peerless Jury*, 4 HOUS. L. REV. 448 (1966); Note, *Fair Jury Selection Procedures*, 75 YALE L.J. 322 (1965); Comment, *Swain v. Alabama: A Constitutional Blueprint for the All-White Jury*, 52 VA. L. REV. 1157 (1966); Note, *Peremptory Challenge — Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967).

19. This three-part test overturned *Swain*'s "crippling burden of proof," *Batson*, 476 U.S. at 92-94, and allowed litigants to prove invidious intent in the use of a specific peremptory challenge, *Batson*, 476 U.S. at 95-96. The Court's decision to adopt a unique three-part test rather than to rely on the traditional categories of facial discrimination and disparate impact may be evidence that these categories do not effectively reveal invidious discrimination. See generally MacKinnon, *supra* note 17.

20. Under *Batson*, a *prima facie* case is established by proving that the excluded juror and the criminal defendant are members of a cognizable racial group and by proving "any other relevant circumstances." *Batson*, 476 U.S. at 96. Such circumstances might include a pattern of strikes against black jurors or the prosecutor's questions during voir dire. *Batson*, 476 U.S. at 97.

Note that *Powers v. Ohio*, 499 U.S. 400 (1991), eliminated the requirement that the defendant and the struck juror be of the same race.

21. For a full discussion of race-neutral explanations, see Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REF. 229 (1993).

22. *Batson* states:

[A] defendant may establish a *prima facie* case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.

The second *Batson* Equal Protection Clause irregularity is that the Court never applied strict scrutiny²³ after establishing a framework for finding intentional discrimination. Under the Equal Protection Clause, the Court applies strict scrutiny to intentional discrimination prior to invalidation.²⁴ Once *Batson* created a framework to find intentional discrimination, strict scrutiny should have been applied.²⁵ Because of these irregularities, it was unclear whether *Batson* should be analyzed as part of the Court's equal protection tradition and, if so, whether it could be expanded beyond race.²⁶

B. *The J.E.B. Model for Assessing Religion-Based Peremptory Challenges*

The cases that followed *Batson* clarified its ambiguous relationship to the Equal Protection Clause. These cases did three things. First, they expanded *Batson*, which addressed only prosecutorial peremptories in criminal trials, to race-based peremptory challenges by nongovernment litigants and to civil trials.²⁷ Second, they

...
Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. . . . [T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. . . . The trial court then will have the duty to determine if the defendant has established purposeful discrimination.

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

Note that the Court recently held that proving that the race-neutral explanation is a pretext, without an affirmative showing of intent to discriminate, is insufficient under *Batson*. *Purkett v. Elem*, 115 S. Ct. 1769 (1995).

23. Strict scrutiny requires that a government act must serve a legitimate purpose and be "narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986).

24. See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-97 (1989).

25. Chief Justice Burger noted this equal protection irregularity in his dissent: "The Court never applies this conventional equal protection framework to the claims at hand, perhaps to avoid acknowledging that the state interest involved here has historically been regarded by this Court as substantial, if not compelling." *Batson*, 476 U.S. at 125 (Burger, C.J., dissenting).

26. Chief Justice Burger, in his *Batson* dissent, was the first to state that *Batson* was not a traditional equal protection case and that *Batson* was limited to race:

That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge on the basis of race But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, age, religious or political affiliation

Batson, 476 U.S. at 123-24 (Burger, C.J., dissenting) (citations omitted). Later courts picked up on this language and refused to extend *Batson* to religion. See, e.g., *State v. Davis*, 504 N.W.2d 767, 769-71 (Minn. 1993), cert. denied, 114 S. Ct. 2120 (1994); *Lundgren v. Ohio*, Nos. 90-L-15-140, 91-L-036, 1993 WL 346444, at *39 (Ohio Ct. App. Sept. 14, 1993).

27. *Powers v. Ohio*, 499 U.S. 400 (1991), first expanded *Batson* to criminal defendants of any race. Next, in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Court extended *Batson* to jury selection in civil trials. The question in *Edmonson* was whether peremptory challenges by private litigants, as opposed to a state prosecutor, could be state action subject to the strictures of equal protection. The Court decided that private attorneys

established that potential jurors themselves have an equal protection right to nondiscriminatory jury-selection procedures.²⁸

Third, *J.E.B. v. Alabama ex rel. T.B.* established that *Batson* is not limited to race and that traditional Equal Protection principles are applicable to the peremptory challenge. In *J.E.B.*, the Court applied "equal protection jurisprudence" to extend *Batson* to gender.²⁹ The Court applied intermediate scrutiny³⁰ to peremptory challenges on the basis of gender³¹ and held that such peremptories were unconstitutional.³² *J.E.B.* followed *Batson* in applying a

are state actors in selecting juries, stating that peremptory challenges involve "overt, significant participation of the government," that peremptories perform "a traditional function of the government," and that the injury caused by discriminatory peremptory challenges is "more severe because the government permits it to occur within the courthouse itself." *Edmonson*, 500 U.S. at 620-28.

Lastly, *Georgia v. McCollum*, 505 U.S. 42 (1992), extended *Batson* to race-based peremptory challenges by criminal defendants. *McCollum* completed the Court's goal of eliminating race-based peremptory challenges by extending *Batson* to virtually all jury-trial settings.

28. *McCollum*, 505 U.S. at 48 ("[D]enying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror."); *Edmonson*, 500 U.S. at 618 ("[R]ace-based peremptory challenge[s] violate[] the equal protection rights of those excluded from jury service."); *Powers*, 499 U.S. at 409 ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."); see also Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 COLUM. L. REV. 725 (1992).

29. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 (1994). *J.E.B.* dealt with a paternity suit by the State of Alabama on the behalf of a single mother. During jury selection, the state used nine of ten peremptory challenges to strike men, resulting in an all-female jury. 114 S. Ct. at 1421-22.

30. "[G]ender-based classifications require 'an exceedingly persuasive justification' in order to survive constitutional scrutiny." *J.E.B.*, 114 S. Ct. at 1425 (quoting *Personnel Admr. v. Feeney*, 442 U.S. 256, 273 (1979)).

Under the Equal Protection Clause, the Supreme Court applies three separate standards of review: strict scrutiny, intermediate scrutiny, and rational basis review. Strict scrutiny is applied to inherently suspect classifications, such as racial classifications. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986). Gender has never been found to be an inherently suspect classification and therefore receives intermediate scrutiny. See *J.E.B.*, 114 S. Ct. at 1425 n.6 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982)). Government acts which burden a fundamental right are also strictly scrutinized. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31-33 (1973). All other types of government classifications are reviewed under "rational basis review." See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (holding that government classifications must be "'rationally related to a legitimate state interest'" (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976))).

31. Note that *J.E.B.*'s application of intermediate scrutiny settles the essential *Batson* equal protection irregularity. Once intentional discrimination is established, traditional equal protection jurisprudence is applied, and the Court applies the appropriate level of scrutiny. Intermediate scrutiny is applied to gender; strict scrutiny is applied to religion. See *infra* Parts II and III.

32. The Court stated:

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 — that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy.

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

three-part test for establishing intentional gender discrimination in the use of a peremptory challenge.³³

J.E.B. sets the model for assessing the constitutionality of peremptory challenges. Individual jurors have a right to non-discrimination in jury selection procedures. The *Batson* three-part test is used to establish the requisite showing of discriminatory intent. If a peremptory challenge is used to exclude groups protected by the Equal Protection Clause, it is analyzed under traditional equal protection principles, and heightened scrutiny is applied.

II. STRICT SCRUTINY UNDER THE FIRST AMENDMENT

In order to assess the constitutionality of religion-based peremptory challenges, it is necessary to establish the level of scrutiny applied to government acts which discriminate on the basis of religion. Part II argues that under the First Amendment, governmental religious discrimination must be strictly scrutinized. Part III argues that under traditional equal protection jurisprudence, governmental religious discrimination must be strictly scrutinized. This Note first analyzes religious discrimination under the First Amendment because the Equal Protection Clause offers no new constitutional rights: instead, it requires states to protect other constitutional rights held by their citizens. Therefore, an understanding of the First Amendment implications of religion-based peremptory challenges must precede any equal protection analysis.

Part II.A argues that under either the Free Exercise Clause or the Establishment Clause of the First Amendment, intentional governmental religious discrimination is subject to strict scrutiny under an analysis which is similar to equal protection jurisprudence. The Court searches for antireligious animus, relying on the familiar categories of facial discrimination and disparate impact. If intentional discrimination is found, the Court applies strict scrutiny. Part II.B argues that strict scrutiny is especially appropriate for religion-based peremptory challenges because the Court has repeatedly stated the need for government neutrality in the selection of government officials.

A. *Intentional Government Religious Discrimination Under the First Amendment*

This section argues that the analysis of government religious discrimination is the same under either clause of the First Amendment: the Court searches for intentional discrimination and applies

33. *J.E.B.*, 114 S. Ct. at 1429-30.

strict scrutiny to such discrimination.³⁴ The First Amendment states "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"³⁵ The Court has generally separated the amendment into the Establishment Clause and the Free Exercise Clause. Governmental religious discrimination violates both clauses of the First Amendment. Under both clauses, the Court has repeatedly ruled that the government must remain neutral among religions.³⁶ When the government discriminates on the basis of religion, it violates this constitutional mandate. Free exercise of religion is abridged because the government is treating a group of persons differently on the basis of their free exercise rights. The Establishment Clause is violated because in discriminating against one religious group the government is establishing another.³⁷ The primary First Amendment violation involved in governmental religious discrimination is the violation of government religious neutrality. Consequently, both clauses are applicable.

There are three levels of scrutiny that are presently applied to violations of the First Amendment. The highest level of scrutiny, which can be called absolute protection, states that "a law targeting religious belief as such is never permissible"³⁸ Any governmental act which explicitly targets religious belief is per se invalid. The second level of scrutiny applied is strict scrutiny. Under strict scrutiny the government act "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."³⁹ Government acts which facially discriminate on the ba-

34. This Note also argues that this same analysis applies under the Equal Protection Clause. See *infra* text accompanying notes 61-79. This Note, therefore, argues for a unified standard for assessing the constitutionality of governmental religious discrimination. See *infra* text accompanying notes 80-81. This is not to suggest that these bodies of law are identical or that all constitutional questions regarding religion should be treated the same.

35. U.S. CONST. amend. I.

36. Compare *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2491 (1994) (stating that the Establishment Clause requires governmental religious neutrality) with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2234 (1993) ("The Free Exercise Clause commits government itself to religious tolerance"); see also Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 10-12 (1989) (arguing for governmental religious neutrality as a "baseline" for the First Amendment).

The Court has also recognized that the two clauses are "interrelat[ed]" and "complementary" in "secur[ing] religious liberty from the invasion of the civil authority." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (citations omitted).

37. For example, if the government were to ban the religious practices of minority religions, it would essentially establish the majority religion as the government's religion of choice.

38. *Lukumi*, 113 S. Ct. at 2227 (citing *McDaniel v. Paty*, 435 U.S. 618, 626 (1978)). As an example of such a law, the Court has used a prohibition on "bowing down before a golden calf." See *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990).

39. *Lukumi*, 113 S. Ct. at 2226.

sis of religion are strictly scrutinized under either clause of the First Amendment.⁴⁰

The lowest level of scrutiny is rational basis.⁴¹ Under the Court's decision in *Employment Division v. Smith*,⁴² government acts that are neutral and generally applicable, but that affect religious practice, receive rational basis review.⁴³ Prior to *Smith*, the level of review for such "neutral" acts was unclear; the Court sometimes applied strict scrutiny⁴⁴ and sometimes rational basis re-

40. For a Free Exercise Clause example, see *Lukumi*, 113 S. Ct. at 2233. For an Establishment Clause example, see *Larson v. Valente*, 456 U.S. 228, 246-47 (1982).

41. See *Employment Div. v. Smith*, 494 U.S. 872, 879-80 (1990) (holding that the First Amendment does not exempt religious adherents from a "neutral, generally applicable regulatory law").

42. 494 U.S. 872 (1990). *Smith* dealt with a claim by members of the Native American Church that Oregon's criminal drug statutes unconstitutionally curtailed their free exercise right to sacramental use of peyote. See 494 U.S. at 875.

43. 494 U.S. at 878-79. The *Smith* decision has been widely criticized. See *Lukumi*, 113 S. Ct. at 2240-50 (Souter, J., concurring) (arguing for a reexamination of *Smith*); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter McConnell, *Free Exercise Revisionism*] (stating that *Smith* has little grounding in authority and diminishes the status of free exercise); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 231-37 (1991); Eddie Lam, Note, *Employment Division, Department of Human Resources of Oregon v. Smith: The Limits of the Free Exercise Clause*, 16 T. MARSHALL L. REV. 377 (1991).

In response to *Smith*, and in an effort to restore strict scrutiny review, Congress passed the Religious Freedom Restoration Act ("RFRA"). Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (Supp. V 1993)). The Act's stated purpose is: "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 free exercise of religion is substantially burdened . . ." 42 U.S.C. § 2000bb(b)(1). The "compelling interest test" of *Sherbert* and *Yoder* is a strict scrutiny standard: Government action may substantially burden an individual's free exercise of religion only if the government demonstrates that the action furthers a compelling governmental interest and is the least restrictive means of furthering that interest. For a discussion of the RFRA, see Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEXAS L. REV. 247 (1994), and Leon F. Sztetpycki & Jean B. Arnold, *Commentary: Religious Freedom Restoration Act*, 88 EDUC. L. REP. 907 (1994). Professor McConnell argues that the law may be unconstitutional depending on the Court's reading of the First Amendment:

If citizens have the right to practice their religion subject only to the government's overriding need to protect peace and safety, then Congress can use Section Five of the Fourteenth Amendment to enforce that right. . . .

. . . If citizens do not have an inherent right to have their religious beliefs accommodated, then the power of Congress to make such a law is less clear.

Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POLY. 181, 187-88 (1992) (emphasis omitted).

Furthermore, Congress does not have the power to change the Court's treatment of the First Amendment. Therefore, Congress' action does not affect "cases under the Free Exercise Clause; it applies only to cases brought under the Religious Freedom Restoration Act." Sztetpycki & Arnold, *supra*, at 915.

44. See, e.g., *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Sherbert*, 374 U.S. at 403 (holding that a burden on the free exercise of religion must be justified by a "compelling state interest").

view.⁴⁵ *Smith* explicitly did not alter the level of review for government acts that *facially discriminate*, reaffirming numerous precedents and stating that the Court "strictly scrutinize[s] governmental classifications based on religion."⁴⁶

The distinction drawn by *Smith* between facial and neutral government acts for the First Amendment brings the Court's treatment of religion into conformity with its treatment of race and sex under the Equal Protection Clause. The level of scrutiny applied depends upon a finding of intentional discrimination and on the categories of facial discrimination and disparate impact.⁴⁷ *Smith* explicitly recognizes the parallel:

Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize governmental classifications based on religion. But, we have held that race-neutral laws that have the effect of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause Our conclusion that generally applicable, religion neutral laws that have the ef-

45. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450-51 (1988) (holding that incidental effects of government programs that make it more difficult to practice certain religions do not require compelling justification); *Bowen v. Roy*, 476 U.S. 693, 706-07 (1986) (holding that a lower standard exists for indirect government burdens on religious practices); *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986) (holding that military regulations are subject to a less stringent First Amendment standard).

46. *Smith*, 494 U.S. at 886 n.3 (citations omitted); see also *Larson v. Valente*, 456 U.S. 228, 246-47 (1981) (holding that a government rule that grants denominational preferences "must be invalidated unless justified by a compelling governmental interest and unless it is closely fitted to further that interest"); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1438 (1994) (Scalia, J., dissenting) (subjecting religious classifications to "heightened scrutiny"); *Davis v. Minnesota*, 114 S. Ct. 2120, 2121 (1994) (Thomas, J., dissenting) (same).

Note that although *Smith* and the later decision, *Lukumi*, both state that strict scrutiny is to be applied to purposeful religious discrimination there is some confusion about what this exactly means. Professor Steven Smith has suggested that under *Lukumi* and *Smith*, the government act must be motivated by an intent to persecute a particular religious faith. See Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 558-61 (1994). Professor Abner Greene formulated the test in terms of an intent to "burden religion." See Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1612 n.9 (1993). Professor Michael McConnell read *Smith* to require "deliberate discrimination against religion." See McConnell, *Free Exercise Revisionism*, *supra* note 43, at 1111. This Note's reading of *Lukumi* and *Smith* as creating a religion model which parallels the equal protection model contradicts Professor Smith's conclusion that intent to persecute is necessary to prove purposeful discrimination. A showing that the act purposefully targets religious conduct or affiliation should be sufficient. But cf. *id.* at 1137-41 (arguing that *Smith's* reliance on equal protection cases ill suits free exercise jurisprudence).

47. See *supra* notes 13-17 and accompanying text. Note that *Smith's* command that government acts be "neutral and of general applicability" essentially imports the Court's intent requirement from the equal protection disparate impact cases. In order to invalidate a generally applicable government act (in other words, an act which is not facially discriminatory), the Court requires a showing of nonneutrality or intentional discrimination. In the free exercise case immediately following *Smith*, the Court relied on a showing of purposeful religious discrimination. *Lukumi*, 113 S. Ct. at 2227-30. Two justices relied on discriminatory statements in the act's legislative history. *Lukumi*, 113 S. Ct. at 2230-31 (opinion of Kennedy, J., joined by Stevens, J.).

fect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these [equal protection] precedents.⁴⁸

The first free exercise case decided after *Smith*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,⁴⁹ applied strict scrutiny to invalidate an ordinance passed by the City of Hialeah, Florida which outlawed ritualistic animal sacrifice.⁵⁰ The law was passed in response to the arrival in Hialeah of a Santeria Church.⁵¹ *Lukumi* restated the rule that intentional religious discrimination is reviewed under strict scrutiny,⁵² thereby establishing that strict scrutiny was still applicable under the Free Exercise Clause of the First Amendment after *Smith*.

The Court has also applied strict scrutiny to intentional government religious discrimination under the Establishment Clause. *Larson v. Valente*⁵³ dealt with a Minnesota law that implemented a new tax structure that reserved certain tax benefits solely to religious organizations that received more than half of their total contributions from members ("the fifty percent rule"). Prior to the fifty percent rule, all religious organizations had been tax exempt.⁵⁴

48. *Smith*, 494 U.S. at 886 n.3 (citations and emphasis omitted).

49. 113 S. Ct. 2217 (1993).

50. *Lukumi* did not rely upon a finding of facial discrimination. The Court stated that the statute's reference to "sacrifice" and "ritual" was not conclusively facial, because these words have secular as well as religious meanings. *Lukumi*, 113 S. Ct. at 2227. Instead, the Court searched for invidious intent by considering whether the law was (a) neutral and (b) of general applicability. In finding that the law was not neutral, the Court looked to the circumstances surrounding the passage of the law and its language. *Lukumi*, 113 S. Ct. at 2227-31. The Court relied on similar findings of discriminatory intent in holding that the statute was not of general applicability. *Lukumi*, 113 S. Ct. at 2232-33. Once the Court decided that the law was not neutral or generally applicable, strict scrutiny was applied, and the law was held unconstitutional. *Lukumi*, 113 S. Ct. at 2233-34.

Under both of *Lukumi*'s inquiries the Court focused on the purpose of the law. Note that only two Justices supported reviewing the legislative history of the act. *Lukumi*, 113 S. Ct. at 2230-31 (opinion of Kennedy, J., joined by Stevens, J.); cf. 113 S. Ct. at 2239 (Scalia, J., concurring, joined by Rehnquist, C.J.) (refusing to join Kennedy and Stevens in assessing the "subjective motivation of the lawmakers" but supporting exploration of the "object" of the law in assessing neutrality (emphasis omitted)).

After *Lukumi*, *Smith*, and RFRA, the status of facially neutral religious discrimination is muddled. If a case involving a facially neutral law which impacts religious practices is brought under the RFRA, strict scrutiny is applied. If such a case is brought under the First Amendment, *Smith* and *Lukumi* suggest that if a discriminatory purpose can be found, strict scrutiny is applied. If the law is neutral, rational basis review is proper. Nevertheless, this controversy does not affect the status of intentional discrimination: it is reviewed under strict scrutiny.

51. *Lukumi*, 113 S. Ct. at 2223-24. In the Santeria religion, "one of the principal forms of devotion is an animal sacrifice." *Lukumi*, 113 S. Ct. at 2222.

52. *Lukumi*, 113 S. Ct. at 2227 (holding that strict scrutiny applies if "the object or purpose of a law is the suppression of religion or religious conduct").

53. 456 U.S. 228 (1982).

54. *Larson*, 456 U.S. at 231.

The Supreme Court found that the fifty percent rule was a government act that favored certain religions (those under the fifty percent cutoff) for tax purposes. The Court ruled that this preference constituted facial discrimination⁵⁵ and applied strict scrutiny in invalidating the statute:

The clearest command of the Establishment Clause [of the First Amendment] is that one religious denomination cannot be officially preferred over another.

... The First Amendment mandates governmental neutrality between religion and religion The State may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute. . . . In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.⁵⁶

The above passage emphasizes the importance of the First Amendment's guarantee of religious neutrality and the role that the strict scrutiny standard plays in protecting that right. Further, *Larson*, *Smith*, and *Lukumi* are all clear on the proposition that under either the Free Exercise Clause or the Establishment Clause, government acts which intentionally discriminate among religions are strictly scrutinized.⁵⁷

B. *Strict Scrutiny and the Assessment of Peremptory Challenges*

The conclusion that governmental religious discrimination must be strictly scrutinized is especially warranted for the peremptory challenge because the Court has repeatedly stressed the need for governmental religious neutrality in the selection of public officials.⁵⁸ This command of government neutrality is directly applicable to the selection of jury members. The Court has characterized

55. *Larson*, 456 U.S. at 246-47 & n.23. The Court explicitly rejected the argument that the statute was "a facially neutral statute, the provisions of which happen to have a disparate impact upon different religious organizations. On the contrary [the statute] makes explicit and deliberate distinctions between different religious organizations." *Larson*, 456 U.S. at 247 n.23.

56. *Larson*, 456 U.S. at 244, 246 (citations omitted).

57. *Larson* recognized that governmental religious discrimination violated either clause of the First Amendment and that under both clauses strict scrutiny was necessary. "This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245.

58. See *Larson*, 456 U.S. at 246; *McDaniel v. Paty*, 435 U.S. 618, 626-29 (1978); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961). Both *Torcaso* and *McDaniel* state the proposition that the government must be neutral among religions in the selection of public officials. In *Torcaso*, the Court struck down Article 37 of the Declaration of Rights of the Maryland Constitution which required an oath of belief in God to serve in public office. *Torcaso*, 367 U.S. at 489. The Court stated that the Government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another." *Torcaso*, 367 U.S. at 493. Nor can the Government "pass laws or impose requirements which aid all religions as against non-believers,

jury service as a public office.⁵⁹ In exercising a peremptory challenge, a litigant is a state actor choosing state officials. Thus, the First Amendment guarantees religious neutrality in this selection procedure, and any facial violation of that neutrality must be strictly scrutinized.⁶⁰

III. STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE

Government acts which distinguish among persons on the basis of religion also trigger strict scrutiny review under the Equal Protection Clause. There are no equal protection cases which have directly applied strict scrutiny to government classifications among religions. This omission is traceable to the fact that religious discrimination cases have traditionally been decided under the First Amendment.⁶¹

Historically there have been two types of government classifications reviewed under strict scrutiny: those that classify persons on the basis of their exercise of a "fundamental right" and those that affect a suspect class.⁶² Section III.A argues that religious groups are a suspect class, and section III.B argues that the practice of religion is a fundamental right.

and neither can [it] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso*, 367 U.S. at 495.

A similar statute was struck down in *McDaniel*. A plurality of the Court applied strict scrutiny and invalidated the statute. See *McDaniel*, 435 U.S. at 626 ("[T]o condition the availability of benefits, [including access to the ballot] upon this appellant's . . . religious faith . . . effectively penalizes the free exercise of [his] constitutional liberties." (quoting *Sherbert v. Verner*, 374 U.S. 398, 406 (1963))). In his concurrence, Justice Brennan stated: "[The Tennessee provision] establishes a religious classification — involvement in protected religious activity — governing the eligibility for office, which I believe is absolutely prohibited." *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring).

59. "The peremptory challenge is used in selecting an entity that is a quintessential governmental body The jury exercises the power of the court and of the government that confers the court's jurisdiction." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991); see also *Georgia v. McCollum*, 505 U.S. 42, 51-54 (1992).

60. *Torcaso* and *McDaniel* also discuss the benefits associated with serving in a public office. The Court's recent peremptory challenge cases have all emphasized the significant benefits to a potential juror of jury service. In *Powers v. Ohio*, 499 U.S. 400 (1991), the Court spoke at length about these benefits:

Jury service . . . "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." Indeed, 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. *Powers*, 499 U.S. at 407. (citation omitted). The right to serve on a jury is a "duty, honor, and privilege," *Powers*, 499 U.S. at 415, and as such, discrimination among religions in the granting of this benefit is a violation of the First Amendment's guarantee of religious neutrality.

61. Such classifications receive strict scrutiny when reviewed under the First Amendment. See *supra* section II.A.

62. "[E]qual protection analysis requires strict scrutiny . . . when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (footnotes omitted); see also *TRIBE*, *supra* note 17, §§ 16-7, 16-13.

A. Religious Affiliation Is a Suspect Classification

The Court has defined suspect classes as those groups "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process."⁶³ Certain religious groups fit this definition because of America's unfortunate history of religious discrimination.⁶⁴

Furthermore, since the Court first considered heightened scrutiny for suspect classifications in footnote four of *United States v. Carolene Products Co.*, the Court has listed religion along with race as a suspect category.⁶⁵ More recently, the Court has recognized that strict scrutiny is applied when "inherently suspect distinctions such as race, religion, or alienage" are involved.⁶⁶ Therefore, religious affiliation is a suspect classification, and government acts that distinguish among persons on the basis of religion must be strictly scrutinized.⁶⁷

In applying this analysis to peremptory challenges, however, there is a question whether a specific history of discrimination in jury selection must be proven. Language in *J.E.B. v. Alabama ex rel. T.B.* suggests that a history of discrimination against a particular group in jury selection may be necessary to extend *Batson* beyond

63. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

64. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-14 (1947) (detailing the history of religious discrimination in America); MORTON BORDEN, *JEWS, TURKS, AND INFIDELS* (1984); JOEL FETZER, *SELECTIVE PROSECUTION OF RELIGIOUSLY MOTIVATED OFFENDERS IN AMERICA* (1989); GUSTAVUS MYERS, *HISTORY OF BIGOTRY IN THE UNITED STATES* (1943); HAROLD E. QUINLEY & CHARLES Y. GLOCK, *ANTI-SEMITISM IN AMERICA* (1979); *ANTI-SEMITISM IN AMERICAN HISTORY* (David A. Gerber ed., 1986). Of course, religious discrimination continues today. For example, five state constitutions still require a belief in God as a prerequisite to serving in public office thirty-five years after such provisions were ruled unconstitutional in *Torcaso v. Watkins*, 367 U.S. 488 (1961). See MD. CONST. art. XXXVI; PA. CONST. art. I, § 4; S.C. CONST. art. VI, § 2; TENN. CONST. art. IX, § 2; TEX. CONST. art. I, § 4. See generally EDD DOERR & ALBERT J. MENENDEZ, *RELIGIOUS LIBERTY AND STATE CONSTITUTIONS* 15-16 (1993).

65. See 304 U.S. 144, 152 n.4 (1938) (holding that heightened scrutiny is appropriate for "statutes directed at particular religious, or national or racial minorities" (citations omitted)).

66. See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 885 (1985) (quoting *New Orleans v. Duke*, 427 U.S. 297, 303 (1976)).

67. This statement directly contradicts a recent Ohio state court decision concerning religion-based peremptory challenges, *State v. Lundgren*, Nos. 90-L-15-140; 91-L-036, 1993 WL 346444 (Ohio Ct. App. Sept. 14, 1993), *affd.*, 653 N.E.2d 304 (1995). *Lundgren* stated that *Batson* should not be extended to religion because there is no analogy between religion and race. *Lundgren*, 1993 WL 346444, at *39. The Ohio court based this holding upon the statement that religion is not a suspect class for equal protection purposes. See *Lundgren*, 1993 WL 346444, at *39.

The basis for *Lundgren* has been undermined by the preceding discussion. First, section III.A shows that religion is a suspect class under equal protection. Second, the court ignores the fundamental right to governmental religious neutrality under the Equal Protection Clause and the First Amendment.

race.⁶⁸ Both *J.E.B.* and *Batson* cite to a specific history of discrimination in jury selection — against women and minorities respectively — that cannot be similarly documented in the area of religion.⁶⁹ The Minnesota Supreme Court cited this lack of a history of religious discrimination in jury selection in refusing to expand *Batson* to religion.⁷⁰

There are several reasons why this lack of history is not fatal to a claim that religion-based peremptory challenges should be reviewed under strict scrutiny. First, unlike gender or race, religion has always had the First Amendment to ensure government religious neutrality. Consequently, there could be no religious discrimination mandated by statutes similar to those denying jury participation to blacks⁷¹ and women.⁷²

Second, *J.E.B.* states as bases for its decision both a *specific* history of discrimination against women in jury selection and a *general* “‘long and unfortunate history of sex discrimination,’ a history which warrants the heightened scrutiny we afford all gender based classifications today.”⁷³ Although religion lacks a specific history of jury discrimination, a similar unfortunate general history of reli-

68. *J.E.B.* states:

While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, “overpower those differences.” . . . Certainly, with respect to jury service, African-Americans and women share a history of total exclusion, a history which came to an end for women many years after the embarrassing chapter in our history came to an end for African-Americans.

We need not determine, however, whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation’s history. It is necessary only to acknowledge that “our Nation has had a long and unfortunate history of sex discrimination,” a history which warrants the heightened scrutiny we afford all gender-based classifications today.

J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1425 (1994) (citations omitted) (quoting *Fronterio v. Richardson*, 411 U.S. 677, 685 (1973)).

69. *J.E.B.* cites a history of gender discrimination in jury service. See *J.E.B.*, 114 S. Ct. at 1424 (citing *Ballard v. United States*, 329 U.S. 187 (1946) (holding that women could not be excluded from the venire in federal trials in states where women were eligible for jury service), and *Taylor v. Louisiana*, 419 U.S. 522 (1975) (striking down a statute which exempted women from jury service under the Sixth Amendment)). *Batson* cites a similar history of race discrimination in jury service. See *Batson v. Kentucky*, 476 U.S. 79, 84-87 (1986) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding the exclusion of black citizens as jurors unconstitutional); *Martin v. Texas*, 200 U.S. 316 (1906) (holding that criminal defendants have a right to be tried by a jury selected pursuant to nondiscriminatory criteria); and *Norris v. Alabama*, 294 U.S. 587 (1935) (holding unconstitutional the assumption that members of the black race are not qualified to serve as jurors)); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618 (1991) (“*Powers* relied upon over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process.”).

70. *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), cert. denied, 114 S. Ct. 2120 (1994) (reading the Supreme Court peremptory challenge jurisprudence to require religion-based discrimination to be a historical and systematic illness in the jury selection process).

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

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

73. *J.E.B.*, 114 S. Ct. at 1425 (citation omitted).

gious discrimination exists in the United States, a history which justifies treating religion as a suspect classification.⁷⁴

Finally, given the Court's focus upon the potential juror's constitutional right to nondiscrimination in jury selection, the question of a history of discrimination in jury selection seems misguided. The fundamental question is whether the equal protection rights of the juror at issue have been violated, and a history of discrimination is simply irrelevant to this question. As *J.E.B.* stated: "the exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system."⁷⁵ Any requirement of systematic violations was overruled when *Batson* replaced the strictures of *Swain v. Alabama*.⁷⁶

B. Free Exercise of Religion Is a Fundamental Right

The Equal Protection Clause also demands strict scrutiny when state action impinges upon a fundamental right. Fundamental rights are those which are "explicitly or implicitly guaranteed by the Constitution."⁷⁷ The Court has stated that "[u]nquestionably, the free exercise of religion is a fundamental constitutional right."⁷⁸ Government classifications which burden the practice of a fundamental right are to be strictly scrutinized.⁷⁹ A government religious classification which results in members of a religion being denied the opportunity to serve on a jury clearly constitutes a "burden" on the free exercise of that religion.

74. See *supra* note 64.

75. *J.E.B.*, 114 S. Ct. at 1428 n.14; see *Batson v. Kentucky*, 476 U.S. 79, 95 (1986) ("[A] consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" (citations omitted)).

76. See *supra* notes 18-19. *Swain* required a pattern of discriminatory peremptory challenges before any peremptories could be found unconstitutional. *Swain v. Alabama*, 380 U.S. 202, 223-25 (1965). *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), overruled this requirement and held that any single peremptory challenge could be found improper.

77. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). Examples of implied fundamental rights are the right to interstate travel, *United States v. Guest*, 383 U.S. 745, 757-59 (1966), the right to privacy, *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), and the right to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

78. *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974).

79. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2813-33 (1992) (applying strict scrutiny to possible violations of a woman's fundamental liberty interest in terminating pregnancy); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 666-67 (1990) (holding strict scrutiny review necessary to analyze an abridgement of the First Amendment right to political expression); *Lyng v. International Union*, 485 U.S. 360, 366 (1988); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (strict scrutiny review applies to violations of a fundamental right); see also *TRIBE*, *supra* note 17, § 16-7 ("Legislative and administrative classifications are to be strictly scrutinized and thus held unconstitutional absent a compelling governmental interest if they distribute benefits or burdens in a manner inconsistent with fundamental rights.").

IV. STRICT SCRUTINY ANALYSIS

Parts II and III argued separately that under either the First Amendment or the Equal Protection Clause, strict scrutiny should be applied to religion-based peremptory challenges. As stated in Part II, the analysis of facial religious discrimination under the First Amendment and the Equal Protection Clause is now essentially the same. As Justice O'Connor stated:

[An] emphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses — the Free Exercise Clause, the Religious Test Clause,⁸⁰ and the Equal Protection Clause . . . all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.⁸¹

This Part applies strict scrutiny review to religion-based peremptory challenges and concludes that they are unconstitutional. Under either First Amendment or Equal Protection analysis, the strict scrutiny standard is the same: the law or practice at issue must be narrowly tailored to serve a compelling government interest.⁸² Religion-based peremptory challenges are a form of religious discrimination and are subject to strict scrutiny.

Religion-based peremptory challenges pass the first prong of strict scrutiny; they are "justified by a compelling government interest."⁸³ As *J.E.B.* recognized, the government's "legitimate interest" in providing a fair and impartial trial is sufficiently compelling to pass the first requirement of strict scrutiny.⁸⁴ The necessary question, therefore, is how effective religion-based peremptory challenges are in guaranteeing a fair trial.⁸⁵ Section IV.A argues that religion-based peremptory challenges are not sufficiently narrowly

80. Article VI of the Constitution states: "[N]o religious test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI.

81. *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2497 (1994) (O'Connor, J., concurring) (citation omitted).

82. Compare *Larson v. Valente*, 456 U.S. 228, 247 (1982) (holding under the First Amendment that "rule must be invalidated unless it is justified by a compelling government interest, and unless it is closely fitted to further that interest" (citations omitted)) with *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986) (holding under the Equal Protection Clause that "[t]o pass constitutional muster racial classifications must be necessary to the accomplishment of their legitimate purpose . . . [and] narrowly tailored to the achievement of that goal" (citations omitted)).

83. *Larson*, 456 U.S. at 247; see *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2233 (1993) ("[A] law restrictive of religious practice must advance 'interests of the highest order.'" (citation omitted)).

84. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 (1994).

85. The *J.E.B.* Court recognized the centrality of this question:

In making this assessment, 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. 114 S. Ct. at 1425-26.

tailored to survive strict scrutiny because they are based on stereotypical assumptions about religious views. Section IV.B argues that religion-based peremptory challenges are not narrowly tailored because there is a less restrictive alternative: litigants could focus on actually ascertained beliefs of potential jurors instead of mere religious affiliation.

A. Narrow Tailoring

The constitutionality of religion-based peremptory challenges depends on whether they are narrowly tailored to achieve the legitimate goal of supplying a fair trial. In assessing the effectiveness of gender-based peremptory challenges, *J.E.B.* cited juror studies on the connection between gender and jury behavior. The Court concluded that there was "virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes."⁸⁶ The data concerning religious affiliation and jury behavior is even less well-developed than that concerning gender, and the available studies provide no support for the claim that religious affiliation alone is an accurate predictor of juror attitudes.⁸⁷

Religion-based peremptory challenges violate strict scrutiny because they depend on stereotypical assumptions. Stereotypes without any statistical evidence cannot withstand strict scrutiny.⁸⁸ The religious stereotypes which have been used as proxies for juror behavior are similar to the gender stereotypes described in *J.E.B.*⁸⁹

86. 114 S. Ct. at 1426-27.

87. See REID HASTIE ET AL., *INSIDE THE JUROR* 124 (1983) (stating that while some social scientists have concluded that religion, among several other factors, may have an effect in certain cases, there is little scientific evidence that religion makes any difference in trial outcomes).

According to Professor Abbott, the "basic" factors in anticipating juror behavior are age, sex, race, occupation, marital status, and spouse's occupation. WALTER F. ABBOTT, *ANALYTIC JUROR RATER* § 4.02 (1987). The supplementary predictors are residential location, socio-economic status, presidential and party choices, religious identity and attendance practices, and attitudinal and lifestyle factors. *Id.* § 4.03. These factors can be used to find out whether the juror is an authoritarian personality or not, which can be a predicting factor. "Extreme Authoritarianism as a personality type has been variously linked with . . . orthodox religious beliefs. . . ." *Id.* § 6.05(c). Religion was listed along with nine other indicia of extreme authoritarianism. Abbott asserts that "authoritarians are typically more inclined to convict" but also cites a study stating the exact opposite conclusion. *Id.* § 6.05(c).

The evidence regarding religion as a factor in jury behavior is meager and inconclusive at best, and religion has never been shown to be an accurate predictor.

88. See *J.E.B.*, 114 S. Ct. at 1426-27.

89. See *J.E.B.*, 114 S. Ct. at 1427 n.10. Professor Abramson provides an example of religious stereotyping in jury selection:

In a 1936 article for *Esquire* magazine, Clarence Darrow divided religions and ethnic groups into the prodefense and prosecution camps. Favorable to defendants were Irish, Jews, Unitarians, Universalists, Congregationalists, and agnostics. The ideal prosecution juror had high regard for the law and a religious attitude toward sin and punishment, qualities found among Scandinavians in particular but also among Lutherans, Baptists, and Presbyterians.

The government has an interest in guaranteeing a fair trial, but the lack of evidence supporting religion-based peremptory challenges' role in supplying an impartial jury leads to the conclusion that such peremptories are not sufficiently narrowly tailored to fit the governmental interest.

B. *A Less Restrictive Alternative*

This section argues that courts can better serve the government interest of supplying a fair trial and better protect the rights of potential jurors by requiring a showing of the potential juror's *actual beliefs*, rather than mere religious affiliation, before removing any juror for potential bias.

An analysis of whether a government policy is "narrowly tailored" requires consideration of whether lawful and less-restrictive means are available.⁹⁰ Peremptory challenges based solely on religious affiliation are not narrowly tailored because they are both underinclusive and overinclusive. 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. They are overinclusive because not every member of a religious sect believes every tenet of that faith, so challenges on the basis of religious affiliation remove jurors who may not actually hold the potential bias.

A focus on actually ascertained beliefs is a lawful and less restrictive means for ascertaining juror bias. This can be stated as a constitutional command to "ask the second question." Litigants should inquire as to what the actual beliefs of the juror are before

Similarly, a 1935 trial manual provided lawyers with a scale for rating [jurors]. . . . In medical malpractice cases . . . the plaintiff was warned away from Jewish jurors because "most Jews want their sons to become doctors . . . and they want their daughters to marry doctors."

JEFFREY ABRAMSON, *WE, THE JURY* 147 (1994) (footnotes omitted). For a particularly bizarre example of religious stereotyping in the use of the peremptory challenge, consider the Marcos-Khashoggi trial. Imelda Marcos, wife of the ex-President of the Philippines, and Adnan Khashoggi, an Arab businessman and arms-dealer, were on the same side at trial, yet Khashoggi's lawyers wanted to eliminate Jewish potential jurors because of supposed anti-Arab bias, while Marcos's lawyers thought Jewish jurors would be ideal because Jews are "sensitive to persecution and suspicious of government power." See STEVEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 57-58 (1994).

90. The Court explained:

The term "narrowly tailored" . . . may be used to require consideration of whether lawful alternative and less restrictive means could have been used. Or, as Professor Ely has noted, the classification at issue must "fit" with greater precision than any alternative means. "Courts should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense."

Wygant v. Jackson Board of Ed., 476 U.S. 267, 280 n.6 (1986) (citations omitted) (quoting Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578-579 (1975)).

any challenge would be constitutionally permissible.⁹¹ There is a fundamental distinction between religious affiliation and actually ascertained religious beliefs. Even if the peremptory challenge is based upon the presumed religious views of the juror and not upon any prejudice, not every member of a religion will agree with all of the tenets of that religion. Consider the division among Catholics on the issue of abortion. Assuming that any and all Catholics are pro-life would not be a fair treatment of Catholic potential jurors in a case where abortion was at issue.

If the voir dire establishes that a juror's religious beliefs will bias her significantly in a particular case, then a removal for cause is proper.⁹² Even if the religious belief at issue cannot satisfy the higher standard of a challenge for cause, however, the potential juror still may be subject to a peremptory challenge on the basis of an actually held belief rather than solely on the basis of a religious affiliation. If a litigant can establish that a potential juror's religious views may bias the juror, then the litigant has provided a neutral explanation, and the peremptory challenge should be upheld.

The distinction between group affiliation and actual bias is found in both *Batson* and *J.E.B.* These cases held that biased notions of either race or sex cannot act as a neutral explanation but

91. The importance of this differential between mere knowledge of religious affiliation and actual knowledge of religious beliefs is underscored by the First Amendment analysis in Part II. If the Government must remain absolutely religiously neutral in the selection of public officials, then not only are peremptory challenges on the basis of religious affiliation unconstitutional, but so are peremptories on the basis of actual religious beliefs, and arguably even removals for cause that impact a religious belief.

The argument should not be stretched to this extent. First, challenges — whether peremptory or for cause — based on actual beliefs are neutral as to religion and therefore disparately impact religious belief. For example, if a lawyer removes all potential jurors who are pro-life from the trial of an abortion clinic bombing, this action may disparately impact certain religious affiliations. The act is neutral, however, because the lawyer is removing potential jurors on the basis of a *nonreligious belief* that any member of the venire may share. Assuming that the litigant does remove all pro-life jurors regardless of religious affiliation, such a peremptory challenge is based on actual beliefs of the jurors, and the government act is religion-neutral. A neutral government act would fall under *Employment Division v. Smith* and would not be strictly scrutinized. See *supra* text accompanying notes 42-48.

Second, even if a challenge (whether peremptory or for cause) based on actually held beliefs were strictly scrutinized, the challenge would pass. The government's interest in a fair and impartial trial would necessarily be hampered by a rule that forced the litigants to accept a juror, no matter how biased his or her beliefs were, simply because the juror's beliefs were religious beliefs.

Furthermore, this "second question" approach also answers the claims of religion-based peremptory challenge proponents that such challenges differ from peremptories based on race or gender because there is a significantly greater correspondence between religious affiliation and beliefs than between race or gender and beliefs. See *Casarez v. Texas*, No. 1114-93, 1994 Tex. Crim. App. LEXIS 140 at *73-79 (Tex. Crim. App. Dec. 14, 1994) (Meyers, J., dissenting); J. Suzanne Bell Chambers, Note, *Applying the Break: Religion and the Peremptory Challenge*, 70 IND. L.J. 569, 595-97 (1995). Even if there is an incrementally better correspondence, there is no argument that it would work better than actually ascertaining the potential juror's beliefs through substantive questioning.

92. For a discussion of challenges for cause, see *supra* note 2.

emphasized that a peremptory challenge is proper if a juror actually holds prejudicial beliefs.⁹³ The same distinction should be made between religious beliefs which are actually held and beliefs which are presumed on the basis of religious affiliation. Therefore, absent a showing of pretext, a juror may be removed on the basis of personal religious beliefs when voir dire has established that the juror actually holds those beliefs.

This Note's approach also comports with the Court's treatment of the strict scrutiny requirement that the government classification be narrowly tailored. A peremptory challenge based upon a potential juror's identified beliefs rather than religious affiliation would constitute a significantly better constitutional fit. An approach that established the necessity of asking the second question would better promote the government's interest in a fair trial and avoid violation of the constitutional rights of the excluded juror.⁹⁴

V. IMPLICATIONS OF ELIMINATING RELIGION-BASED PEREMPTORY CHALLENGES

This Part discusses the practical implications of eliminating religion-based peremptories and argues that these implications do not present a significant obstacle to an extension of *Batson* to religion.

Section V.A rebuts the objection that extending *Batson* to religion will result in the eventual demise of the peremptory challenge. Section V.B discusses and rejects the objection that the *Batson* test has been relatively unsuccessful in stemming race discrimination in jury selection, and therefore extending *Batson* to religion offers no help to religion or race.

93. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1429 (1994); *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986). The distinction between a belief presumed on the basis of race and a belief actually held was also emphasized by the Court in *Georgia v. McCollum*:

We have, accordingly, held that there should be a mechanism for removing those on the venire whom the defendant has specified reason to believe would be incapable of confronting and suppressing their racism.

But there is a distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice.

Georgia v. McCollum, 505 U.S. 42, 58-59 (1992) (citations omitted).

94. Such an inquiry would only be proper if the religious views of the juror might constitute a bias. In the majority of cases, religious affiliation is simply irrelevant. The irrelevance of religion to jury service has been recognized at common law:

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. Questions about religious beliefs are relevant only if pertinent to religious issues involved in the case, or if a religious organization is a party, or if the information is a necessary predicate for a voir dire challenge.

State v. Davis, 504 N.W.2d 767, 772 (Minn. 1993) (citing *Coleman v. United States*, 379 A.2d 951, 954 (D.C. 1977), and *United States v. Schullo*, 390 F. Supp. 1067 (D. Minn. 1975)).

A. Preservation of Peremptory Challenges

Eliminating religion-based peremptory challenges will have a narrow effect and will not result in the elimination of peremptory challenges altogether. Ever since the Court began requiring nondiscriminatory explanations for certain peremptory challenges, judges and commentators alike have argued that *Batson* has resulted in the de facto end of the peremptory challenge, because the peremptory has traditionally been wholly unexplained.⁹⁵ These arguments apply equally to any extension of *Batson*: the more circumstances that are included, the less unexplained the peremptory becomes.⁹⁶

First, the argument against expanding *Batson* has already been lost by its extension to gender in *J.E.B.* Further, the concern that this expansion would engulf any and all group affiliations was specifically denied by *J.E.B.*, which stated that “[p]arties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to ‘rational basis’ review.”⁹⁷ Therefore, the debate is limited only to those groups that

95. This argument began in Chief Justice Burger's dissent in *Batson*, 476 U.S. at 124 (arguing that the majority decision signaled the eventual end of the peremptory challenge).

Note that Justice Marshall's concurrence in *Batson* argued explicitly for eradicating the peremptory challenge altogether, 476 U.S. at 102-8 (arguing that under equal protection analysis, the proper remedy is the elimination the peremptory challenge altogether).

Commentators have argued for abolishing the peremptory challenge as well. See Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Role of the Jury*, 73 TEXAS L. REV. 1041 (1995); Jeffrey Toobin, *Juries on Trial*, THE NEW YORKER, Oct. 31, 1994, at 42 (arguing for the elimination of the peremptory challenge); cf. Robert M. O'Connell, Note, *The Elimination of Racism from Jury Selection, Challenging the Peremptory Challenge*, 32 B.C. L. REV. 433 (1991) (arguing that any peremptory challenges that conflict with principles of equal protection must be eliminated).

Others have advocated peremptories because of their efficacy. See Barbara Allen Babcock, *Jury Service and Community Representation*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 460, 479 (Robert E. Litan ed., 1993); John C. Blattner, Book Notice, *Courts and Constitutions*, 93 MICH. L. REV. 1363, 1369-71 (1995) (reviewing STEVEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* (1994)); J. Suzanne Bell Chambers, Note, *Applying the Break: Religion and the Peremptory Challenge*, 70 IND. L.J. 569, 573-76 (1995).

96. One commentator stated:

The claim that the [*Batson*] rule is in hopeless conflict with the [peremptory] challenge is frequently linked to the suggestion that the ban on jury discrimination must inevitably expand to prohibit not only jury selection based on race, but also jury selection based on religion, national origin, gender, language, disability, age, occupation, political party, and a host of other categories. The relationship between the two points is clear: the longer the list of prohibited categories, the less room there is for a lawful challenge other than a challenge for cause.

Underwood, *supra* note 28, at 761 (footnote omitted).

97. *J.E.B.*, 114 S. Ct. at 1429. Examples of group affiliations subject to rational basis review are: mental retardation, see *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985); wealth, see *Maher v. Roe*, 432 U.S. 464, 470-71 (1977); age, see *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976); and occupation, see *Williamson v. Lee Optical*, 348 U.S. 483, 488-89 (1955).

receive some level of heightened scrutiny under equal protection. Among the recognized groups that receive heightened scrutiny, only religion has yet to be invalidated as a basis for peremptory challenges.

Second, religion is an infrequent basis for peremptory challenges,⁹⁸ and invalidating such peremptories would have a much smaller impact than the invalidation of race- or gender-based peremptories. Under the common law, voir-dire questions concerning a potential juror's religious affiliation are proscribed as prejudicial and irrelevant.⁹⁹ Therefore, litigants generally will not even know the religious affiliation of the potential jurors, and the occurrence of religion-based peremptories will be infrequent.

B. *Batson's Ineffectiveness in Practice*

Despite the potential practical difficulties of eliminating discrimination in the use of the peremptory challenge, whether aimed at race, sex, or religion, the strictures of the Equal Protection Clause should be applied, and *Batson* should be extended. State and federal courts have had difficulties applying *Batson's* three-part test, and these difficulties must be considered in any discussion of an expansion of *Batson* to religion. Some commentators argue that the neutral explanations that courts have accepted after *Batson* objections are so numerous that *Batson* has become a virtual sieve.¹⁰⁰ It is unclear whether the difficulty lies with the *Batson* test itself or with hostility by the courts to *Batson*. Nonetheless, in eliminating only the most egregious examples of race discrimination, the *Batson* test has failed to cure racism in the jury selection process. The same *Batson* test is applied to gender-based peremptories under

98. A survey of over 2,000 state and federal *Batson* cases found that "[i]n only a handful of the cases we studied did the prosecutor offer a neutral explanation based upon religion." Raphael & Ungvarsky, *supra* note 21, at 246.

99. *State v. Davis*, 504 N.W.2d 767, 772 (1993). For a quotation from *Davis* concerning this common law rule, see *supra* note 94.

100. Consider the following from Raphael and Ungvarsky:

A prosecutor who wishes to rebut the prima facie case does not face a significant challenge. In our data, only a small percentage of the neutral explanations for peremptory strikes were rejected. Indeed, those explanations that were rejected often involved the clearest cases of *Batson* violations, such as prosecutors who explained that they struck the juror based on race or prosecutors who gave no reason for striking the juror. . . . These cases intimate that courts are often uncritical in evaluating neutral explanations. In fact, our research demonstrates that in almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race.

Raphael & Ungvarsky, *supra* note 21, at 235-36 (citations omitted).

*J.E.B.*¹⁰¹ and would almost certainly be the test applied for religion-based peremptory challenges.¹⁰²

It should be noted, however, that extending *Batson* to religion may actually help in solving the problems experienced under the *Batson* test by eliminating a formerly neutral explanation. In extending *Batson* to gender in *J.E.B.*, the Court stated:

Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.¹⁰³

The above rationale applies equally to peremptories on the basis of religion, which overlaps both race and gender. As long as religion-based peremptories are permitted, they will serve to shield both race and gender discrimination. Furthermore, as with gender discrimination in *J.E.B.*, the majority of religion-based peremptory challenge cases arose as race-neutral explanations for "the use of the peremptory challenge to remove minorit[ies]."¹⁰⁴ As courts be-

101. See *J.E.B.*, 114 S. Ct. at 1429-30. The *Batson* test is also applied under Georgia v. McCollum, 505 U.S. 42, 59 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991); and Powers v. Ohio, 499 U.S. 400, 416 (1991).

102. It is not within the scope of this Note to argue a new standard for the *Batson* test, although several commentators have made sensible suggestions. Raphael & Ungvarsky advocate a four-part test of neutrality:

The trial court must: (A) independently confirm the basis of the explanation; (B) affirmatively find that any other jurors with similar characteristics to the challenged juror were struck; (C) determine that an explanation based on characterizations of a group which includes a juror be shown specifically true of the challenged juror; and (D) find that an explanation is rational, meaningful, and related to the particular case.

Raphael & Ungvarsky, *supra* note 21, at 268; see also Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina*, 69 N.C. L. Rev. 1533, 1566 n.304 (1991) (arguing that "vague and highly subjective" explanations be rejected); Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 361-66 (1993) (arguing for rejection of all explanations that cannot be confirmed by the record).

All of these suggested *Batson* standards are consistent with this Note's emphasis on the distinction between mere knowledge of religious affiliation and the actual content of a venire person's religious beliefs. See *supra* section IV.B.

103. *J.E.B.*, 114 S. Ct. at 1430 (footnotes omitted).

104. *J.E.B.*, 114 S. Ct. at 1430 n.18. The religion-based peremptory challenge cases that have arisen out of objections on the basis of race discrimination are: *United States v. Greer*, 939 F.2d 1076 (5th Cir. 1991), *vacated in part on reh. en banc*, 968 F.2d 433 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1390 (1993); *United States v. Clemmons*, 892 F.2d 1153, 1157 (3d Cir. 1989), *cert. denied*, 496 U.S. 927 (1990); *Joseph v. State*, 636 So. 2d 777, 780-81 (Fla. Dist. Ct. App. 1994); *People v. Malone*, 570 N.E.2d 584, 588-89 (Ill. App. Ct. 1991); *State v. Young*, 569 So. 2d 570, 578 (La. Ct. App. 1990); *State v. Worthy*, 532 So. 2d 541, 553 (La. Ct. App. 1988); *State v. Brown*, 522 So. 2d 1110, 1114 (La. Ct. App. 1988); *State v. Davis*, 504 N.W.2d 767, 771 n.3 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994); *Johnson v. State*, 529 So. 2d 577, 583 (Miss. 1988); *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. 1987); *State v. Lundgren*, Nos. 90-L-15-140, 91-L-036, 1993 WL 346444 (Ohio Ct. App. Sept. 14, 1993), *aff'd*, 653

gin to apply *J.E.B.*, religion can also be expected as a neutral explanation used to justify gender discrimination.

Insofar as extending *Batson* to religion is not helpful, the failure is attributable to *Batson*'s three-part test and not the constitutional underpinnings of an argument for eliminating religion-based peremptory challenges. No one could fairly argue that because *Batson*'s three-part test has not been wholly effective, *Batson* should be overturned. Likewise, the difficulties associated with the test should not bar *Batson*'s expansion to religion.

CONCLUSION

This Note has argued that religion-based peremptory challenges are unconstitutional. This issue is important on more than an intellectual level because *Batson* and its progeny represent an effort by the Court to end discrimination in jury selection: if courts refuse to extend the *Batson* doctrine to suspect classes besides race and gender, this goal will not be reached. In the peremptory challenge cases, the Court was keenly sensitive to the fact that the discrimination occurred in the courthouse itself. The Court was particularly disturbed that the justice system required citizens to appear for jury service, only to subject them to discrimination at the hands of lawyers acting as agents of the court.

Furthermore, in *J.E.B.*, the Court recognized that this harm was not limited to race; jurors removed on the basis of gender were no better off than those removed because of race. This reasoning must be extended to religion. Citizens summarily dismissed on the basis of their religion have suffered the same harm: they have been called to serve and then removed on unconstitutional grounds. As long as religion-based peremptory challenges remain, they, like race- and gender-based peremptory challenges before them, act as an unmistakable reminder that discrimination remains a fixture in our society, even within the walls of the courthouse.

N.E.2d 304 (Ohio 1995); *Casarez v. Texas*, No. 1114-93, 1994 WL 695868 (Tex. Crim. App. Dec. 14, 1994); *Grady v. State*, 730 S.W.2d 191, 195 (Tex. Ct. App. 1987); *Chambers v. State*, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987).