The Equal Protection Clause, the Free Exercise Clause and Religion-Based Peremptory Challenges

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During the trial of Ralph Clemmons, the prosecutor moved to strike a venireman named Balhandra Das, who was dark skinned.1 Clemmons's attorney, consistent with the Supreme Court's holding in *Batson v Kentucky* that striking a venireman on account of his race violates the Equal Protection Clause,2 requested a race-neutral explanation for the strike. The prosecutor responded that he thought Das was of Asian-Indian descent, which meant that Das was probably Hindu, and that "Hindus tend ... to have feelings a good bit different from ours.... [He] may have religious beliefs that may affect his thinking."3 The court agreed that this explanation was sufficiently race-neutral under *Batson*, and it allowed the challenge. The court did not, however, consider the constitutionality of the challenge to the extent it was based on Das's religion.

In the decade since the Supreme Court handed down its decision in *Batson*, courts have struggled to determine the constitutionally permissible scope of peremptory challenges. Recently, in *J.E.B. v Alabama ex rel T.B.*, the Supreme Court held that peremptory challenges based on gender also violate the Equal Protection Clause.4 More than any previous decision, *J.E.B.* evinces the Supreme Court's view that racial discrimination is not unique and that other forms of discrimination are also invidious and deserving of eradication.

After *J.E.B.*, however, the Supreme Court denied certiorari in *State v Davis*, a case in which the Minnesota Supreme Court had ruled that the Equal Protection Clause did not prohibit peremptory challenges based on religion.5 Before *Davis*, many

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3 Clemmons, 892 F2d at 1156.
4 114 S Ct 1419, 1422 (1994).
5 504 NW2d 767, 770-71 (Minn 1993), cert denied 114 S Ct 2120 (1994).
jurists and legal commentators had predicted that once the Supreme Court extended Batson to classifications other than race, the Court would slide down a slippery slope, eventually forbidding all peremptory challenges. Justice Thomas dissented from the denial of certiorari, arguing that he saw no principled reason for declining to apply Batson to any peremptory challenge based on a classification accorded heightened scrutiny under the Equal Protection Clause. He ultimately concluded that the Court should remand the case so that the Minnesota courts could explicitly consider whether a principled distinction between religion and gender exists.

This Comment addresses the question raised by Justice Thomas: whether there is indeed a distinction between religion, on the one hand, and race and gender, on the other, for purposes of peremptory challenges. In J.E.B., the Supreme Court said that when a peremptory challenge is used to remove a member of a suspect class, the challenge must have "an exceedingly persuasive justification" that "furthers the State's legitimate interest in achieving a fair and impartial trial." Since religion, unlike race and gender, is based upon a system of beliefs, at least one court has maintained that religion is distinguishable from race and gender, and that permitting religion-based peremptory challenges does in fact serve that interest. In order to truly resolve this issue, one must look at available social-scientific data to determine if religion actually is an accurate predictor of potential jurors' sympathies and prejudices (and therefore a permissible basis for the exercise of peremptory challenges). A close examination of this data, however, reveals little, if any, support for the notion that religious affiliation alone is an accurate predictor of how a prospective juror will decide the merits of a case. Therefore, religion-based peremptory challenges do not serve the state's interest in providing a fair and impartial jury any more than peremptory challenges based upon race and gender do.

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6 See Georgia v McCollum, 505 US 42, 60-62 (1992) (Thomas concurring) (arguing that the Court's constitutional restriction of peremptory challenges "inexorably will lead to the elimination of peremptory strikes"); Mark Curriden, The Death of the Peremptory Challenge, 80 ABA J 62, 65 (Jan 1994) ("[I]t may take some deft maneuvering to justify not applying Batson to other categories that are subject to equal protection, notably age and religion.").

7 Davis, 114 S Ct at 2120-22 (Thomas dissenting).


9 See Casarez v State, 913 SW2d 468, 494-95 (Tex Crim App 1995).
Extending *Batson* to another protected suspect class, however, would not sound the death knell for all peremptory challenges. First, the abolition of religion-based peremptory challenges would not in any way affect the status of challenges based on classifications that are not subject to heightened scrutiny under the Equal Protection Clause. Second, to be consistent with the social-scientific data on this topic, this Comment proposes a fairly limited protection: although courts should bar challenges based solely on a venireman's religious affiliation, they should continue to permit challenges based on his actual beliefs, even when those beliefs spring from the venireman's religion.

Part I of this Comment discusses the jury selection process and the use of peremptory challenges. Part II discusses the Supreme Court's decision in *Batson*, the subsequent decisions developing and expanding the equal protection rights of veniremen, and the emerging case law on religion-based strikes in the lower courts. Part III proposes a framework for examining peremptory challenges under both the Equal Protection Clause and the Free Exercise Clause. After concluding that religion-based peremptory challenges should receive strict scrutiny, this Comment examines social science research to assess whether there is any support for the notion that religion-based peremptory challenges help achieve impartial juries. Because the support for this notion is weak, this Part concludes that such challenges fail to pass strict scrutiny analysis. Finally, Part IV urges the adoption of a regime that prohibits challenges grounded solely on stereotypes about religious affiliation, but that allows those grounded on prospective jurors' particular beliefs.\(^{10}\)

I. THE SELECTION OF A JURY

After a group of potential jurors, or veniremen, is assigned to a courtroom, the parties begin the process of selecting the jurors who will hear the trial. Parties can eliminate prospective jurors through two mechanisms: challenges for cause and peremptory challenges. Each party is generally given an unlimited number of challenges for cause, but such challenges are allowed only at the discretion of the judge. Allowable grounds for a challenge for

\(^{10}\) Although this Comment's principal focus is the constitutionality of religion-based peremptory challenges in the criminal context, the arguments should apply to civil cases as well. See *Edmonson v Leesville Concrete Co.*, 500 US 614, 629-31 (1991) (holding that race-based peremptory challenges pose the same constitutional problem in the civil context as in the criminal).
cause are generally circumscribed by statute, and typically include previous jury service on a related case, prior or potential testimony as a witness against the defendant, and relation to the defendant or another significant party to the litigation, in addition to the more general ground of lack of impartiality.\footnote{Yale Kamisar, Wayne R. LaFave, and Jerold H. Israel, Modern Criminal Procedure 1410-11 (West 8th ed 1994).}

While challenges for cause can only be used in a fairly limited number of situations, "[t]he peremptory challenge permits a party to excuse a juror for any reason that the party sees fit, or for no reason at all."\footnote{James J. Gobert and Walter E. Jordan, Jury Selection: The Law, Art, and Science of Selecting a Jury § 8.01 at 269 (McGraw-Hill 2d ed 1990).} Peremptory challenges are designed to be used any time a party perceives a prospective juror to be ill suited to sit on the jury. They are generally used when litigants cannot state a compelling reason for the dismissal of a particular venireman.\footnote{See, for example, Hayes v Missouri, 120 US 68, 70 (1887) ("The public prosecutor may have the strongest reasons to distrust the character of a juror offered . . . and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is protection against his being accepted.").} In contrast to challenges for cause, the number of peremptory challenges a party receives is usually fixed by statute. Today, most states provide the defendant with twenty for offenses punishable by death or life imprisonment, ten for other felonies, and three for misdemeanors.\footnote{Kamisar, LaFave, and Israel, Modern Criminal Procedure at 1428 (cited in note 11).} Most states give the prosecution a number equal to those granted to the defendant, but some give the prosecution fewer than the defendant.\footnote{Id.}

Peremptory challenges serve a number of important interests. First, peremptory challenges can correct, instantly and easily, a judge's erroneous decision to refuse to grant a party's challenge for cause. By correcting a judge's possible error, peremptory challenges save time and resources by eliminating the need for an appeal and possible retrial.\footnote{See Ross v Oklahoma, 487 US 81, 88 (1988) (holding that erroneous denial by trial court of a challenge for cause does not require reversal where the defendant used one of his peremptory challenges to exclude the juror); James J. Gobert, The Peremptory Challenge—An Obituary, 1989 Crim L Rev 528, 529 ("[T]he challenge provides a ready corrective for errors by a trial judge in refusing to grant a challenge for cause."). See also Charles J. Morton, Jr., Peremptory Challenges: Are Their Days Numbered?, 24 Md B J 32, 32 (Nov/Dec 1991) ("Through peremptory challenges, attorneys, and their clients, have been able to strike a finite number of potential jurors for reasons which, as a matter of right, need never be explained or questioned by the court or their opponents.").} Second, peremptory challenges allow litigants to remove veniremen who litigants suspect are
unsuitable, but who do not appear to be sufficiently biased during voir dire to justify removal for cause. Jurors themselves may be unaware of their biases or may be reluctant to reveal unpopular personal prejudices or predispositions.  

Third, because peremptory challenges require no explanation, an attorney can dismiss a juror without having to ask the juror probing, embarrassing questions during voir dire. 

Relatedly, without peremptory challenges, a lawyer might be deterred from asking such questions even if he feels them necessary, out of concern that any resulting hostility on the part of the venireman could not be remedied by a peremptory strike. 

Finally, when litigants are able to use peremptory challenges, both parties are more likely to find a jury verdict legitimate. Peremptory strikes enhance each party's control over the composition of the jury, leaving less room for postverdict complaints about unfairness. 

Much of the value of peremptory challenges, however, depends on the ability of the parties to inquire into the veniremen's beliefs during voir dire. Although the Supreme Court has guaranteed defendants the right to make certain inquiries into racial bias, there is as yet no acknowledged right to make religious inquiries during voir dire. Nonetheless, trial courts are charged with ferreting out potential bias, and they have very broad discretion in determining how best to conduct voir dire. 

A typical test for determining whether a court has adequately questioned prospective jurors regarding bias is "whether the means employed to test impartiality have created a reasonable assurance that prejudice would be discovered if present."

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18 V. Hale Starr and Mark McCormick, Jury Selection: An Attorney's Guide to Jury Law & Methods § 11.4.3 at 458 (Little, Brown 2d ed 1993) ("[T]he challenge allows the attorney to avoid interrogating persons whom he or she feels fit common stereotypes.").
19 As the Fourth Circuit stated in United States v Hamilton: "Peremptory challenges enable 'counsel to ascertain the possibility of bias through probing questions on the voir dire and...[facilitate] the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause." 850 F2d 1038, 1042 (4th Cir 1988), quoting Swain v Alabama, 380 US 202, 219-20 (1965).
21 See Ham v South Carolina, 409 US 524, 526-27 (1973) (concluding that whenever racial matters are inextricably involved, a defendant is entitled to question the veniremen as to their racial biases); Turner v Murray, 476 US 28, 36-37 (1986) (holding that capital defendants accused of interracial crimes are entitled to have prospective jurors questioned as to their racial biases).
22 Rosales-Lopez v United States, 451 US 182, 189 (1981) ("Federal judges have been accorded ample discretion in determining how best to conduct the voir dire."); FRCrP 24(a) (giving the trial court broad discretion to conduct voir dire itself or to let the parties do it).
23 United States v Saimiento-Rozo, 676 F2d 146, 148 (5th Cir 1982). See also State v
the guidelines are broad, courts enjoy a great deal of latitude in deciding what inquiries into veniremen's religious beliefs they will permit. In the current framework, as we will shortly see, religious inquiry during voir dire appears to be a common occurrence, and it merits constitutional scrutiny.

II. PEREMPTORY CHALLENGES AND THE CONSTITUTION

Although the Supreme Court has opened the dike by recognizing the equal protection dimensions of race- and gender-based peremptory challenges, it has not yet directly addressed the constitutionality of religion-based challenges. Such challenges have, however, come under increasing constitutional scrutiny in the lower courts.

A. The Early Years

The Supreme Court first addressed the constitutionality of race-based peremptory challenges in Swain v Alabama. In Swain, the Court held that purposefully denying blacks the opportunity to participate as jurors on account of their race violated the Equal Protection Clause. However, the Court severely limited the instances in which a defendant could claim that a prosecutor's use of peremptory challenges had been discriminatory. Under Swain, unless the prosecutor admitted outright that he had struck someone who was black solely on account of race, a defendant had to demonstrate systematic exclusion of blacks from the venire. This essentially required a defendant to compile


Bishop, 753 P2d 439, 448 (Utah 1988) ("[W]hether the trial court abused its discretion in conducting voir dire turns on whether, considering the totality of the questioning, counsel was afforded an adequate opportunity to gain the information necessary to evaluate jurors.").

24 See, for example, Congregation of the Passion v Touche Ross & Co., 159 Ill 2d 137, 636 NE2d 503, 516, cert denied, 115 S Ct 358 (1994) (holding that where the defendants were accused of negligently preparing financial statements for a religious corporation, it was within the trial court's discretion to refuse the defendants' request to ask jurors about their contributions to the Catholic Church); State v Wright, 619 SW2d 822, 825 (Mo Ct App 1981) (holding that the defendant was not entitled to make inquiries during voir dire concerning prejudices that veniremen might have about the defendant's religion where the defendant's Muslim religion was not at issue in the burglary prosecution); Riley v State, 496 A2d 997, 1006-07 (Del 1985) (ruling that the trial court did not abuse its discretion in refusing to comply with the defendant's request to ask jurors if they were Roman Catholic, after the Catholic Church gave the victim's family significant amounts of aid).

25 See Section II.D.


27 Id at 203-04.
evidence from multiple trials and to be able to demonstrate a racially discriminatory pattern. Thus, *Swain* identified a problem but provided no concrete remedy for it, since few blacks could meet this tough evidentiary burden.

B. *Batson* and Its Successors

The Supreme Court overturned *Swain*'s systematic exclusion requirement in *Batson*. In *Batson*, the prosecutor used his four peremptory challenges to strike all four blacks from the venire, resulting in an all-white jury. The Court held that the Equal Protection Clause guarantees the defendant that the state will not exclude prospective jurors solely on account of race, and that the state may not exclude prospective jurors "on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." Racial stereotypes were thus not sufficiently sound to justify race-based strikes.

Departing from *Swain*, the *Batson* Court held that a defendant can make a prima facie showing of purposeful racial discrimination by relying solely on the facts surrounding jury selection in his individual trial. To do so, the defendant must prove that the facts and relevant circumstances raise an inference that the prosecutor exercised a peremptory challenge to exclude a venireman on account of his race. Once the defendant makes this showing, the burden shifts to the prosecutor to articulate a race-neutral explanation for the challenge. If the prosecution fails to do so, the strike is not allowed, and the court must impanel the prospective juror.

In explaining its holding, the Supreme Court observed that racial discrimination in jury selection harms the defendant, the jurors, and the justice system in general:

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially

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28 Id ("[T]he defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time.").
30 Id at 83.
31 Id at 88-89.
32 Id at 95.
33 Id at 96-98.
to consider evidence presented at a trial. . . . [B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. . . . Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.\(^{34}\)

Notably, the Court in *Batson* did not offer any empirical support for its conclusions that peremptory challenges based on race have no merit and harm African-Americans. The Court also did not address whether peremptory challenges of members of other suspect classes were potentially unconstitutional as well.

Unlike the majority, the dissent in *Batson* did address the case's possible extension to other groups traditionally afforded protection under the Equal Protection Clause. The dissent argued that the conventional equal protection principles used to justify the Court's holding would theoretically apply just as well to exclusions based on religion, gender, age, and other grounds.\(^{35}\)

During the next few years, the Court further defined the scope of *Batson*. In *Powers v Ohio*, the Court held that a criminal defendant could object to race-based exclusions of veniremen even if the defendant were not of the same race as the excluded veniremen.\(^{36}\) In *Edmonson v Leesville Concrete Co.*, the Court held that a private litigant in a civil case, like the prosecution in a criminal case, could not use peremptory challenges to exclude veniremen on account of their race.\(^{37}\) And in *Georgia v McCollum*, the Court ruled that the Equal Protection Clause prohibited the defense as well as the prosecution from using peremptory challenges to engage in purposeful racial discrimination.\(^{38}\)

Significantly, the Court in *McCollum* briefly shifted its focus beyond race and suggested the impropriety of basing peremptory challenges on religious grounds, thus foreshadowing the extension of *Batson* to other suspect classifications. In reaffirming its rejection of peremptory challenges based on assumptions of racial bias, the Court concluded: "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a per se rule—that justice in a court of law may

\(^{34}\) Id at 87 (citations omitted).
\(^{35}\) Id at 124 (Burger dissenting).
turn upon the pigmentation of skin, the accident of birth, or the choice of religion.\textsuperscript{39}

C. J.E.B. and Beyond

In \textit{J.E.B.}, the Supreme Court found that peremptory challenges based on gender also violate the Equal Protection Clause.\textsuperscript{40} \textit{J.E.B.} involved a paternity and child-support suit. At trial, the state used nine of its ten peremptory challenges to remove nine of the ten potential male jurors, leading eventually to an entirely female jury.\textsuperscript{41} The Supreme Court found that discriminatory assumptions based on stereotypical notions of gender could not withstand heightened scrutiny under the Equal Protection Clause, especially where the "discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."\textsuperscript{42} That is, since discrimination in jury selection did not "substantially further [ ] the State's legitimate interest in achieving a fair and impartial trial," gender-based peremptory challenges violated the Equal Protection Clause.\textsuperscript{43}

In \textit{J.E.B.}, the Supreme Court analyzed gender-based peremptory challenges under an intermediate standard of review.\textsuperscript{44} It indicated that although parties could freely exercise peremptory challenges to remove from the venire any group or class of individuals normally subject to rational basis review, peremptory challenges against groups afforded heightened scrutiny were potentially unconstitutional.\textsuperscript{45} In determining whether gender-based peremptory challenges could survive heightened scrutiny, the Court considered whether these challenges provided "substantial aid to a litigant's efforts to secure a fair and impartial jury."\textsuperscript{46} The Court found that even though there was some statistical support for stereotypes based on gender, that support alone could not justify the discriminatory use of peremptory chal-

\textsuperscript{39} Id at 59, quoting \textit{Ristaino v Ross}, 424 US 589, 596 n 8 (1976) (emphasis added by author).
\textsuperscript{40} 114 S Ct 1419, 1422 (1994).
\textsuperscript{41} Id at 1421-22.
\textsuperscript{42} Id at 1422.
\textsuperscript{43} Id at 1425.
\textsuperscript{44} That is, a standard more rigorous than rational basis review, but less exacting than strict scrutiny. For a discussion of the various standards of review in Equal Protection Clause cases and the implications of each, see Gerald Gunther, \textit{Constitutional Law} 602-03 (Foundation 12th ed 1991).
\textsuperscript{45} \textit{J.E.B.}, 114 S Ct at 1424-25, 1429.
\textsuperscript{46} Id at 1425-26.
The Court declared that many of the same harms that resulted from race-based peremptory challenges would follow from gender-based peremptory challenges as well: by exercising peremptory challenges based on gender stereotypes, state actors would “ratify and reinforce prejudicial views of the relative abilities of men and women.”\textsuperscript{48} Concluding, the Court held that “the Equal Protection Clause prohibits discrimination in jury selection [based] on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man.”\textsuperscript{49}

Unlike the Batson Court, the J.E.B. Court did offer some empirical support for its conclusions that gender-based peremptory challenges were meritless, although the Court ultimately considered such research irrelevant to its constitutional analysis.\textsuperscript{50} In his dissent, however, Justice Scalia noted an earlier case that had found that “[c]ontrolled studies... have concluded that women bring to juries their own perspectives and values that influence both jury deliberation and result.”\textsuperscript{51} To Scalia, such empirical support was relevant to the constitutional analysis.

Justice Scalia further asserted that the majority’s reasoning prohibited religion-based peremptory challenges as well as those based on gender:

The Court says that the only important government interest that could be served by peremptory strikes is “securing a fair and impartial jury.” It refuses to accept respondent’s argument that these strikes further that interest by eliminating a group (men) which may be partial to male defendants, because it will not accept any argument based on “the very stereotype the law condemns.”... That places all peremptory strikes based on any group characteristic at risk, since they can all be denominated “stereotypes.”...

Even if the line of our later cases guaranteed by today’s decision limits the theoretically boundless Batson principle to race, sex, and perhaps other classifications subject to

\begin{itemize}
\item \textsuperscript{47} Id at 1427 n 11.
\item \textsuperscript{48} Id at 1427.
\item \textsuperscript{49} Id at 1430, citing Batson, 476 US at 97-98.
\item \textsuperscript{50} J.E.B., 114 S Ct at 1426-27 & n 11.
\item \textsuperscript{51} Id at 1436 (Scalia dissenting), quoting Taylor v Louisiana, 419 US 522, 532 n 12 (1975).
\end{itemize}
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heightened scrutiny (which presumably would include religious belief), much damage has been done.\(^{52}\)

In this passage, Justice Scalia presaged the possible prohibition of religion-based peremptory challenges and set the stage for what was soon to come.

The Supreme Court's most recent encounter with the peremptory challenge was its denial of certiorari in \textit{Davis},\(^{53}\) where the Minnesota Supreme Court had held that religion-based peremptory challenges did not violate the Equal Protection Clause.\(^{54}\) Although there was no majority opinion in the Court's denial of certiorari, Justice Ginsburg wrote a concurring opinion in which she focused on two factors that, she believed, distinguished religion from race and gender. First, she noted that religious affiliation is not as self-evident as race or gender.\(^{55}\) Second, she quoted the Minnesota Supreme Court's determination that inquiry into the veniremen's religious beliefs was irrelevant and therefore improper.\(^{56}\)

Justice Ginsburg's attempt to persuade the Court that there was no need to assess the constitutionality of religion-based challenges is unconvincing. First, her argument that religion is not self-evident (and therefore presumably will not become an issue during voir dire) is problematic, since religion became an issue during voir dire in \textit{Davis} as well as in several other reported cases.\(^{57}\) Her second argument, that inquiry into religion during voir dire is improper, also fails, since litigants are generally free to ask veniremen whatever questions they think will best enable them to select the most favorable jury, and it is entirely possible that a lawyer will think that a prospective juror who belongs to a particular religion will somehow be biased against his case. In any case, it is important to note that, although Justice Ginsburg wrote in support of the denial of certiorari, she did not assess the constitutionality of religion-based challenges under the Equal Protection Clause or the Free Exercise Clause. Instead, she attempted to explain why assessing the constitutionality of religion-based peremptory challenges was unnecessary.

\footnotesize{\(^{52}\) Id at 1438 (citations omitted) (emphasis added in final paragraph).

\(^{53}\) 114 S Ct at 2120.

\(^{54}\) \textit{Davis}, 504 NW2d at 767, cert denied, 114 S Ct at 2120. The Minnesota Supreme Court did not consider how religion-based challenges would fare under the Free Exercise Clause.

\(^{55}\) 114 S Ct at 2121 (Ginsburg concurring).

\(^{56}\) Id.

\(^{57}\) See Section II.D.}
Dissenting from the denial of certiorari, Justice Thomas argued that since the Supreme Court’s decision in J.E.B. extended the holding of Batson to gender, peremptory challenges against religious groups should be scrutinized as well. Thomas noted that the Minnesota Supreme Court based its decision on the (he believed erroneous) assumption that Batson’s equal protection analysis was confined to race-based peremptory strikes. Given the Court’s implication in J.E.B. that all peremptory strikes against groups that receive heightened scrutiny are potentially unconstitutional, Thomas posited that there was no principled reason for declining to apply Batson to religion-based challenges. Thomas speculated that the Court’s decision to deny certiorari stemmed from an unwillingness to confront forthrightly the ramifications of the J.E.B. decision. He stated that “[i]t has long been recognized by some members of the Court that subjecting the peremptory strike to the rigors of equal protection analysis may ultimately spell the doom of the strike altogether, because the peremptory challenge is by nature ‘an arbitrary and capricious right.’” So, after Batson, J.E.B., and Davis, the religion-based peremptory challenge stands on thin—though not yet broken—constitutional ice.

D. Religion-Based Peremptory Challenges in the Lower Courts

Lower courts have both upheld and rejected the extension of Batson to religion-based peremptory challenges, but only the

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58 Davis, 114 S Ct at 2121-22.
59 Id at 2122.
60 Id.
62 See, for example, United States v Greer, 939 F2d 1076, 1085 (5th Cir 1991) (holding that the defendants accused of vandalizing a temple could not constitutionally strike Jewish veniremen from the panel). But see Davis, 504 NW2d at 771 (upholding the exclusion of a prospective juror based on religious affiliation); Casarez, 913 SW2d at 495-96 (same).

Courts have also held that some state constitutions forbid religion-based peremptory challenges as well. See, for example, Joseph v State, 636 S2d 777, 781 (Fla Dist Ct App 1994) (peremptory strike of a potential juror executed solely because the juror was Jewish violated the Florida constitution’s guarantee of an impartial jury); State v Eason, 336 NC 730, 445 SE2d 917, 921-23 (1994), cert denied, 115 S Ct 764 (1995) (holding that North Carolina constitution specifically prohibits exclusion from jury service on account of religion, but that prohibition does not apply to exclusion on the basis of religious opposition to capital punishment); State v Levinson, 71 Hawaii 492, 796 P2d 845, 849-50 (1990) (same for the Hawaii constitution); Commonwealth v Carleton, 36 Mass App 137, 629 NE2d 321, 325 (1994) (holding that religion-based peremptory challenges violate clause of the Massachusetts Declaration of Rights guaranteeing defendants a jury of their peers); People v Fudge, 7 Cal 4th 1075, 31 Cal Rptr 2d 321, 332 (1994), cert denied, 115 S Ct
Texas Court of Criminal Appeals, in *Casarez v State*, has considered this issue in light of *J.E.B.* and its suggestion that all peremptories against groups that receive heightened scrutiny may be unconstitutional. The *Casarez* court, however, held that all religion-based peremptory challenges were constitutional. The court reasoned that excluding a potential juror on the basis of his religious affiliation was reasonable because a religion is based upon a system of beliefs shared by all its members. To hold that a venireman could not be excluded on account of his religious preference was tantamount, the court thought, to holding that he could not be struck on account of his beliefs, an idea that the court believed to be beyond the scope of *Batson*.

The dissent was "astounded" by the lack of authority for the majority's holding and disputed the majority's assumption that the beliefs of a religion are held by all of its members. The dissent then argued that religion-based peremptory challenges did not advance a compelling state interest and, therefore, should be eliminated.

The *Casarez* dissent accurately pointed out the crucial problem with the majority opinion: the absence of empirical data to support the majority's tenuous conclusion that religion is an accurate predictor of a juror's individually held beliefs and his vote. One cannot just assume that, for example, the millions of Catholics in this country are all opposed to birth control without some data to support this conclusion. But because the *Casarez* court based its opinion on these debatable assumptions about the empirical data...
correlation between personal beliefs and religious affiliation, they merit close scrutiny.

III. A CONSTITUTIONAL FRAMEWORK FOR EXAMINING RELIGION-BASED PEREMPTORY CHALLENGES

This Section argues that courts must review religion-based peremptory challenges under strict scrutiny and that, since they are not narrowly tailored to serve a compelling state interest, such challenges violate both the Equal Protection Clause and the Free Exercise Clause. Practitioners might think that religion-based peremptory challenges are a necessary tool in the selection of a fair and unbiased jury, and are in fact narrowly tailored to this end. However, social science data reveals that religion-based peremptory challenges are unlikely to facilitate the exclusion of biased veniremen, and such strikes therefore are not narrowly tailored toward achieving the state's interest in fair trials. But before scrutinizing the empirical research relevant to religion-based peremptory challenges, it is helpful to analyze precisely why courts afford religion-based classifications strict scrutiny.

A. The Equal Protection Clause

A classification receives heightened scrutiny under the Equal Protection Clause if it either burdens a "fundamental right" or discriminates against a "suspect class." While it is undisputed that a "fundamental right" is one guaranteed by the Constitution, such as the free exercise of religion, the Supreme

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72 See, for example, Plyler v Doe, 457 US 202, 232 (1982) (Blackmun concurring) (stating that "fundamental rights are those that 'explicitly or implicitly are] guaranteed by the Constitution"), quoting San Antonio Independent School District v Rodriguez, 411 US 1, 33-34 (1973) (alteration in Plyler); City of Mobile v Bolden, 446 US 55, 113 (1980) (Marshall dissenting) ("Under the Equal Protection Clause, if a classification 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution, ... strict judicial scrutiny' is required . . . ."), quoting San Antonio Independent School District, 411 US at 17.
73 See, for example, Nguyen v Nguyen, 882 SW2d 176, 177 n 2 (Mo Ct App 1994) (stating that fundamental rights for equal protection purposes include freedom of religion); Phan v Virginia, 806 F2d 516, 519-20 (4th Cir 1986) (holding that conditioning receipt of a public benefit upon choice of religion unconstitutionally interferes with a fundamental right under the Equal Protection Clause). Courts are often reluctant to make this point, however, since they can reach the same result under the First Amendment. See, for example, Sherbert v Verner, 374 US 398, 410 (1963) ("In view of the result we have reached under the First and Fourteenth Amendments' guarantee of free exercise of religion, we have no occasion to consider appellant's claim [under the Equal Protection Clause].").
Court has never articulated a precise test for determining which groups should be regarded as "suspect." In addition to discussing religion as a fundamental right, this Section will also discuss religion as a suspect class, arguing that religion-based peremptory challenges merit strict scrutiny under both rationales.

The Supreme Court has been relatively consistent in regarding religious classifications as suspect under the Equal Protection Clause, although the Court has not fully explained why it considers religion to be suspect. In general, the Court considers the following factors to be persuasive indicators of a suspect classification: whether the group's defining characteristic is immutable; whether the group has suffered a history of discrimination; whether the group has been relegated to such a position of political powerlessness that extraordinary protection from the majoritarian political process is necessary; and whether the group's defining characteristic affects its members' ability to participate in or contribute to society.

Although the Supreme Court did not consider how gender fared under these factors in J.E.B. (probably since it was already well settled that classifications based on gender were afforded heightened scrutiny), the Court indicated that a classification of individuals who had a "long and unfortunate" history of discrimination should receive heightened scrutiny. By this same ratio-

74 See Burlington Northern Railroad Co. v Ford, 504 US 648, 651 (1992) (stating that a statute did not offend the Equal Protection Clause since it did not "classify along suspect lines like race or religion"); Larson v Valente, 456 US 228, 246 (1982) (ruling that a law drawing distinctions on religious grounds must be strictly scrutinized); City of New Orleans v Dukes, 427 US 297, 303 (1976) (stating that the rational basis test only applies if statute does not draw upon "inherently suspect distinctions such as race, religion, or alienage"); Oyler v Boles, 368 US 448, 456 (1962) (ruling that selective enforcement does not pose Equal Protection Clause concerns unless explicitly based upon "an unjustifiable standard such as... religion"). See also Davis, 114 S Ct at 2121 (Thomas dissenting) ("J.E.B. would seem to have extended Batson's equal protection analysis to all strikes [against classifications that receive heightened scrutiny]—a category which presumably would include classifications based on religion."), citing Larson, 456 US at 244-46.
75 See, for example, Frontiero v Richardson, 411 US 677, 686 (1973).
76 See, for example, id at 684.
77 See, for example, San Antonio Independent School District, 411 US at 28.
78 See, for example, City of Cleburne v Cleburne Living Center, Inc., 473 US 432, 442-44 (1985).
79 J.E.B., 114 S Ct at 1425 (concluding that gender-based classifications warrant heightened scrutiny because of this country's long and unfortunate history of gender discrimination). Although the J.E.B. Court looked only to the history of discrimination against women when it held gender-based challenges up to heightened scrutiny, some courts have concluded that religion may warrant strict scrutiny because it is an immutable characteristic. See, for example, Galloway v Louisiana, 817 F2d 1154, 1159 (5th Cir 1987) (To establish an equal protection claim, "[a] plaintiff must show membership in
nale, our nation's history of religious discrimination, especially in the jury system, suggests that courts should review religion-based challenges under heightened scrutiny as well.

The history of religious persecution in England and America that at least in part inspired the First Amendment no doubt contributed to the development of the Court's now routine conclusion.80 Indeed, the period that saw the early settlement of the American colonies was marked by severe religious discrimination in England, where most religious groups other than the Anglican Church were repressed.81

Religious discrimination was pervasive in the colonies and early states as well. One can find the "religious test oath" codified in early state constitutions: in Georgia, South Carolina, and New Hampshire, for example, only Protestants could serve as state legislators.82 The Massachusetts Constitution of 1780 guaranteed equal treatment only to those belonging to Christian denominations.83 In early colonial New England, Puritans statutorily banished Baptists and expelled or executed Quakers.84 And in Virginia, an Anglican colony, Baptists were horsewhipped and jailed up until the Revolution, while Puritans and Catholics were expelled.85

Some of the colonies, however, responded to religious discrimination by adopting a policy of religious toleration that guar-
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anteed "liberty of conscience." These policies are the predecessors of today's constitutional provisions guaranteeing freedom of religion. The Framers of the United States Constitution incorporated substantial protections against religious discrimination into Article VI and the First Amendment. Yet, even as late as 1968, Maryland's constitution required state officials to declare their belief in the existence of God.

Moreover, some states historically denied people of particular religions the opportunity to serve as jurors. Until 1965, when the Maryland Court of Appeals outlawed the practice, the Maryland Declaration of Rights made a belief in God a prerequisite for jury service. Other courts have avoided declaring religious qualifications for jury duty unconstitutional by interpreting state provisions that require jurors to take oaths to permit affirmations instead. As these cases highlight, religious discrimination not only has been a problem in our nation's history, it has also been a problem specifically within our jury system.

In sum, since the Supreme Court considers religious classifications to be suspect and considers the free exercise of religion to be a fundamental right, it seems inevitable that the Supreme Court will subject religion-based classifications to strict scrutiny. If religion-based classifications are afforded strict scrutiny, then a proponent of religion-based peremptory challenges must prove that such challenges promote a compelling state interest and are narrowly tailored to achieve that interest. But before turning to whether religion-based peremptory challenges meet this standard, it is important to note an additional basis for affording

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86 Id at 1425-26.
87 Id at 1427-28.
88 Article VI forbids the use of religious tests to exclude citizens from "public trusts." US Const, Art VI, cl 3. One might argue that the discriminatory classification of individuals based upon their religious beliefs that occurs when religion-based peremptory challenges are executed is such a prohibited religious test. However, no litigant has ever pressed the issue in this way in the courts.
91 See Schwegurow v State, 240 Md 121, 213 A2d 475, 478 (Md Ct App 1965) (holding that the requirement of a belief in God to qualify as a juror violates the Fourteenth Amendment). See also Md Const of 1867, Art 37.
92 See, for example, Jones v State, 94 Nv 679, 585 P2d 1340, 1341 (1978) ("Where an affirmation is permitted in lieu of an oath, a juror's freedom of religion is not violated."). See also Chambers, 70 Ind L J at 599 n 204 (cited in note 82).
religion-based classifications strict scrutiny: the Free Exercise Clause.

B. The Free Exercise Clause

Apart from the Equal Protection Clause, the Free Exercise Clause of the First Amendment provides an alternative ground for holding that religion-based challenges merit strict scrutiny. The Supreme Court has yet to consider peremptory challenges under the First Amendment because it has never decided a case in which peremptory challenges raised religious issues. However, as a general rule, when a state actor denies a recipient an important state benefit because of his religious beliefs, the state infringes upon the recipient's right to the free exercise of religion, and such actions are subject to strict scrutiny. Because the Supreme Court has long considered jury service an important benefit of citizenship, and because the Free Exercise Clause prohibits the state from denying such benefits because of religious affiliation, there is yet another reason for finding that religion-based peremptory challenges should receive strict scrutiny.

The Supreme Court recently stated its view that jury service is an important state benefit in *Powers v Ohio*:

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. . . . It “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.

Although this Comment's discussion of the First Amendment is limited to the Free Exercise Clause, some commentators have suggested that religion-based peremptory strikes might also violate the Establishment Clause of the First Amendment. See David G. Hart and Russel 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, 115 (1994) (arguing that when the state allows a civil litigant to strike a juror because of his or her religious beliefs, the state is in effect preferring one religion over another). See text accompanying notes 96-105.

Although *Powers* involved a juror who was dismissed on account of his race, the state-benefit analysis applies with equal force to the case of a venireman dismissed on religious grounds.

The Supreme Court has strictly scrutinized and subsequently struck down programs that forced people to choose between their right to receive important state benefits and their right to religious freedom. In *McDaniel v Paty*, the Court struck down a Tennessee constitutional provision that prohibited clergymen from serving as delegates to the state’s limited constitutional convention on the ground that Tennessee’s policy conditioned the right of clergymen to the free exercise of their religion on the surrender of their right to seek office. The government could not “fence out” from politics people whom it regarded as overinvolved in religion. Since Tennessee’s policy singled people out because of their religion and withheld from them a state benefit, the classification was strictly scrutinized and struck down.

In addition to the right to seek elected office, the Court has considered several cases involving the right to receive state unemployment compensation. The Supreme Court has generally struck down any state statute that conditioned the receipt of state unemployment benefits on the relinquishment of a religious practice. In its first case on this issue, *Sherbert v Verner*, the Supreme Court held that South Carolina could not constitutionally apply the eligibility provisions of its unemployment compensation statute so as to deny benefits to a Seventh-Day

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96 In addition, the Religious Freedom Restoration Act ("RFRA") provides that every government rule that interferes with the free exercise of religion must satisfy the strict scrutiny standard. RFRA was passed by Congress to overrule *Employment Division v Smith*, which held that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. 494 US 872, 885 (1990). RFRA restored the application of strict scrutiny to state programs that do not directly target religious beliefs but indirectly restrain the free exercise of religion. See *Hunt v Hunt*, 162 Vt 423, 648 A2d 843, 853-54 (1994); S Rep No 103-111, 103d Cong, 1st Sess 2 (1993), reprinted in 1993 USCCAN 1892, 1893 (expressing congressional intent to overrule *Smith* through passage of RFRA); HR Rep No 103-88, 103d Cong, 1st Sess 2 (same). RFRA therefore supports the conclusions reached in Section III.


98 Id at 641 (Brennan concurring).

99 *McDaniel*, 435 US at 629. See also *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520, 546 (1993) (holding that when the government takes an action that is in fact neutral but rather is intended to interfere with particular conduct because that conduct is dictated by a religious belief, the government action will undergo “the most rigorous of scrutiny”).
Adventist. The plaintiff had been discharged by her original employer because she would not work on Saturday, and she refused to take on new work because those jobs also required her to work on Saturday. When she applied for unemployment compensation, the agency in charge of distributing benefits claimed that she was ineligible for them since she had turned down "suitable work."

The Court in Sherbert first addressed the issue of whether South Carolina's policy burdened the plaintiff's right to the free exercise of her religion. The Court held that the policy clearly did, since the agency's ruling forced her to choose between following the precepts of her religion and collecting state benefits. The Court then considered whether some compelling state interest furthered by the South Carolina eligibility provisions justified the substantial infringement of the plaintiff's First Amendment rights. The Court found none, and it struck the policy down as unconstitutional.

In a later decision much in line with Sherbert, the Supreme Court held:

Where the State conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

The Court went on to find that Indiana's denial of unemployment compensation benefits to a Jehovah's Witness who had quit his job because his religious beliefs forbade his participation in the production of armaments violated his First Amendment rights.
Like the Tennessee constitutional provision and the various state welfare policies, peremptory challenges based on religion single out and deny benefits to members of religious groups solely on the basis of religious belief or status. Consequently, because they burden potential jurors’ free exercise rights, courts should subject religion-based peremptory challenges to strict scrutiny under the Free Exercise Clause.

C. Determining Whether Religion-Based Peremptory Challenges Are Narrowly Tailored: Social-Scientific Data

The determination that religion-based peremptory challenges receive strict scrutiny under the Equal Protection Clause and the Free Exercise Clause is only the first step in the constitutional inquiry. So long as allowing religion-based peremptory challenges constitutes a narrowly tailored means of furthering a compelling state interest, it will be upheld even if a fundamental right or suspect class is burdened. The Supreme Court has made it clear that states have a compelling interest in ensuring the selection of fair and impartial juries. What remains at issue is whether religion-based peremptory challenges are narrowly tailored to further that admittedly compelling interest. By looking to empirical data for evidence that peremptory challenges based on religion are effective tools for excluding biased veniremen, a proponent of such challenges could seek to offer some support for them. However, since there is little, if any, social-scientific support for the efficacy of religion-based peremptory challenges, the enterprise would fail. In other words, religion-based peremptory challenges are not narrowly tailored toward achieving a compelling state interest, and, consequently, they are unconstitutional.

The first thing to note is that the Supreme Court has indicated that religion-based peremptory challenges will only satisfy strict scrutiny if there is strong evidence to support their effectiveness in enabling litigants to remove biased veniremen. In J.E.B., the Supreme Court recognized that veniremen have an equal protection right to be free from “group stereotypes rooted

plaintiff to choose between following her religion and receiving state benefits).

Although a prospective juror who is dismissed with a peremptory challenge technically does not choose between the receipt of a state benefit and his religion (because the choice is made for him by the litigants in the case), a juror is still denied a fundamental right of citizenship because of his professed choice of religion.

J.E.B., 114 S Ct at 1425.
in, and reflective of, historical prejudice.\textsuperscript{108} The \textit{J.E.B.} Court did note that one side in that case tried to offer some empirical support for its claim that men and women have different attitudes about certain issues,\textsuperscript{109} but the Court concluded that a small amount of statistical support for a stereotype will not by itself justify the peremptory challenge:

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.\textsuperscript{110}

Essentially, the Supreme Court recognized that members of a class may have common characteristics and may share a set of common values but emphasized that this alone would not justify the continuation of discriminatory stereotypes.

Based on this reasoning, one might think that the Supreme Court would never consider findings from social science dispositive in determining if a peremptory challenge should survive strict scrutiny. To the contrary, though, social science research is crucial in resolving the debate over religion-based peremptory challenges. While race and gender classifications are based upon physical characteristics, religious classifications are based on beliefs: members of a religion are united, if at all, by common beliefs. Unlike striking a juror because of his physical characteristics, striking a juror because of his beliefs might not seem as intuitively offensive and meritless. However, since the \textit{J.E.B.} Court specifically warned that a party defending a peremptory

\textsuperscript{108} Id at 1421.

\textsuperscript{109} Id at 1426 n 9.

\textsuperscript{110} Id at 1427 n 11 (citations omitted). Many of the studies that indicate that members of the same religion are inclined to have some of the same political views also conclude that members of racial and gender groups are as likely, if not more likely, to have the same opinions on controversial issues. See, for example, Gallup Organization, \textit{Preferences in Three-Way Trials}, 3 Am Enter 92 (Sept/Oct 1992); Voter Research & Surveys, \textit{Etnocultural Patterns}, 4 Am Enter 92, 92-96 (Jan/Feb 1993); Jay Schulman, et al, \textit{Recipe for a Jury}, Psych Today 37, 37-44 (May 1973); Donald E. Vinson, \textit{Jury Trials: The Psychology of Winning Strategy} 12-15 (Michie 1986); Jeffrey T. Frederick, \textit{The Psychology of the American Jury} 12-15 (Michie 1987). But since the Supreme Court barely considered such data in \textit{J.E.B.}, it is entirely possible that they would also not consider it dispositive in the religion context.
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challenge based on a stereotype about a suspect class would bear a heavy burden, and that coming up with a small amount of statistical support for the stereotype would not be enough to satisfy this burden, a proponent of a religion-based peremptory challenge will need to provide a large amount of statistical data before that party will satisfy the strict scrutiny standard. Therefore, a proponent of a religion-based peremptory challenge would probably have to do more than merely provide evidence proving a correlation between religion and specific opinions on discrete issues. This is apparent because the Supreme Court rejected similar evidence in *J.E.B.*, and because this type of data does not necessarily prove how a juror would decide the merits of a particular case.

What data there is to support the conclusion that members of a given religion are inclined to reach similar outcomes when placed on a jury panel is unpersuasive because the relevant studies have at most established that members of a religion may tend to share similar ideological views on various issues; the studies have not proved that religious affiliation is an indicator of how members of a jury will decide the outcome of a trial, nor have they established that members of any religion are less able than nonmembers to reach an impartial verdict, as the Supreme Court would require a proponent of a religion-based peremptory challenge to do.

In the study most applicable to the jury selection process, *Religiousness, Religious Orientation, and Attitudes Towards Gays and Lesbians*, Randy Fisher and others surveyed members of the Orlando, Florida, jury pool, purportedly to gather information to...
be used in an upcoming trial. The supposed plaintiff, a former deputy sheriff and admitted homosexual, claimed he was improperly fired from the sheriff's office because of his homosexuality. The surveyors wanted to assess how members of various religions viewed the deputy's case, so they asked the respondents whether they believed the plaintiff's or the defendant's version of the events and whether the plaintiff was entitled to damages. The authors found a strong correlation between religious preference and antigay attitudes: Baptists and fundamentalist Christians showed high levels of antigay attitudes, Catholics and Presbyterians showed low to moderate levels, and Jews showed the lowest levels. Furthermore, antigay attitudes correlated with a tendency to disbelieve the homosexual plaintiff.

While on the surface these findings may bolster litigants' claims as to the validity of religion-based peremptory challenges, there are two problems with this study. First, the ways the study identified antigay prejudice were flawed. One of the five measures was whether respondents believed the plaintiff's or the defendant's version of a crucial meeting, but believing the defendant sheriff's version could have indicated something other than antigay feelings, such as respect for the police.

Second, and more important, responses to a thumbnail summary of the plaintiff's and defendant's versions of the events (the format of the study) were poor proxies for actual jury voting patterns. At a real trial, a juror might be swayed by his peers during deliberations, the somber atmosphere of the courtroom, or the effect of seeing a live plaintiff who may have been harmed in ways not obvious from the brief sketch. At a real trial, whatever political and moral predispositions a juror may have when he enters the courtroom become one of the many elements that ultimately influence his decision. The study, however, failed to account for these factors. A truly persuasive study would have to take place in a realistic setting. In any case, all that this study proves is that a small "measure of truth" can be found in the stereotypes about members of some religious groups and antigay attitudes, and that religious affiliation can often be linked to certain beliefs and opinions. This will not satisfy the burden that

116 Id.
117 Id at 623.
118 Id at 622.
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the Supreme Court places on a proponent of a religion-based peremptory challenge.\(^{119}\)

In addition, stereotypes upon which litigants may rely in exercising peremptory challenges may be inaccurate, because members of a religion frequently do not share the same values and beliefs and often do not adopt their church's official position on controversial issues. As Robert Young concluded in his study of people's positions on capital punishment: "religious orientation is a highly complex phenomenon that supports a variety of seemingly contradictory attitudes and behaviors."\(^{120}\) For example, although the Roman Catholic Church forbids the use of artificial birth control,\(^{121}\) 87 percent of American Catholics believe that they should be allowed to use birth control.\(^{122}\) This means that if a litigant struck a Catholic venireman because the litigant attributed to her the Catholic Church's condemnation of artificial contraceptives, that litigant would face an 87 percent chance of being wrong. Similarly, even though many people think Catholics are staunchly opposed to abortion, nearly half the Catholics in this country think that a woman should be able to have an abortion for economic reasons.\(^{123}\) These studies thus indicate that there is a wider variety of beliefs among members of the same religion than people may assume. Therefore, there is some indication that when a practitioner strikes a venireman immediately after hearing that the venireman is a member of some particular religious group (before ascertaining in fact whether the venireman actually holds the belief the practitioner wants to eliminate from the jury), that practitioner might be incorrect much of the time.

Finally, even if a proponent of a religion-based peremptory challenge were to provide a court with concrete empirical data bearing out a correlation between religion and bias, the strikes should still fail strict scrutiny, since there is no proof that litigants could effectively use this data. On this point, the study by

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\(^{119}\) See J.E.B., 114 S Ct at 1427 n 11.


\(^{122}\) Patricia Edmonds, Rome wants obedience: Most U.S. Catholics disagree with Vatican on issues, USA Today 3A, 3A (June 19, 1992).

\(^{123}\) Election Profile: Catholics, 2 Am Enter 93, 93-98 (Sept/Oct 1991) (citing National Opinion Research Center survey finding that 40 percent of American Catholics support abortion for low-income families). This figure is only four points below the national average. Id.
Hans Zeisel and Shari Diamond questions the ability of lawyers to detect jurors' biases and to predict how these biases will impact jurors' decisions in discrete cases. According to the study, lawyers hardly improved their positions through the use of their peremptory challenges, and they would have fared about the same if they had eliminated jurors randomly. This further suggests that religion-based peremptories are not narrowly tailored to further the selection of a fair and unbiased jury.

But even if in theory religion-based peremptory challenges could be useful, in practice they are not. Historically, trial experts often have based their assessments of jurors not on well reasoned theories about religion, but rather on groundless and stereotypical assumptions that often contradict each other. For instance, as one celebrated commentator warned:

Presbyterians [are] as cold as the grave; [they] know[ ] wrong from right, although [they] seldom find anything right. . . . If possible, the Baptists are more hopeless than the Presbyterians. . . . Methodists are worth considering; they are nearer the soil. . . . As to Unitarians, Universalists, Congregationalists, Jews and other agnostics, don't ask them too many questions; keep them anyhow, especially Jews and agnostics.

Another text cautioned: "Ask veniremen their religious preference. Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused. Lutherans and Church of Christ veniremen usually make good State's jurors." In the medical malpractice context, one commentator warned plaintiffs' lawyers to stay away from Jewish jurors because "most Jews want their sons to become doctors, . . . and they want their daughters to marry doctors." On the other hand, some trial advocacy writers think that questions

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125 Id.
126 Clarence Darrow, Attorney for the Defense, Esquire 36, 37, 211 (May 1936).
about religion should be omitted altogether because they are not at all helpful in predicting jurors' dispositions.\textsuperscript{129}

Although knowledge of a juror's religious affiliation does not significantly help a lawyer predict how the juror will decide a case, the extent and intensity of the juror's religious involvement and commitment to his particular religion may be helpful in predicting his positions on controversial issues. In Robert L. Young's study of the relationship between religious orientation and attitudes toward the death penalty, he concluded that religious observance correlated strongly with opposition to the death penalty.\textsuperscript{130} Similarly, Andrew Greely's study, \textit{Religion and Attitudes Toward the Environment}, concluded that the crucial predictor of environmental concern was the literalism of one's belief in the Bible.\textsuperscript{131} And the Fisher study, which found a correlation between antigay attitudes and membership in certain religions, concluded that greater frequency or attendance at religious services is associated with greater prejudice toward gays.\textsuperscript{132} Given these studies, it makes sense to forbid challenges based on religious affiliation in favor of a system that forces a party to probe more deeply during voir dire into a potential

\textsuperscript{129} See, for instance, Judicial Conference of the United States, \textit{The Jury System in the Federal Courts} 28 (Inst of Jud Admin 1960) (concluding that questions on race and religion "might better be completely omitted" since they are unrevealing); John A. Appleman, et al, \textit{Successful Jury Trials: A Symposium} 128 (Bobbs-Merrill 1992) ("Unless questions of religious beliefs are likely to be raised in the case... one need not be too much concerned about a juror's religious affiliations.").

\textsuperscript{130} Young, 31 J Sci Stud Relig at 85 (cited in note 120).

\textsuperscript{131} Andrew Greely, \textit{Religion and Attitudes Toward the Environment}, 32 J Sci Stud Relig 19, 22 (1993) ("Biblical literalism... correlates negatively with environmental concern. . . .")

\textsuperscript{132} Fisher, et al, 24 J Applied Soc Psych at 623 (cited in note 115). See also Harold G. Grasmick, Carolyn Stout Morgan, and Mary Baldwin Kennedy, \textit{Support for Corporal Punishment in the Schools: A Comparison of the Effects of Socioeconomic Status and Religion}, 73 Soc Sci Q 177, 182 (1992) (finding that fundamentalist Protestants are more supportive of corporal punishment than nonfundamentalist Protestants); National Opinion Research Center, \textit{Religion and Politics}, 1 Am Enter 101, 101 (Nov/Dec 1990) (finding that "increasingly, it's the extent of religious involvement and commitment that is the key political variable"); \textit{Election Profile: Catholics}, 2 Am Enter at 95 (cited in note 123) (finding that Catholics who attend church frequently tend to be more conservative politically); \textit{Faith in America}, 5 Am Enter 90, 91 (Sept/Oct 1994) (reporting that more than half of Americans attend church at least once a week); Bruce L. Vaughan, \textit{Courtroom Psychology and Jury Selection} 24 (Interstate College of Personology 1986) ("It is far more important to know the degree of religious behavior rather than which faith the person belongs to."); Gobert and Jordan, \textit{Jury Selection} § 11.08 at 403-04 (cited in note 12) (stating that "it is important... to determine the strength of a juror's religious beliefs in order to gauge the rigidity of that juror's concepts of right and wrong").
juror’s actual beliefs, the intensity of those beliefs, and his commitment to the teachings of his religion.

In sum, religion-based peremptory challenges fail strict scrutiny. Although practitioners may feel that they are an important tool, the Court in *J.E.B.* implicitly held that religion-based peremptories would fail to pass constitutional muster unless they were narrowly tailored to achieve the goal of the selection of an unbiased jury. While there may be evidence linking certain religious affiliations with certain beliefs and values, evidence of that alone is unlikely to satisfy a court. Proving that some prospective jurors come to the jury room with certain predilections and opinions does not prove that these jurors will be any less capable of leaving their beliefs “at the door” of the jury deliberations room and rendering a fair and impartial verdict. The only way a proponent of religion-based peremptory challenges could overcome this hurdle is through the use of empirical data demonstrating that members of any religion are less able to render impartial verdicts or even that members of one religion are likely to come to certain verdicts. Because no such data exists, and because there is no proof that, even if the data existed, litigants could effectively make use of it, religion-based peremptory challenges fail to survive strict scrutiny. Following the Court’s analysis in *J.E.B.*, the rights of jurors to the free exercise of their religion and the equal protection of the laws represent interests too compelling to maintain a system of unbridled use of religion-based peremptory challenges.

**IV. IMPLEMENTING A BAN ON RELIGION-BASED PEREMPTORY CHALLENGES: THE DISTINCTION BETWEEN AFFILIATION-BASED AND BELIEF-BASED CHALLENGES**

Because of the amorphous nature of religion and religious belief, determining which religion-based peremptory challenges should be forbidden will be more difficult than making the same determination about race-based and gender-based strikes. However, by drawing a firm line that forbids peremptory challenges based on a prospective juror’s religious *affiliation* but permits challenges based on the prospective juror’s *beliefs*, the legal system can preserve the peremptory challenges that ensure the selection of a fair and impartial jury.
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A. The Mechanics of the Proposal

One can distinguish two kinds of religion-based peremptory challenges. First, counsel might exercise a peremptory challenge immediately after hearing that a prospective juror belonged to a specific religion, without inquiring into the venireman's actual beliefs. For example, a defense lawyer might immediately want to strike someone who is Jewish if the defendant were charged with the desecration of a temple. Second, counsel might ascertain that a prospective juror belongs to a religion that she has found through past experience to be biased, and might then continue to inquire into his beliefs to determine whether he did indeed hold an "objectionable" belief. For example, after finding out that a venireman was a Jehovah's Witness, the lawyer might determine through further questioning that the venireman believed that he should refrain from exercising judgment over his fellow human beings, in which case the lawyer would strike him. Under the approach proposed in this Comment, the peremptory challenge exercised in the first example would be unconstitutional, while the peremptory challenge in the second example would be permissible.

Generally, a prohibition on affiliation-based peremptories would not alter voir dire. Neither side would face greater restrictions on its right to ask questions about a venireman's religion and religious beliefs. If one party suspected that the other had exercised an impermissible strike, the challenging attorney could request an affiliation-neutral explanation. The burden would then shift to the nonmoving party to articulate a neutral explanation for dismissing the juror. If that party failed to do so, the strike would not be allowed and the court would impanel the juror.

For example, suppose that a venireman was called to serve in a criminal case in which the defendant was charged with the failure to pay alimony and child support. The defense might ask this prospective juror if he belonged to a religion that might "influence his thinking." Suppose the juror answered yes, he happened to be Catholic, and he "frowned" on any man who di-

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133 See, for example, Davis, 504 NW2d at 768.
134 As previously noted, there is no constitutional right to inquire into prospective jurors' religious beliefs during voir dire, so it is largely up to the judge's individual discretion if he will permit the parties to propose religion-based questions. See text accompanying note 24.
135 This procedure was outlined by the Supreme Court in Batson, 476 US at 93-98.
vorced his wife. The defense lawyer would first try to remove the juror for cause. Assuming he failed in his attempt, he might exercise a peremptory challenge. The state could then request an affiliation-neutral explanation for the challenge. The burden would then shift back to the defense, who would have to explain that the prospective juror was struck not on the basis of his religion but rather on the basis of his personal bias against divorce. Under this approach, it is irrelevant what motivates the juror’s bias, because religion is treated like any other non-religious motivating factor.

If the other party suspected that the explanation for the strike was pretextual and that the strike was in fact based on the juror’s religious affiliation, the court might hold a mini-\textit{Batson} hearing to make a fact-based determination as to what the lawyer’s motivations in striking the prospective juror really were. As with race-based and gender-based claims, a party alleging affiliation-based discrimination would be required to make a prima facie showing of intentional discrimination before the party exercising the strike would be required to explain the basis for the strike. When an explanation is required, it need not rise to the level of a challenge for cause. Instead, it must only be based on a characteristic of the juror other than religious affiliation, although it must not be merely a pretext for discrimination.\footnote{\textit{J.E.B.}, 114 S Ct at 1434 (Kennedy concurring).}

B. Why Belief-Based Challenges, as Opposed to Affiliation-Based Challenges, Are Narrowly Tailored to Serve a Compelling State Interest

Forbidding peremptory challenges based solely on stereotypical notions of religion is administratively straightforward and almost surely constitutionally mandated. Justice Kennedy best articulated the groundwork for this conclusion in \textit{J.E.B.} when he said that courts should not consider a potential juror as a representative of a racial, religious, or sexual group, but as an individual citizen.\footnote{\textit{J.E.B.}, 114 S Ct at 1429-30.} Strikes based on an inquiry into the venireman’s actual beliefs are not unconstitutional because the party executing the peremptory challenge bases the strike on a theory about the juror’s actual beliefs rather than on a stereotype about the juror’s religious affiliation.
This proposed line also best comports with the social science research. While no research supports the notion that members of any religion are less capable of reaching fair and unbiased verdicts than members of any other religion, it is generally accepted that the intensity of one’s religious beliefs is an accurate predictor of one’s views on many issues. This means that, although knowing a venireman’s religion is not very helpful for predicting his vote, knowing how religious the venireman is might be. Given this discernible pattern in the statistical data on the intensity of one’s religious affiliation, the courts should adopt a regime that encourages practitioners to probe more deeply into the individually-held beliefs and practices of prospective jurors in order to ascertain how religious the prospective juror is and, therefore, to predict which party he will favor. Although a party could not remove, for example, a fundamentalist Baptist any more than a party could remove an “ordinary” Baptist under the proposal, by requiring both sides to probe a venireman’s beliefs, a litigant would be more likely to uncover some personally-held belief that would support a constitutional peremptory challenge.

Furthermore, if peremptory challenges based on religious beliefs were prohibited, parties opposing exclusion of a venireman could argue that a virtually unlimited number of beliefs were religious in order to defeat peremptory challenges. For example, in a case in which a doctor is charged with violating a state law prohibiting late-term abortions, counsel might well want to strike a venireman who stated that he was Catholic and was opposed to abortion, although he claimed that his opinion about abortion had nothing to do with his religious convictions. Would the court have to disallow the strike because it might be religious in nature, or allow it, since the man claimed that this opinion had nothing to do with his religion? The difficulty is compounded by the fact that the Supreme Court has never articulated a formal definition of a “religious belief” or a “religion.” If belief-based challenges were forbidden, such difficult situations might well become common, as the party opposing exclusion could almost always describe a belief as religious.

Finally, if peremptory challenges based on a juror’s recitation of his religious beliefs were disallowed, the legal system would be stripped of its tools for removing religious extremists but not

138 See text accompanying notes 130-32.
nonreligious extremists. For example, a juror who said, "I can walk on water," could be properly challenged, but a juror who said, "I can walk on water because Jesus will lift me into the air," would be stating her religious conviction and would be immune from peremptory challenges. Similarly, consider the case of a juror who said that she could fairly consider the case against a Jewish defendant, even though she hated all Jews because she believed that they secretly own all the banks, control the universities, and are conspiring to take over the world. A litigant could use a peremptory challenge to remove her, but not a similar juror who hated all Jews because her religion taught that they killed Jesus, since her motivations would be religious. By forbidding only peremptory challenges exercised to remove jurors on the basis of religious affiliation, while retaining challenges exercised to remove jurors for particular beliefs they hold, the courts can prevent such inconsistencies from becoming a problem during voir dire.

C. Potential Pitfalls

One might doubt whether this solution would actually prevent practitioners from exercising affiliation-based peremptories. For example, say that an Arab man charged with desecrating a temple wanted to strike anyone who was Jewish, so his lawyer asked each venireman about his religious beliefs. After one said that he is Jewish, the lawyer asked if he believed in Christmas. The man said no, and the lawyer struck him. Although this would technically be a belief-based rather than an affiliation-based strike, a court should not allow the defense to exercise a peremptory in this case. Since the defendant would be unable to explain how the failure to celebrate Christmas could possibly be relevant to the juror's ability to decide the case at hand, the judge should treat the explanation for this strike as pretextual and recognize that the strike was really an unconstitutional, affiliation-based strike. Consequently, such strikes would be disallowed under the proposal.  

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140 One might question the trial court's ability to prevent the invention of pretextual reasons. When a lawyer requests a religion-neutral explanation for a peremptory challenge, it might seem that the other side could concoct a plausible, non-discriminatory explanation with reference to subjective impressions. However, in practice courts have been reluctant to let lawyers advance subjective impressions in response to a request for a neutral explanation of a peremptory challenge. See, for example, Williams v State, 574 S2d 136, 137 (Fla 1991) (rejecting a peremptory challenge based on the claim that a prospective juror could not understand the felony murder rule and further asserting that
Other commentators have argued that no type of religion-based peremptory challenge should be forbidden because practically every peremptory challenge might be followed by a request for a religion-neutral explanation, slowing down voir dire considerably. However, this concern is unfounded. In most cases, there is no reason to suspect that litigants are seeking to eliminate jurors of any particular religion. If a juror's religion becomes an issue during voir dire, both sides know to be on guard that the other side may seek to eliminate that juror. Moreover, a judge can use his authority over voir dire to stop lawyers from making frivolous, repeated requests for religion-neutral explanations for peremptory challenges.

Still other commentators have noted that jurors may not all welcome a system that enhances questioning during voir dire. If a court requires a party to strike a juror based on the juror's personal beliefs rather than the juror's religious identity, the party will have to probe more deeply into the juror's personal beliefs and intrude on the juror's privacy to a greater degree. Unfortunately, this result is unavoidable, and this Comment's proposal is, in any case, preferable to a system in which jurors are summarily dismissed and labeled unsuitable without regard to their particular beliefs.

In sum, the problems of conducting voir dire in a system that limits religion-based peremptory challenges are small compared to the constitutional mandate this solution addresses. By forbidding affiliation-based peremptory challenges while retaining belief-based peremptory challenges, courts can eliminate the most invidious peremptory challenges that have little if any empirical support (such as those used to eliminate all Jews from the panel in an anti-Semitism case, and those used to eliminate Balhandra Das in _Clemmons_142) while still preserving jurors' rights to the equal protection of the laws and the free exercise of their religion without disrupting the performance of the justice system.

"the peremptory challenge is uniquely suited to masking discriminatory motives... and thus must be vigilantly policed"); _Floyd v State_, 569 S2d 1225, 1229 (Fla 1990) (rejecting explanation as pretextual upon discovering that prosecution's stated version of events at voir dire was not supported by the record); _American Security Insurance Co. v Hettel_, 572 S2d 1020, 1020-21 (Fla Dist Ct App 1991) (holding that dislike of the manner in which a juror answered counsel's questions and the juror's apparent disinterest in the case was not a sufficiently clear and specific reason for the challenge).

141 See, for example, _Chambers_, 70 Ind L J at 587-612 (cited in note 82).
142 See text accompanying notes 1-3.
CONCLUSION

When the Supreme Court decided *J.E.B.*, it opened the door for the eventual prohibition of religion-based peremptory challenges by stating that challenges exercised against groups afforded heightened scrutiny were potentially unconstitutional. The Supreme Court's denial of certiorari in *Davis* highlighted the need for an assessment of the constitutionality of religion-based peremptory challenges. Justice Thomas argued that it was necessary to resolve the issue by determining whether there was a principled distinction between religion-based strikes and those based on race or gender.

This Comment answers Justice Thomas by concluding that there is indeed no principled distinction between race, gender, and religious affiliation. Religious classifications, like classifications based on race and gender, receive heightened scrutiny under the Equal Protection Clause. Moreover, the First Amendment requires that burdens on the free exercise of religion receive strict scrutiny. Weighing the relevant compelling interests and examining what statistical data supports litigants' exercise of religion-based peremptory challenges, one must reach the same conclusion with respect to religion-based peremptories that the Supreme Court reached in *J.E.B.* with respect to gender-based peremptories: religious affiliation-based challenges are unconstitutional.

In arriving at this conclusion, the legal system need not say farewell to all peremptory challenges. First, however the debate on religion-based peremptories is resolved, challenges against groups not afforded heightened scrutiny are in little danger of being declared unconstitutional, since the Supreme Court has never indicated its intention to forbid peremptory challenges exercised against other groups that receive only rational basis review. Also, it is possible to maintain a workable system by preserving religion-based challenges that are exercised on the basis of a venireman's beliefs while simultaneously forbidding religion-based peremptory strikes based on the venireman's recitation of his religious affiliation. By so holding, courts can draw a clear line between permissible and impermissible challenges that will prevent a slide down the proverbial slippery slope.

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143 *J.E.B.*, 114 S Ct at 1424.
144 *Davis*, 114 S Ct at 2122 (Thomas dissenting).
145 See text accompanying note 6.