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A Battle of the Amendments: Why Ending Discrimination in the Courtroom May Inhibit a Criminal Defendant's Right to an Impartial Jury

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NOTES

A BATTLE OF THE AMENDMENTS: WHY ENDING DISCRIMINATION IN THE COURTROOM MAY INHIBIT A CRIMINAL DEFENDANT'S RIGHT TO AN IMPARTIAL JURY

*Gina M. Chiappetta**

Since the U.S. Supreme Court began limiting the exercise of peremptory challenges to safeguard potential jurors from discrimination, it has faced a nearly impossible task. The Court has attempted to safeguard a juror's equal protection rights without eradicating the peremptory challenge's ability to preserve a criminal defendant's right to an impartial jury. Under the current legal framework, it is not certain whether either constitutional right is adequately protected. This Note examines the history of the Supreme Court's limitation on peremptory challenges. It then discusses the current federal circuit split over whether peremptory challenges should be further limited. Finally, this Note concludes that the existing framework's application should be extended and restricted to more effectively protect the constitutional rights at issue.

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INTRODUCTION

James Kirkland Batson was an African American man charged with burglary and receipt of stolen goods.¹ During voir dire proceedings prior to the start of his trial, the prosecutor used four of his six peremptory challenges to remove every African American from the venire.² The result: Batson was convicted by an all-white jury.³

By its definition, a peremptory strike is not “subject to the court’s control”—its exercise cannot be challenged.⁴ In 1986, however, when the U.S. Supreme Court reviewed the Kentucky Supreme Court’s decision to affirm Batson’s conviction, it imposed the first of many limitations on the exercise of peremptory challenges.⁵ Relying heavily on the Fourteenth Amendment’s Equal Protection Clause, the U.S. Supreme Court decided this seminal case, *Batson v. Kentucky*,⁶ very narrowly. It held that prosecutors could not exercise peremptory strikes against veniremen solely on the basis that they share the same race as the defendant.⁷

Justice Thurgood Marshall did not have much faith in the Court’s solution, however. He predicted that ending racial discrimination in the jury selection process would “be accomplished only by eliminating peremptory challenges entirely.”⁸ Three decades later, the peremptory challenge no longer lives up to its name. In several attempts to temper the

1. *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).
 2. *Id.* at 83.
 3. *Id.*
 4. *Swain v. Alabama*, 380 U.S. 202, 220 (1965).
 5. *See infra* Part I.B.2–3.
 6. 476 U.S. 79 (1986).
 7. *Id.* at 93–95.
 8. *Id.* at 102–03 (Marshall, J., concurring).

discrimination peremptory challenges facilitate, *Batson* has been extended far beyond its original bounds.⁹ Now, civil and criminal litigants are prohibited from peremptorily dismissing a venireman based on their race or gender, regardless of whether the stricken juror shares the race or gender of a litigant.¹⁰ Whether or not *Batson* can be applied to further limit the procedure, however, is complicated.

Batson's scope has been narrowed so that peremptory challenges may be freely exercised against any group entitled to rational basis review under the Fourteenth Amendment.¹¹ For example, race and gender, classifications entitled to heightened scrutiny, are unconstitutional bases for peremptory challenges.¹² Mental handicap, on the other hand, is a permissible basis for a peremptory strike, as a classification only entitled to rational basis review.¹³ This limiting principle is not as easily applied, however, when it is unclear to which standard of review a group is entitled.

SmithKline Beecham Corp. v. Abbott Laboratories,¹⁴ an antitrust dispute between two producers of HIV medication, demonstrates the confusion plaguing the *Batson* regime.¹⁵ The district court needed to decide whether a peremptory challenge against a homosexual member of the venire potentially violated *Batson*.¹⁶ SmithKline's counsel argued that the "well-known" presence of AIDS in the homosexual community motivated Abbott to exercise its peremptory challenge on the basis of the juror's sexual orientation.¹⁷ The judge responded, "Well, I don't know that, number one, whether *Batson* applies in civil, and number two, whether *Batson* ever applies to sexual orientation."¹⁸ Ultimately, the *Batson* challenge was rejected.¹⁹ Yet, on appeal, the Ninth Circuit became the second circuit to recognize sexual orientation as a classification entitled to heightened scrutiny, and the first federal court to prohibit the exercise of peremptory challenges based on sexual orientation.²⁰

It is uncertain not only whether the *Batson* regime permits such a prohibition but also whether the Ninth Circuit's expansion will successfully prevent discriminatory peremptory strikes. As Justice Marshall predicted, despite several limitations on the exercise of peremptory challenges, the jury selection process continues to evince many kinds of discrimination.²¹ Still, in the face of more than thirty years of persistent criticism, the peremptory strike has persevered.

9. See *infra* Part I.B.3.

10. See *infra* Part I.B.3.

11. See *infra* Part I.C.

12. See *infra* Part I.C.1-2.

13. See *infra* Part I.C.1-2.

14. 740 F.3d 471 (9th Cir. 2014).

15. *Id.* at 474.

16. *Id.*

17. *Id.* at 475.

18. *Id.*

19. *Id.*

20. See *id.*

21. See generally *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (permitting peremptory strikes on the basis of classifications entitled to rational basis review).

The reason for this perseverance is that, despite the costs of permitting the procedure, prohibiting the exercise of peremptory challenges entirely also has costs.²² This Note examines the costs and the value of the peremptory challenge, and discusses whether *Batson* should be extended to prohibit sexual orientation–based strikes. To this end, Part I discusses the merits and shortcomings of peremptory challenges, and explains the ways in which *Batson* and subsequent cases limit the exercise of peremptory strikes. Part II discusses the two interpretations of *Batson*’s scope employed by the federal circuit courts. The first prohibits and the second permits sexual orientation–based peremptory strikes. Part III critically assesses the *Batson* regime and suggests that, to reduce the costs of further regulation of peremptory strikes, the *Batson* framework be altered to limit the circumstances under which a *Batson* challenge may be raised.

I. UNDERSTANDING THE *BATSON* REGIME AND ITS REGULATION OF PEREMPTORY CHALLENGES

The Supreme Court once defined a peremptory strike of a venireman²³ as a challenge “exercised without a reason stated, without inquiry and without being subject to the court’s control.”²⁴ In 1986, however, the Court decided *Batson*. This seminal case used the Fourteenth Amendment’s Equal Protection Clause²⁵ to empower courts to limit the motives with which a party may exercise peremptory strikes.²⁶ Part I.A discusses the virtues and deficiencies of limiting peremptory challenges. Part I.B traces the evolution of Supreme Court doctrine governing the exercise of peremptory strikes. Part I.C explores how the Fourteenth Amendment’s three-tiered system of judicial review limits the scope of *Batson*’s protections.

A. *Peremptory Challenges: Their Merits and Shortcomings*

During voir dire²⁷ proceedings, litigants have the opportunity to question prospective jurors to gain information that enables them to remove jurors from the venire.²⁸ There are two procedures that facilitate this removal: for-cause and peremptory challenges. A party may remove a prospective juror from the venire either by arguing to excuse a venireman peremptorily

22. See *infra* Part I.A.1.

23. BLACK’S LAW DICTIONARY 1789 (10th ed. 2014) (“A prospective juror; a member of a jury panel.”).

24. *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

25. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

26. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

27. See BLACK’S LAW DICTIONARY 1805 (10th ed. 2014) (defining “voir dire” as the preliminary examination of prospective jurors by a judge or lawyer to decide whether “the prospect is qualified and suitable to serve on a jury” that is informally referred to as “the jury-selection phase of a trial”).

28. See *id.* at 1789 (“A ‘venire’ is a panel of persons selected for jury duty and from among whom the jurors are to be chosen.”).

or for-cause.²⁹ So long as it offers a “narrowly specified, provable and legally cognizable basis of partiality” for a strike, a litigant may exercise an unlimited number of for-cause challenges.³⁰ Common bases of for-cause strikes include a prospective juror’s “familial or social relationship to one of the parties, failure to meet statutory qualifications for jury duty, or other specific evidence of bias.”³¹

A peremptory strike, on the other hand, need not be “supported by a reason.”³² Rather, a peremptory challenge, theoretically, allows a party to exclude a member of the venire without justifying the strike to the court.³³ In recent decades, however, the Supreme Court has defined certain circumstances in which a party must divulge its reason for peremptorily striking a venireman.³⁴ As the application of *Batson* has been expanded to limit the exercise of peremptory challenges, so too has the litany of arguments in favor of, and against, preserving the practice.³⁵

To grasp the split among federal courts of appeals, it is important to understand the virtues and shortcomings of peremptory challenges.

1. Arguments in Favor of Maintaining Peremptory Challenges

The perseverance of peremptory challenges throughout history is often cited as a justification for their continued use.³⁶ While peremptory challenges have been part of almost every system of jury trial, “from the Romans to today,” American colonists adopted the peremptory challenge from the eighteenth-century English legal system.³⁷ Under that regime, the prosecutor was afforded unlimited exercise of peremptory strikes, whereas criminal defendants were allotted only thirty-five.³⁸ While the use of such challenges was considered a “right” in American Colonies,³⁹ the practice

29. Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 549–50 (1975).

30. Coburn R. Beck, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 963 (1998).

31. *Id.* at 964.

32. See BLACK’S LAW DICTIONARY 279 (10th ed. 2014).

33. See *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

34. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 144–45 (1994) (explaining that, as with “race-based *Batson* claims,” counsel must articulate its basis for a peremptory challenge only if a prima facie case of intentional discrimination is established); *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (holding that if a party establishes a prima facie case that opposing counsel has exercised a peremptory strike based on juror’s race, opposing counsel may refute the accusation by articulating non-discriminatory reason for the strike).

35. See *infra* Part I.A.1–2.

36. See Elaine A. Carlson, *Batson, J.E.B., and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 953 (1994).

37. *Id.*

38. *Id.*

39. *Id.*; see also *Swain v. Alabama*, 380 U.S. 202, 214–17 (1965) (discussing the origins of the peremptory challenge in United States).

was not adopted by the U.S. Constitution.⁴⁰ Nonetheless, the exercise of peremptory strikes is incorporated into both federal and state statutes, and their use continues uninterrupted in the United States.⁴¹ The historical persistence of peremptory strikes “demonstrate[s] the long and widely held belief that peremptory challenge is a necessary part of trial by jury.”⁴²

In addition to this history, the use of peremptory challenges is justified as a method by which a criminal defendant’s Sixth Amendment right to an impartial jury⁴³ is safeguarded.⁴⁴ Since no objective basis to peremptorily strike a juror must be offered, parties may remove a prospective juror based simply on a negative intuition, “not necessarily capable of clear articulation,” that a juror maintains a certain bias.⁴⁵ In other words, peremptory challenges ensure that a partial venireman will not remain on the jury simply because an attorney is unable to prove his or her bias.⁴⁶

Moreover, peremptory challenges allow litigants, “those whose fortunes are at issue,” to choose their own jury.⁴⁷ Consider that, without having to meet any sort of legal standard, a litigant may dismiss any person he or she dislikes from the venire. This gives the litigants, and through them, the public, confidence that “the jury is a good and proper mode for deciding matters and that its decision should be followed.”⁴⁸ It is important not only that the jury be fair and impartial, but also that to the litigants, it seems to be so.⁴⁹ “As Justice Frankfurter once wrote: ‘The appearance of impartiality is an essential manifestation of its reality.’”⁵⁰

Peremptory strikes also protect jurors and promote the efficiency and integrity of the voir dire proceedings.⁵¹ During voir dire, lawyers and judges ask prospective jurors about their “private attitudes and practices—

40. *Stilson v. United States*, 250 U.S. 583, 586 (1919) (“There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.”).

41. Carlson, *supra* note 36, at 953, 949.

42. *Swain*, 380 U.S. at 219.

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

44. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 147 (1994) (O’Connor, J., concurring) (“The principal value of the peremptory is that it helps produce fair and impartial juries.”); *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (stating that the use of peremptory strikes is “one means of assuring the selection of a qualified and unbiased jury”).

45. Carlson, *supra* note 36, at 954.

Insuring a party’s right to a fair trial has been the historical justification for a system that allows the unchallenged exercise of peremptory strikes. Allowing counsel to strike prospective jurors without enunciating a reason is a recognition of the many biases and prejudices that all humans foster, and of the potential for a prospective juror’s failure to perceive that bias. It would be fruitless to inquire of unknown prejudices that a juror might harbor.

Id. at 953–54.

46. *See id.*

47. Babcock, *supra* note 29, at 552.

48. *Id.*

49. *Id.*

50. *Id.* (quoting *Dennis v. United States*, 339 U.S. 162, 182 (1950)).

51. 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, 158 (1989).

asking, for example, about the jurors' religious beliefs, drinking habits, jobs, hobbies, and prior experience with lawyers, then asking about their relatives' jobs, experiences as crime victims, and arrest records as well."⁵² Consider that, because of the option to exercise a peremptory challenge, a potential juror may be relieved of the further extensive inquiry regarding her biases and prejudices that would be necessary to establish basis for a for-cause challenge.⁵³ Should those questions be asked, the sensitive and embarrassing nature of the inquiry may cause an otherwise impartial juror to develop ill feelings toward, or a bias against, an attorney and his client.⁵⁴

Along the same lines, peremptory challenges allow attorneys to silently rely on "[c]ommon human experience, common sense, psychosociological studies, and public opinion polls" to inform their decisions.⁵⁵ Such reliance is important because judges conduct voir dire examinations in many courts, or at the very least restrict the number and types of questions counsel may ask.⁵⁶ While certainly promoting expediency, such procedures leave attorneys with limited information to support an argument for-cause.⁵⁷ Moreover, peremptory challenges render unnecessary certain group-bias arguments, like "middle-aged civil servants would be unable to decide on the evidence."⁵⁸ Such arguments are not only "societally divisive"⁵⁹ but also more likely than not to be rejected, regardless of their accuracy.⁶⁰ In fact, for-cause challenges are regularly rejected, "even when common sense indicates that there *must* be a bias—as long as the potential juror says that she would decide the case 'only on the evidence presented,' and would not be influenced by any other factor."⁶¹

Despite these virtues, the peremptory strike is heavily criticized,⁶² and so arguments in favor of eliminating or limiting the exercise of peremptory challenges must be addressed.

2. Arguments in Favor of Eliminating Peremptory Challenges

Critics of the peremptory strike argue that the procedure may actually inhibit a criminal defendant's Sixth Amendment right to an impartial jury.

52. *Id.*

53. Babcock, *supra* note 29, at 554–55.

54. *Id.*

55. *Id.* at 553.

56. *Id.* at 548.

57. *Id.*

58. *Id.* at 553.

59. *Id.* at 553–54 ("[T]o allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise Although experience reveals that black males as a class can be biased against young alienated blacks who have not tried to join the middle class, to enunciate this in the concrete expression required of a challenge for cause is societally divisive. Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not.")

60. *Id.* at 549–50.

61. *Id.*

62. *See infra* Part I.A.2.

They posit that parties do not exercise peremptory strikes in order to ensure an impartial jury at all.⁶³ Instead, each selects jurors who will be partial or amenable to their position.⁶⁴ Furthermore, the Supreme Court, in *Batson*, rejected the argument that since both parties have the ability to select jurors that are partial to their side, the juror's biases will cancel each other out.⁶⁵

As such, critics argue that eliminating or reducing the number of peremptory challenges would result in a more efficient and cost-effective jury selection process.⁶⁶ Without peremptory strikes, they argue, fewer veniremen would be excluded from the jury, thus, expediting the voir dire process and resulting in fewer citizens being called for jury duty.⁶⁷ Moreover, litigants would save money and time spent consulting so-called jury experts who specialize in determining which jurors will be favorable to their side.⁶⁸ Should peremptory challenges be eliminated, trial courts would also save time by avoiding *Batson* hearings⁶⁹ to determine if a party silently employed a permissible motive when peremptorily excusing a juror.⁷⁰

The use of peremptory challenges to select a jury, either partial or impartial, also appears to necessitate prejudgment of individuals, a practice that is seemingly inconsistent with “democratic ideals such as equality and fairness.”⁷¹ By its nature, a peremptory strike is discriminatory and “reflects a preconceived notion or negative intuition as to how a prospective juror will evaluate one's client and case.”⁷²

Peremptory challenges may also compromise the cross-sectional ideal⁷³ by allowing a jury to be composed of quite like-minded individuals.⁷⁴ Such

63. Babcock, *supra* note 29, at 551.

64. *Id.* “Of course, neither litigant is trying to choose ‘impartial’ jurors, but rather to eliminate those who are sympathetic to the other side, hopefully leaving only those biased for him.” *Id.*

65. See Alschuler, *supra* note 51, at 205 (“The *Batson* decision . . . rejected the proposition that two wrongs make a right.”). The ability of the defense counsel in *Batson* to peremptorily challenge whites did not justify the prosecutor's challenge of blacks. *Id.*

66. PATRICIA HENLEY, PUBLIC LAW RESEARCH INSTITUTE, IMPROVING THE JURY SYSTEM: PEREMPTORY CHALLENGES 1, <http://gov.uchastings.edu/public-law/docs/plri/juryper.pdf> (last visited Feb. 23, 2015).

67. *Id.* at 3–4.

68. *Id.* at 4 (indicating that studies show that efforts to predict how a juror will decide a case, based on stereotypes, are rarely successful).

69. See *infra* Part I.B.4.

70. See Henley, *supra* note 66, at 3.

71. *Id.*

72. Carlson, *supra* note 36, at 953.

73. Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (explaining that the cross-sectional ideal represents the idea that the group from which a jury is selected “must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof”); see also Smith v. Texas, 311 U.S. 128, 130 (1940) (“It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.”). “The cross-sectional ideal is based on the idea that there is no way to escape from bias.” Henley, *supra* note 66, at 4. “The only way to deal with prejudice is to have a balance of various values and perspectives on the jury.” *Id.*

74. Henley, *supra* note 66, at 4.

a composition potentially undermines the validity of jury verdicts.⁷⁵ Consider that when a group is systematically excluded from the jury it is potentially less likely that the verdict will “reflect the values of the community as a whole.”⁷⁶

Furthermore, a diverse jury arguably increases the probability that individuals with different backgrounds and opinions may be able to correct “mistaken views or recollections of evidence presented at trial.”⁷⁷ Said differently, peremptory challenges that are used to eliminate jurors based on certain characteristics may increase the probability that prejudices will go unchallenged during deliberation.⁷⁸ If peremptory strikes are eliminated, a resulting jury could be more representative of the community and, as a result, render a more widely accepted verdict.⁷⁹

As arguments for further expanding *Batson* persist, these merits and shortcomings of peremptory strikes must be considered. For those who believe that the peremptory strike has little power to protect a criminal defendant’s Sixth Amendment right to an impartial jury, *Batson*’s expansion has few, if any, costs. The opposite is true, however, if the peremptory challenge is considered a safeguard of impartiality.

*B. The Evolution of the Batson Challenge:
How the Fourteenth Amendment Limits
the Once Unrestricted Exercise of Peremptory Strikes*

Prior to *Batson*, the exercise of peremptory challenges, although finite in number, was unrestrained.⁸⁰ Since that case was decided, however, a number of restrictions have been placed on the exercise of peremptory strikes. Part I.B.1 introduces the pre-1986 peremptory challenge regime and the cases leading up to the Supreme Court’s decision in *Batson*. Part I.B.2 discusses *Batson* and the Supreme Court’s shift in focus to the Fourteenth Amendment. Part I.B.3 considers the cases that have expanded *Batson*’s application, and Part I.B.4 examines the effect these cases have had on the *Batson* inquiry.

1. Pre-*Batson* Decisions

In 1879, the Supreme Court decided *Strauder v. West Virginia*,⁸¹ and first addressed whether criminal defendants had a right to a trial by a jury

75. *Id.*

76. *Id.*

77. *Id.* The cross-sectional ideal is considered a means by which to achieve an impartial jury. *People v. Wheeler*, 583 P.2d 748, 754–56 (Cal. 1978). The best means of achieving an impartial jury is to promote a jury composed of various types of people with different views, whose respective biases, “to the extent they are antagonistic, will tend to cancel each other out.” *Id.* at 755.

78. Henley, *supra* note 66, at 4.

79. *Id.* at 5.

80. *See Swain v. Alabama*, 380 U.S. 202, 220 (1965).

81. 100 U.S. 303 (1879).

“impanelled without discrimination . . . because of race or color.”⁸² The case evaluated the constitutionality of a West Virginia statute that restricted eligibility to participate on a jury, stating, “All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided.”⁸³ The Court reasoned that systematically denying blacks the right to participate “in the administration of the law, as jurors,” based solely on their race, was an “impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”⁸⁴

While *Strauder* prevented states from statutorily denying black males the right to be called for jury service, it did not prevent them from being peremptorily dismissed based on their race.⁸⁵ In other words, the case simply ensured black men the right to be part of the venire, not the right to be chosen to sit on the jury.⁸⁶ Under *Strauder*, therefore, it was possible that upon completion of voir dire proceedings, the resulting jury would be entirely homogenous.⁸⁷

Subsequent cases similarly expounded this foundation, determining that while a black defendant was not entitled to a jury comprised of members of his own race,⁸⁸ the Equal Protection Clause was violated when a state deliberately excluded citizens from participating in “the administration of justice” based on race.⁸⁹ The Court recognized that “[j]urymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.”⁹⁰ Furthermore, it concluded that excluding citizens, African American or otherwise,⁹¹ from jury service based on race, not only violated the Equal Protection Clause but was also “at war with our basic concepts of a democratic society and a representative government.”⁹²

82. *Id.* at 305.

83. *Id.*

84. *Id.* at 308 (“If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.”).

85. *See id.*

86. *Id.*

87. Carlson, *supra* note 36, at 955.

88. *Strauder*, 100 U.S. at 305.

89. *See generally* Gibson v. Mississippi, 162 U.S. 565 (1896); *Ex parte* Virginia, 100 U.S. 339 (1879). *See also* Carter v. Texas, 177 U.S. 442, 447 (1900) (“Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied.”).

90. Cassell v. Texas, 339 U.S. 282, 286 (1950).

91. Hernandez v. Texas, 347 U.S. 475, 482 (1954) (holding that the constitutional prohibition of intentional exclusion from a jury is not limited to African Americans but also applies to all other ethnic groups).

92. Smith v. Texas, 311 U.S. 128, 130 (1940).

While these cases prohibited the exclusion of citizens from jury service based on race, it was not until its 1965 decision in *Swain v. Alabama*,⁹³ that the Supreme Court considered whether a prosecutor's racially discriminatory exercise of peremptory challenges violated the Fourteenth Amendment.⁹⁴ In this case, the defendant moved to void the petit jury⁹⁵ that convicted him of rape based on "alleged invidious discrimination in the selection of jurors."⁹⁶ Supporting the defendant's contention was evidence that, of the eight black jurors on the petit venire, two were exempt and the other six peremptorily dismissed by the prosecutor.⁹⁷ Moreover, the record indicated that while blacks were often called to sit on the venire, no black citizen had actually served on a Talladega jury since 1950.⁹⁸

Evaluating the evidence with the presumption that a prosecutor uses peremptory challenges "to obtain a fair and impartial jury,"⁹⁹ the Court determined that the evidence in this case fell short of proving "the prosecutor . . . in case after case, whatever the circumstances, . . . [was] responsible for the removal of [African Americans] who [had] been selected as qualified jurors."¹⁰⁰ While the defendant demonstrated that in his own case the prosecutor exercised peremptory strikes to exclude blacks from the jury, the record did not evince how the prosecutor had used the challenges in the past.¹⁰¹ The Court reasoned that the record was "absolutely silent" as to which past instances of exclusion were facilitated by the prosecutor alone.¹⁰² Apparently, in some cases, the prosecution agreed with defendants to remove blacks from the jury.¹⁰³ Absent such a showing, the Court deemed the evidence insufficient to establish, *prima facie*, that the state applied peremptory challenges in order to systematically exclude jurors based on race.¹⁰⁴

Quite consistent with the Supreme Court's pre-*Batson* focus on the integrity of the peremptory challenge regime,¹⁰⁵ this case provided an "illusory hope . . . [of] racial parity."¹⁰⁶ The possibility of meaningfully challenging a racially discriminatory peremptory strike was essentially negated by the absence of state records detailing prosecutors' use of

93. 380 U.S. 202 (1965).

94. *Id.* at 209.

95. See BLACK'S LAW DICTIONARY 987 (10th ed. 2014) ("A jury, (usually consisting of 6 or twelve persons) summoned and empaneled in the trial of a specific case.").

96. *Swain*, 380 U.S. at 203.

97. *Id.* at 205.

98. *Id.*

99. *Id.* at 222.

100. *Id.* at 234, 223.

101. *Id.* at 224.

102. *Id.* 224–25.

103. *Id.*

104. *Id.* at 226–27 (explaining that without a detailed record the state could not effectively rebut allegations of discrimination).

105. See *id.* at 222 (noting that "[a]ny other result . . . would establish a rule wholly at odds with peremptory challenge system").

106. Carlson, *supra* note 36, at 956; see *Batson v. Kentucky*, 476 U.S. 79, 92 (1986) ("[*Swain v. Alabama*] placed on defendants a crippling burden of proof.").

peremptory strikes.¹⁰⁷ This difficulty remained until the Court decided *Batson* in 1986.¹⁰⁸

2. *Batson v. Kentucky*: A Shift in the Supreme Court's Focus

Prior to its decision in *Batson*, and as early as *Strauder*, the Supreme Court seemed to prioritize a criminal defendant's Sixth Amendment right to an impartial jury over a juror's Fourteenth Amendment protection against discrimination.¹⁰⁹ The Court's landmark 1986 decision in *Batson* marked a shift in the Court's focus and demonstrated a greater concern for protecting jurors from discrimination.¹¹⁰

In *Batson*, the Supreme Court reconsidered the evidentiary burden *Swain* placed on criminal defendants, claiming the prosecutor's use of peremptory strikes denied them equal protection.¹¹¹ In this case, the petitioner, a black man convicted of second-degree burglary and receipt of stolen goods, challenged the prosecutor's peremptory removal of the only four black jurors on the venire.¹¹² Overruling *Swain*,¹¹³ the Court held that "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 [own] trial."¹¹⁴ The decision emphasized that peremptorily excusing a prospective juror based on his or her race was injurious to the defendant and the excluded juror, but also to the public, as it undermined its confidence in the justice system.¹¹⁵

107. Carlson, *supra* note 36, at 956 ("[*Swain*'s] standard negated any effective challenge to the use of racially motivated peremptory strikes because few states even kept records of how peremptory challenges were used by prosecutors.").

108. See generally *Batson*, 476 U.S. 79 (reconsidering the evidentiary burden on criminal defendants).

109. See, e.g., *Swain*, 380 U.S. at 222 (recognizing that racially discriminatory exercise of peremptory challenges was against the Fourteenth Amendment, but imposing a nearly insurmountable burden of proving a prima facie case in order to preserve the purpose of peremptory challenges); *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879) (framing the issue in terms of a criminal defendant's right to an impartial jury "impanelled without discrimination" and not in terms of a juror's right not to be discriminated against).

110. See generally *Batson*, 476 U.S. 79 (1986).

111. *Id.* at 82. The jury occupies a central position in the justice system, "safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Id.* at 86. A discriminatorily chosen jury, therefore, would violate a defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." *Id.* at 87 (quoting *Strauder*, 100 U.S. at 309).

112. *Id.* at 82–83.

113. See Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1086 n.48 (2011) (explaining that the *Batson* opinion framed its holding as a modification and not a repudiation of *Swain*, even though the majority reached "precisely the opposite conclusion as *Swain*"); see also *Batson*, 476 U.S. at 100 n.25 ("To the extent anything in [*Swain*] is contrary to the principles we articulate today, that decision is overruled."); *id.* at 100 (White, J., concurring) ("The Court overturns the principal holding in *Swain*.").

114. *Batson*, 476 U.S. at 96 (majority opinion).

115. See *id.* at 87 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection

The real challenge the Court faced was not articulating the constitutional prohibition against race-based peremptory strikes.¹¹⁶ Rather it was the “daunting task of fashioning a mechanism to enforce that prohibition” that presented the biggest challenge.¹¹⁷ The Court crafted a three-step procedure when a party challenges an opponent’s peremptory strike as one based on racial discrimination.¹¹⁸ These three steps have evolved over time.

Batson’s first step required a defendant to establish a prima facie case of discrimination.¹¹⁹ To do so, the defendant needed to establish that he was part of a cognizable racial group¹²⁰ and that the prosecutor exercised peremptory challenges to remove venireman of defendant’s race from the jury.¹²¹ Then, the defendant also was required to show that the circumstances of the challenged peremptory strikes raised an inference that the prosecutor excluded venireman based on their race.¹²² To determine whether this preliminary inference of purposeful discrimination existed, the trial court was instructed to “consider all relevant circumstances.”¹²³

If the defendant successfully established a prima facie case, the burden would shift to the state to provide a neutral explanation for having challenged the black jurors.¹²⁴ The state did not have to justify the exercise of a for-cause challenge.¹²⁵ Rather, the prosecutor only had to furnish an explanation that did not violate Equal Protection guarantees.¹²⁶ Namely, the prosecutor could not justify the peremptory challenge on the assumption or intuition that the jurors would not be impartial because they were of the same race as the defendant.¹²⁷ Should the prosecutor fail to furnish a race-

procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”).

116. *Bellin & Semitsu*, *supra* note 113, at 1086. The Court reiterated the repeatedly articulated principle that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.” *Id.* (quoting *Batson*, 476 U.S. at 89).

117. *Id.* Creating this mechanism was particularly difficult because the Court rejected Justice Marshall’s “relatively clean” suggestion of abolishing the peremptory challenge all together. *Id.* at 1086–87.

118. *Batson*, 476 U.S. at 96–98.

119. *Id.* at 96.

120. *Id.* (citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)).

121. *Id.*

122. *Id.* at 97.

123. *Id.* at 96. The Court listed two examples of evidence that tends to prove purposeful discrimination. *Id.* at 97. First, a pattern of strikes against black jurors may give rise to a preliminary inference of discrimination. *Id.* Moreover, the prosecutor’s “questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose.” *Id.* But ultimately, the Court demonstrated confidence that trial judges were experienced enough to decide whether the circumstances of a particular case established prima facie case of discrimination against a black veniremen. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

neutral explanation for its peremptory challenge, the defendant's conviction would be reversed.¹²⁸

Kentucky objected to the Court's framework, positing that it would "eviscerate the fair trial values served by the peremptory challenge."¹²⁹ The Court pointed out, however, that, while it is an important trial procedure, the right to peremptory challenges is not one guaranteed by the Constitution.¹³⁰ The Court further characterized its opinion as one that "enforce[d] the mandate of equal protection and further[ed] the ends of justice."¹³¹

Justice Marshall, in his concurring opinion, agreed that the majority "cogently explain[ed] the pernicious nature of the racially discriminatory use of peremptory challenges."¹³² He did not, however, have as much faith in its designed solution, stating: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."¹³³

Despite Justice Marshall's misgivings, the Court has relied on *Batson* to craft its later limitations on peremptory strikes.¹³⁴ In its expansion of *Batson*, the Court has also significantly altered the framework designed in the 1986 decision.¹³⁵

3. The Supreme Court's Expansion of *Batson* Beyond Its Original Purpose

Since *Batson* was decided in 1986, the Court has imposed more expansive limitations on the exercise of peremptory challenges.¹³⁶ *Batson's* holding was originally limited to the discriminatory peremptory challenges exercised by prosecutors in criminal cases where the juror was the same race as the defendant.¹³⁷ Since its decision in *Batson*, the Supreme Court has extended its rationale far beyond those original bounds.¹³⁸

*Powers v. Ohio*¹³⁹ was the first case to broaden the application of *Batson's* rule. There the Court held that a race-based exclusion of a juror is prohibited, even when the potential juror and the defendant are not of a

128. *Id.* at 100.

129. *Id.* at 98.

130. *Id.* at 98–99.

131. *Id.* at 99.

132. *Id.* at 102 (Marshall, J., concurring).

133. *Id.* at 102–03.

134. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

135. *See infra* Part I.B.4.

136. *See, e.g., J.E.B.*, 511 U.S. at 127; *Powers v. Ohio*, 499 U.S. 400 (1991).

137. David Smith & Rachel Dennehy, *Controversy over the Peremptory Challenge: Should Batson Be Expanded?*, 10 ST. JOHN'S J. LEGAL COMMENT. 453, 461 (1995).

138. *See, e.g., J.E.B.*, 511 U.S. at 142–43 (extending *Batson* to prohibit gender-based peremptory strikes); *Powers*, 499 U.S. at 415 (extending *Batson's* application to cases where defendant and stricken juror were not of the same race).

139. 499 U.S. 400 (1991).

common race.¹⁴⁰ The petitioner was a white defendant objecting to the exclusion of black veniremen.¹⁴¹ While the state argued that the petitioner was precluded from objecting to the peremptory dismissals under *Batson*, because he was not of the same race as the excluded jurors, the Court ultimately disagreed. Essentially, criminal defendants were afforded “third-party standing”¹⁴² to challenge a violation of a juror’s equal protection rights.¹⁴³

The Supreme Court further broadened *Batson*’s application in the years following *Powers*.¹⁴⁴ Until 1991, the Supreme Court had only considered whether the discriminatory peremptory strikes of a prosecutor, a recognized state actor, violated the Equal Protection Clause.¹⁴⁵ In *Edmonson v. Leesville Concrete Co.*,¹⁴⁶ by contrast, the Court considered whether litigants in civil cases could exercise discriminatory peremptory challenges.¹⁴⁷ First, the Court concluded that the selection of jurors serves an important function of the government and attorneys act with substantial assistance of the court.¹⁴⁸ Furthermore, should civil veniremen be subjected to discrimination, “[t]he injury to excluded jurors would be the direct result of governmental delegation and participation.”¹⁴⁹ Thus, during voir dire proceedings, the exercise of peremptory challenges is “pursuant to a course of state action.”¹⁵⁰ The Court further reasoned that, regardless of whether a trial is criminal or civil, a challenged juror’s equal protection rights are violated when they are peremptorily dismissed based on race.¹⁵¹

140. *Id.* at 413 (stating that “a criminal defendant suffers real injury when the prosecutor excludes jurors . . . on account of race”).

141. *Id.* at 406.

142. *See id.* at 410. The Court engaged in a three-part analysis to determine whether a criminal defendant could be afforded third-party standing on behalf of a juror. *See id.* at 410–11. It found that voir dire proceedings permit a party to establish a very close relationship, “if not a bond of trust,” with the veniremen. *Id.* at 413. It also found that this relationship is maintained throughout the trial and, in some cases, through sentencing. *Id.* Furthermore, the congruent interest criminal defendants and jurors have in “eliminating racial discrimination from the courtroom,” according to the Court, makes it “necessary and appropriate” for the defendant to have third-party standing. *Id.* at 413–14. Lastly, the Court determined that, while improperly excluded jurors have a right to bring suit on their own behalf, these challenges would necessarily be rare. *See id.* at 414. Coupled with the financial burden at trial and the likely small financial stake, jurors would rarely, if ever, bring such action. *See id.*

143. *Id.* at 416.

144. *See Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

145. *McCollum*, 505 U.S. at 50 (“Until *Edmonson*, the cases decided by this Court that presented the problem of racially discriminatory peremptory challenges involved assertions of discrimination by a prosecutor . . .”).

146. 500 U.S. 614 (1991).

147. *Edmonson*, 500 U.S. at 621–22 (considering (1) “the extent to which the actor relies on governmental assistance and benefits;” (2) “whether the actor is performing a traditional governmental function;” and (3) “whether the injury caused is aggravated in a unique way by the incidents of governmental authority”).

148. *Id.* at 628.

149. *Id.*

150. *Id.* at 622.

151. *Id.* at 628.

Accordingly, the Court held that civil litigants may not exercise racially motivated peremptory strikes.¹⁵²

In its 1992 decision in *Georgia v. McCollum*,¹⁵³ relying heavily on its analysis in *Edmonson*, the Court considered whether criminal defendants were permitted to peremptorily strike jurors based on race.¹⁵⁴ The Court predictably concluded that criminal defendants were state actors subject to the same limitations as prosecutors and civil litigants under the Equal Protection Clause.¹⁵⁵ Accordingly, the Court further broadened *Batson*'s scope and reaffirmed its post-*Swain* commitment to protecting jurors from discrimination, stating, “‘if race stereotypes are the price for acceptance of a jury panel as fair,’ we reaffirm today that such a ‘price is too high to meet the standard of the Constitution.’”¹⁵⁶

The Court's final expansion of *Batson* occurred in *J.E.B. v. Alabama*,¹⁵⁷ when it prohibited peremptory challenges based on gender.¹⁵⁸ The respondent in *J.E.B.* used nine of her ten peremptory challenges to exclude men from the venire, resulting in an exclusively female jury.¹⁵⁹ The petitioner challenged the use of these strikes as a violation of the Equal Protection Clause.¹⁶⁰ Outlining the history of discrimination against women in the United States, the Court reasoned that “the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or 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.”¹⁶¹ The Court further elaborated that similar to race the guarantee of the Equal Protection Clause, “ensuring citizens that their State will not discriminate,” would be meaningless if the Court were to permit gender-based peremptory exclusion.¹⁶²

4. The Post-Expansion *Batson* Inquiry

As its rationale has been extended, the *Batson* inquiry designed by the Supreme Court has been altered and more thoroughly defined. Entirely eliminating the first requirement of the prima facie case defined in

152. *Id.*

153. 505 U.S. 42 (1992). The Court considered four questions:

First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case.

Id. at 48.

154. *Id.* at 44.

155. *Id.* at 59.

156. *Id.* at 57 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991)).

157. 511 U.S. 127 (1994).

158. *Id.* at 146.

159. *Id.* at 129.

160. *Id.*

161. *Id.* at 146.

162. *Id.* (quoting *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986)).

Batson,¹⁶³ trial courts today begin a *Batson* hearing by determining whether “the totality of the relevant facts” sufficiently establish a prima facie case of purposeful discrimination.¹⁶⁴ “Indicia of a prima facie case might include the ‘pattern’ of strikes, counsel’s ‘questions and statements during voir dire,’ as well as ‘racial identity between the defendant and the excused prospective juror.’”¹⁶⁵

If a trial judge determines that a prima facie case of discrimination has been made, the burden of production shifts to the party who executed the strike to offer a race-neutral¹⁶⁶ or gender-neutral¹⁶⁷ explanation. An explanation is not neutral if it is based on an assumption that members of a particular race or gender are likely to hold certain views or be biased in a certain way.¹⁶⁸ Moreover, a “legitimate reason” for a peremptory challenge is not one that simply makes logical sense.¹⁶⁹ Rather, it is one that does not deny equal protection guarantees.¹⁷⁰ In fact, this second step is concerned only with the “facial validity” of a party’s explanation.¹⁷¹ Thus, any justification will be deemed neutral unless “a discriminatory intent is inherent in the prosecutor’s explanation.”¹⁷²

The third and final step of a *Batson* inquiry requires the trial court to evaluate the plausibility and “persuasiveness of the prosecutor’s justification for his peremptory strike.”¹⁷³ The very point of a peremptory strike is that a party’s motivation for the challenge remains unspoken.¹⁷⁴

163. *See Powers v. Ohio*, 499 U.S. 400, 415 (1991) (holding that defendant does not have to be of the same race as excluded juror in order to raise a *Batson* challenge).

164. *Batson*, 476 U.S. at 94; *see Johnson v. California*, 545 U.S. 162, 170 (2005) (“[A] defendant satisfies the requirements of *Batson*’s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.”).

165. *Bellin & Semitsu*, *supra* note 113, at 1087 (quoting *Powers*, 499 U.S. at 416; *Edmonsville v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991)).

166. *Purkett v. Elem*, 514 U.S. 765, 767 (1995).

167. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 144–45 (1994) (requiring gender-neutral explanation for peremptory challenge if prima facie case of intentional discrimination based on juror’s gender is established).

168. *Batson*, 476 U.S. at 98 (holding that a reason is not legitimate if it “arise[s] solely from the juror’s race”).

169. *Purkett*, 514 U.S. at 768–69.

170. *Id.* at 769.

171. *Hernandez v. New York*, 500 U.S. 352, 360 (1866).

172. *Id.* Some examples of accepted neutral explanations include: “[n]ot smart enough to serve on the jury,” “[d]ressed like a 15-year-old, with baggy clothes,” “[n]ot mature enough,” “single.” *Bellin & Semitsu*, *supra* note 113, at 1091.

Our survey reveals that in a broad array of cases . . . attorneys articulate and judges accept “race-neutral” explanations for peremptory strikes that either highly correlate with race or are silly, trivial, or irrelevant to the case. Reviewing courts then affirm these determinations. This is significant because if attorneys can avoid *Batson* in this manner, there are only two narrow circumstances in which a *Batson* challenge is likely to succeed: (1) where an attorney admits to a racial motivation and (2) where an attorney’s explanation applies to a virtually identical juror of a different race who was not stricken. . . . [T]hese two scenarios in which *Batson* will likely smoke out a racially discriminatory strike are exceedingly unlikely. *Id.* at 1102.

173. *Id.* at 1088 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 338–39 (2003)).

174. *Babcock*, *supra* note 29, at 553–55.

Thus, most often there is little evidence for the trial court to rely on when deciding this issue other than “the demeanor of the attorney who exercises the challenge.”¹⁷⁵ The trial court essentially makes a fact-based determination whether the prosecutor’s explanation is credible.¹⁷⁶ The Supreme Court also has mandated that the trial court be afforded great deference of its third-step determination.¹⁷⁷ This is practically justified by the “necessarily fact intensive” *Batson* review.¹⁷⁸ Consider, many of the critical facts relied on by the trial court, such as the attorney’s demeanor, will not be readily apparent on the appellate record.¹⁷⁹

C. Drawing the Line: The Fate of Peremptory Strikes in the Wake of Supreme Court Equal Protection Jurisprudence

In *J.E.B. v. Alabama*, after expanding *Batson* a final time, the Supreme Court iterated that its holding did not “imply the elimination of all peremptory challenges.”¹⁸⁰ It clearly explained that parties can exercise peremptory challenges to remove any “group or class of individuals normally subject to ‘rational basis’ review”¹⁸¹ under the Fourteenth Amendment’s Equal Protection Clause. With this, the Court drew a line in the sand. A *Batson* challenge cannot be sustained unless the juror stricken from the venire is a member of a class entitled to something more than “rational basis review.”¹⁸² Part I.C.1. defines rational basis review and discusses the Supreme Court’s three-tiered system of judicial review. Part I.C.2. examines how the Court determines whether a classification is entitled to more than mere rational basis review.

1. The Three-Tiered System of Judicial Review Under the Fourteenth Amendment

Ordinarily, a classification is constitutional if it passes rational basis review,¹⁸³ the most lenient form of judicial review.¹⁸⁴ A court will consider a law subject to rational basis review with a “presumption of constitutionality,” and uphold it if the challenged law is “rationally related”

175. *Hernandez*, 500 U.S. at 365.

176. *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986) (“[T]he trial judge’s findings in the context under consideration here largely will turn on evaluation of credibility . . .” (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575–76 (1985))). The credibility determination considers, among other things, the party’s demeanor, the reasonableness or improbability of the offered explanation, and whether the explanation has “some basis in accepted trial strategy.” *Bellin & Semitsu*, *supra* note 113, at 1088 (quoting *Miller-El*, 537 U.S. at 339).

177. *Bellin & Semitsu*, *supra* note 113, at 1089.

178. *Id.*

179. *Id.*

180. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994).

181. *Id.*

182. *Id.*; *see also* *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 479–80 (9th Cir. 2014).

183. Roberta A. Kaplan & Julie E. Fink, *The Defense of Marriage Act: The Application of Heightened Scrutiny to Discrimination on the Basis of Sexual Orientation*, 2012 *CARDOZO L. REV.* 203, 205–06.

184. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

to a “legitimate government interest.”¹⁸⁵ This standard of review is applied in all cases where no fundamental right or suspect classification is at issue.¹⁸⁶ For example, laws that discriminate on the basis of mental disability or age are reviewed under this lenient standard.¹⁸⁷

Some legislative classifications are subject to “a more exacting type of heightened scrutiny,” if they burden a quasi-suspect¹⁸⁸ or suspect¹⁸⁹ class:

Such classifications are appropriately treated by the courts with extreme skepticism, because there is a particularly high risk that the law was designed for an improper purpose. In other words, the assumption in those situations is that the legislature should not be in the business of passing laws that treat these groups differently than others.¹⁹⁰

Intermediate scrutiny, at issue in *J.E.B.*, is the middle tier of judicial review applied in cases involving quasi-suspect classifications.¹⁹¹ In order for a classification to be sustained under intermediate scrutiny, the law must further an important government interest by means that are substantially related to that interest.¹⁹²

The most rigorous strict scrutiny standard is applied in cases involving suspect classifications such as race.¹⁹³ To pass strict scrutiny, the legislature must have passed the law to further a “compelling governmental interest,” and must have narrowly crafted the rule to achieve that goal.¹⁹⁴ A court applies strict scrutiny if the government significantly abridges a fundamental right with the law’s enactment or passes a law that involves a suspect classification.¹⁹⁵ Suspect classifications include race, national origin, and alienage.¹⁹⁶

Under the heightened scrutiny standards, “a tenable justification must describe actual stated purposes, not rationalizations for actions in fact differently grounded.”¹⁹⁷ Stated differently, a state actor cannot defend a classification based on the “hypothetical justifications” welcomed under rational basis review.¹⁹⁸ Accordingly, in most equal protection analyses, the “primary, and often determinative, question” concerns the level of scrutiny to be applied and whether the classification involved should be treated as suspect or non-suspect.¹⁹⁹

185. Kaplan & Fink, *supra* note 183, at 205.

186. *See Romer*, 517 U.S. at 631.

187. *See* Kaplan & Fink, *supra* note 183, at 205.

188. *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 313 (D. Conn. 2012) (recognizing that gender and illegitimate children are quasi-suspect classes).

189. *Id.* (identifying race, national ancestry, and ethnic origin as suspect classes).

190. Kaplan & Fink, *supra* note 183, at 205.

191. *See Pedersen*, 881 F. Supp. 2d at 310.

192. *See id.*

193. *See id.* at 298, 313.

194. *Id.* at 310.

195. *See id.*

196. *Id.* at 313.

197. *United States v. Virginia*, 518 U.S. 515, 535–36 (1996).

198. Kaplan & Fink, *supra* note 183, at 206.

199. *Id.*

2. Defining Suspect and Quasi-Suspect Classifications

In the 1970s and 1980s, the Supreme Court developed a test for determining whether a particular group is entitled to the application of heightened scrutiny.²⁰⁰ This test contemplates four factors.²⁰¹ First, it considers whether the group in question has suffered a history of discrimination.²⁰² Second, it inquires as to whether the group-defining characteristic has any relation to an individual's ability to perform or contribute to society.²⁰³ Third, it considers whether the group exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group."²⁰⁴ Last, the test accounts for whether the group is a numerical minority or politically powerless.²⁰⁵

When applying this test, there is no single factor that is dispositive.²⁰⁶ Any one of the four factors may signal to the court that a classification, "provides no sensible ground for differential treatment"²⁰⁷ or is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective."²⁰⁸ The Court has given particular consideration to whether a group has been subjected to a history of discrimination, as well as whether the distinguishable characteristics of a group bear any relation to its ability to perform or contribute to society.²⁰⁹

II. THE CIRCUIT SPLIT: DOES THE *BATSON* REGIME PROHIBIT OR PERMIT SEXUAL ORIENTATION–BASED PEREMPTORY CHALLENGES?

When the Supreme Court decided *J.E.B.*, it made very clear that the expansion of *Batson's* reach was not intended to entirely abdicate the peremptory challenge's effect.²¹⁰ In order for this intention to be practicable, it was necessary to draw a line in the sand. At the time, the Court decided that this line would be drawn based on the level of judicial review the Court would apply when reviewing different classifications under the Fourteenth Amendment.²¹¹ Therefore, whether a peremptory challenge based on sexual orientation is eligible for *Batson* protection depends entirely on the level of scrutiny a court applies on review.²¹²

200. *See id.*

201. *See* John Nicodemo, *Homosexuals, Equal Protection, and the Guarantee of Fundamental Rights in the New Decade: An Optimist's Quasi-Suspect View of Recent Events and Their Impact on Heightened Scrutiny for Sexual Orientation–Based Discrimination*, 28 *TOURO L. REV.* 285, 292–97 (2012).

202. *See id.* at 292–93.

203. *See* Kaplan & Fink, *supra* note 183, at 206.

204. *Id.*

205. *See* Nicodemo, *supra* note 201, at 296–97.

206. *See* Kaplan & Fink, *supra* note 183, at 206.

207. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

208. *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

209. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); Kaplan & Fink, *supra* note 183, at 206.

210. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994).

211. *Id.*

212. *See id.*

Part II of this Note discusses the federal circuit courts' diverse treatment of classifications based on sexual orientation and the resulting circuit split regarding the eligibility of jurors to receive *Batson* protection against peremptory challenges motivated by sexual orientation. Part II.A examines three Supreme Court cases reviewing the constitutionality of classifications based on sexual orientation. Part II.B analyzes the position that heightened scrutiny is applied to classifications based on sexual orientation, and therefore, *Batson* may be extended to prohibit peremptory strikes based on sexual orientation. In contrast, Part II.C dissects the opposite position that classifications based on sexual orientation are entitled only to rational basis review, and thus, peremptory strikes based on sexual orientation remain permissible.

A. *The Supreme Court's Review of Classifications
Based on Sexual Orientation Under the Fourteenth Amendment*

The Supreme Court has decided three cases concerning classifications based on sexual orientation which involved, at least in part, an analysis under the Fourteenth Amendment's Equal Protection Clause: *Romer v. Evans*,²¹³ *Lawrence v. Texas*,²¹⁴ and *Windsor v. United States*.²¹⁵ The current circuit split, regarding which level of scrutiny must be applied when reviewing classifications based on sexual orientation, largely is based on how these cases have been, and are being, interpreted.²¹⁶

1. *Romer v. Evans*

In its 1996 decision in *Romer*, the Supreme Court first addressed sexual orientation discrimination under the Equal Protection Clause.²¹⁷ In this case, the Court reviewed the constitutionality of an amendment to the Colorado Constitution, which prohibited all legislative, executive, and judicial action designed to protect homosexuals.²¹⁸ The Court specifically articulated its application of rational basis review²¹⁹ and explained the

213. 517 U.S. 620 (1996).

214. 539 U.S. 558 (2003).

215. *Windsor v. United States (Windsor III)*, 133 S. Ct. 2675 (2013).

216. *See, e.g., SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480, 484 (9th Cir. 2014) (interpreting *Windsor III* to indicate homosexuals are entitled to heightened scrutiny). *But see, e.g., DeBoer v. Snyder*, 772 F.3d 388, 414 (6th Cir. 2014) (interpreting *Windsor III* as a decision about federalism, not heightened scrutiny).

217. The Supreme Court previously reviewed sexual orientation discrimination under the Due Process Clause in *Bowers v. Hardwick*. *See* 478 U.S. 186 (1986). In that case, respondent challenged the constitutionality of a Georgia statute criminalizing sodomy. *See id.* at 187–88. The Court found that there was no fundamental right to engage in homosexual sodomy as such a right was not “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [it] were sacrificed.’” *Id.* at 191–92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 326 (1937)).

218. *Romer*, 517 U.S. at 623. This amendment was passed in response to several Colorado municipalities' prohibition of sexual orientation discrimination in realms of public and private housing, employment, education, public accommodations, and health and welfare services. *Id.*

219. *Id.* at 631–32.

deferential test: “In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.”²²⁰ The Court found that Amendment 2 “confound[ed]” even this deferential standard for two reasons.²²¹

First, the Court explained, Amendment 2 denied “equal protection of the laws in the most literal sense.”²²² It imposed a “broad and undifferentiated disability on a single named group”²²³ and was, simultaneously, “too narrow and too broad.”²²⁴ It was a type of legislation simply not supported by “our constitutional tradition,” making it more difficult for a specific group to obtain help from its government.²²⁵

Second, the Court concluded that Colorado did not have a legitimate interest in enacting Amendment 2.²²⁶ The Court not only rejected the state’s proffered interests,²²⁷ but also determined that the harm Amendment 2 inflicted on homosexuals “outr[an] and belie[d]” any legitimate interest that could justify its enactment.²²⁸ The Court, instead, succumbed to the “inevitable inference,” that the law was motivated by animus toward homosexuals,²²⁹ and concluded that Amendment 2 did not further a legitimate end but rather sought to make homosexuals unequal to everyone else.²³⁰ Notably, the Court did not address whether homosexuals constituted a quasi-suspect or suspect class.²³¹

2. *Lawrence v. Texas*

Seven years after *Romer*, the Supreme Court reviewed the constitutional legitimacy of a Texas statute criminalizing homosexual sodomy in *Lawrence*.²³² While it ultimately struck down the statute under the Due Process Clause, the Court superficially reviewed its legitimacy under the Equal Protection Clause.²³³ The majority concluded that, while *Romer* potentially provided a basis for striking down the statute under the Equal

220. *Id.* at 632.

221. *Id.* at 633.

222. *Id.*

223. *Id.* at 632.

224. *Id.* at 633.

225. *Id.*

226. *See id.* at 634–35.

227. *See id.* at 635 (noting that Colorado cited “respect for other citizens’ freedom of association,” “liberties of landlords or employers who have personal or religious objections to homosexuality,” and “conserving resources to fight discrimination against other groups” as its purposes for passing Amendment 2). The Court discredited these explanations because “[t]he breadth of the amendment [was] so far removed from these particular justifications.” *Id.*

228. *Id.*

229. *Id.* at 634–35 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”).

230. *Id.* at 635.

231. *See generally id.*

232. *See Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

233. *See id.* at 574–75.

Protection Clause, the case required the Court to evaluate the “continuing validity” of *Bowers v. Hardwick*.²³⁴

In her concurring opinion, however, Justice O’Connor explicitly found the Texas statute unconstitutional under the Equal Protection Clause.²³⁵ She did so applying a “more searching form of rational basis review” that was justified by the statute’s “desire to harm a politically unpopular group.”²³⁶ Rearticulating the principles set forth in *Romer*, she stated, “[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”²³⁷

3. *Windsor III*

Most recently, the Supreme Court reviewed a Second Circuit decision²³⁸ striking down Section 3 of the Defense of Marriage Act²³⁹ (DOMA). The plaintiff, Edith Windsor, married her wife in Canada and subsequently resided in New York.²⁴⁰ Upon her wife’s death, Windsor was denied the benefit of a spousal deduction of federal estate taxes because DOMA’s definitions of “marriage” and “spouse” precluded the Internal Revenue Service from “recognizing Windsor as a spouse or the [same-sex] couple as married.”²⁴¹ The Court concluded that since DOMA sought to injure the “very class New York [sought] to protect,” it violated both due process and equal protection principles.²⁴² In doing so, however, the Court neither articulated the standard of review it was applying,²⁴³ nor, as in *Romer*,²⁴⁴ did it address whether homosexuals constituted a quasi-suspect or suspect class.²⁴⁵

234. *Id.* The Court ultimately concluded that the statute “further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Id.* at 578.

235. *Id.* at 579 (O’Connor, J., concurring).

236. *Id.* at 580.

237. *Id.* at 582.

238. *See infra* Part II.B.1.a (discussing “*Windsor II*”).

239. The Defense of Marriage Act, 1 U.S.C. § 7 (1996) (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

240. *Windsor v. United States (Windsor II)*, 699 F.3d 169, 175 (2d Cir. 2012).

241. *Id.*

242. *Windsor III*, 133 S. Ct. 2675, 2693 (2013) (“The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group. In determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ especially require careful consideration. DOMA cannot survive under these principles.”).

243. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480 (9th Cir. 2014) (noting that the Court in *Windsor III* “did not expressly announce the level of scrutiny it applied to the equal protection claim at issue”).

244. *See supra* note 231 and accompanying text.

245. *See Windsor III*, 133 S. Ct. at 2706 (Scalia, J., dissenting).

The Court paid much attention to DOMA's purpose and effect.²⁴⁶ It determined that DOMA's "unusual deviation" from the practice of recognizing state definitions of marriage was "strong evidence" that the purpose and effect of the law was to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."²⁴⁷ Moreover, the Court reasoned that DOMA's "operation in practice" further evidenced this purpose.²⁴⁸

Ultimately, the Court concluded that DOMA was invalid under the Fifth Amendment.²⁴⁹ It held that no legitimate purpose "[overcame] the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."²⁵⁰

B. A New Quasi-Suspect Class: Batson May Prohibit Sexual Orientation–Based Strikes

The Second and Ninth Circuits have decided that classifications based on sexual orientation require the application of heightened scrutiny. Part II.B.1 assesses cases holding that heightened scrutiny applies when reviewing laws that classify based on sexual orientation. Part II.B.2 discusses the possibility of prohibiting preemptory strikes based on sexual orientation in circuits where such classifications are reviewed with heightened scrutiny, and the Ninth Circuit's express decision to do so.

1. Homosexuals Are a Quasi-Suspect Class Entitled to Heightened Scrutiny

In 2012, the Second Circuit became the first circuit to hold that heightened scrutiny applies to classifications based on sexual orientation. In 2014, the Ninth Circuit followed suit.

246. *Id.* at 2693–94 (majority opinion).

247. *Id.* at 2693. The Court indicated that Congress's stated purpose was to promote "an interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Id.* Furthermore, the Court adopted the argument that the Act's demonstrated purpose was to "ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for the purposes of federal law." *Id.* at 2693–94. "DOMA writes inequality into the entire United States Code." *Id.* at 2694. "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person." *Id.*

248. *Id.*

249. *Id.* at 2696. "The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *Id.* at 2695 (citing *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954)). "While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved." *Id.*

250. *Id.* at 2696.

a. *The Second Circuit Applies Heightened Scrutiny to Review the Defense of Marriage Act: Windsor II*

In its 2012 case, *Windsor II*,²⁵¹ the Second Circuit considered whether a review of the constitutionality of Section Three of DOMA necessitated the application of heightened scrutiny.²⁵²

The Second Circuit first recognized that several courts have read Supreme Court precedent as demanding the application of a more searching rational basis review when there are “historic patterns of disadvantage suffered by the group adversely affected by the statute.”²⁵³ It further stated, however, that the Supreme Court has never “expressly sanctioned” such modification of the rational basis standard.²⁵⁴ Accepting that there is sufficient “doctrinal instability in this area,” the Second Circuit avoided deciding which level of rational basis need be applied, as “if heightened scrutiny is available” no “permutation of rational basis review is needed.”²⁵⁵

The court employed the Supreme Court’s four-factor suspect class inquiry²⁵⁶ and concluded that its review of Section Three of DOMA necessitated the application of heightened scrutiny.²⁵⁷ In applying this test, the court identified two of the four factors as merely “indicative” and not determinative of a group’s suspect class status.²⁵⁸ First, the court doubted whether there was “much left of the immutability theory.”²⁵⁹ It cited to the Supreme Court’s decision in *Nyquist v. Mauclet*,²⁶⁰ which rejected the argument that classifications based on alienage did not necessitate the application of strict scrutiny because alienage is not an immutable characteristic.²⁶¹ Second, it recognized that the political powerlessness of a group was relevant, but neither necessary (“as the gender cases demonstrate”) nor sufficient (“as the example of minors illustrates,”²⁶²) to establish a suspect class.²⁶³ Nevertheless, despite the limited importance of these two factors, the Second Circuit determined that all four of the test’s factors justified the application of heightened scrutiny.²⁶⁴

The court began with an “easy” conclusion that homosexuals have suffered a history of discrimination, a fact which was “not much in

251. 699 F.3d 169 (2d Cir. 2012).

252. *Id.* at 181.

253. *Id.* at 180 (quoting *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012)).

254. *Id.*

255. *Id.* at 181.

256. *See supra* notes 201–05 and accompanying text.

257. *Windsor II*, 699 F.3d at 181.

258. *Id.*

259. *Id.* (quoting *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 n.10 (1985)).

260. 432 U.S. 1 (1977).

261. *Windsor II*, 699 F.3d at 181 (citing *Nyquist*, 432 U.S. at 9 n.11).

262. *Id.* (citing *Cleburne*, 473 U.S. at 472 n.24).

263. *Id.*

264. *Id.* at 181–82.

debate.”²⁶⁵ Looking only as far as the criminalization of homosexual activity in several states to find “telling proof of animus and discrimination against homosexuals,” the court quickly dismissed arguments that this history was insufficient to warrant the application of heightened scrutiny.²⁶⁶ While it recognized that unlike racial minorities and women homosexuals have never been politically disenfranchised, Supreme Court precedent precluded this difference from being decisive.²⁶⁷ Moreover, the short history of discrimination against homosexuals, relative to that against women and racial minorities, did not avert the application of the heightened standard.²⁶⁸ Rather, in accordance with the majority of cases having “meaningfully considered the question,” the court found the ninety years of discrimination against homosexuals, beginning in the 1920s, sufficient to satisfy the “history of discrimination” factor.²⁶⁹

With similar “ease,” the court concluded that homosexuality is a characteristic bearing no relation to the “ability to perform or contribute to society.”²⁷⁰ There are some characteristics, such as age or mental handicap, which “may arguably inhibit an individual’s ability to contribute to society.”²⁷¹ Sexual orientation, however, is not among them.²⁷² Quite oppositely, the court indicated, “[t]he aversion homosexuals experience” bears absolutely no relation to aptitude or performance.²⁷³

The Second Circuit further concluded that homosexuality is a “sufficiently discernible characteristic to define a discrete minority class.”²⁷⁴ It rejected the argument that a defining characteristic must be both obvious *and* immutable.²⁷⁵ Instead, the court interpreted the test more broadly as whether there are “obvious, immutable, *or* distinguishing characteristics” that define the discrete group.²⁷⁶ Furthermore, the court indicated that whether a group-defining characteristic is obvious is not important.²⁷⁷ Rather the relevant inquiry is whether, when manifest, the

265. *Id.* at 182.

266. *Id.*

267. *Id.* (applying intermediate scrutiny in cases involving classifications based on illegitimacy even though children born out of wedlock were never disenfranchised (citing *Lalli v. Lalli*, 439 U.S. 259 (1978))).

268. *Id.* (“[W]hether such discrimination existed in Babylon is neither here nor there.”).

269. *Id.* (citing *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 318 (D. Conn. 2012)).

270. *Id.* (quoting *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985)).

271. *Id.*

272. *Id.*

273. *Id.* at 182–83.

274. *Id.* at 183.

275. *Id.* (“Classifications based on alienage, illegitimacy, and national origin are all subject to heightened scrutiny, even though these characteristics do not declare themselves, and often may be disclosed or suppressed as a matter of preference. What seems to matter is whether the characteristic of the class calls down discrimination when it is manifest.”).

276. *Id.* (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)).

277. *Id.*

characteristic invites discrimination.²⁷⁸ Homosexuality, the court reasoned, is a sufficiently distinguishing characteristic in this way.²⁷⁹

Contemplating the last factor of the suspect class test, the court indicated that homosexuals did not have the power to protect themselves against “discrimination at the hands of the majoritarian political process.”²⁸⁰ Recognizing the difficulty in determining whether homosexuals are actually underrepresented in the government, the court was instead persuaded by the small number of “acknowledged homosexuals” in positions of power and authority.²⁸¹ The two posited explanations for this small number—hostility which excludes homosexuals from these positions or, alternatively, hostility which motivates homosexuals to keep their sexual orientation private—were just as dispositive to the court as a statistical underrepresentation would have been.²⁸² Furthermore, the court posited that these same hostilities would surely suppress at least some political activity by stigmatizing the open association with certain political agendas.²⁸³

Ultimately, the analysis of these four factors led the court to define homosexuals as a quasi-suspect class entitled to intermediate scrutiny under the Fourteenth Amendment.²⁸⁴

*b. The Ninth Circuit’s Decision to Apply Heightened Scrutiny
to Classifications Based on Sexual Orientation:
SmithKline Beecham Corp. v. Abbott Laboratories*

The Ninth Circuit, in *Smithkline Beecham Corp. v. Abbott Laboratories*,²⁸⁵ specifically considered whether peremptory strikes could be exercised on the basis of sexual orientation.²⁸⁶ In the lower court, the plaintiff brought an action alleging that the manufacturer of an HIV drug violated the implied covenant of good faith and fair dealing and antitrust laws.²⁸⁷ During voir dire, the defendant used its first peremptory challenge to remove the only self-identified gay juror from the venire.²⁸⁸ The plaintiff responded with a *Batson* challenge, alleging that the defendant’s peremptory strike was motivated by the juror’s sexual orientation.²⁸⁹ The trial judge rejected the *Batson* challenge, expressing doubt as to whether

278. *Id.*

279. *Id.*

280. *Id.* at 184.

281. *Id.*

282. *Id.* at 184–85 (stating that actual underrepresentation of homosexuals in positions of authority and power and hostility which causes the appearance of such “amounts to much the same thing”).

283. *Id.*

284. *Id.* at 185. The mistreatment suffered by homosexuals “is not sufficient to require ‘our most exacting scrutiny.’” *Id.* (quoting *Trimble v. Gordon*, 430 U.S. 762, 767 (1977)).

285. 740 F.3d 471 (9th Cir. 2014).

286. *Id.* at 474.

287. *Id.*

288. *Id.* at 474–75.

289. *Id.* at 475. Counsel for plaintiff cited the involvement of AIDS medication in the litigation as the suspected motivation for the peremptory strike by the defendant. *Id.*

Batson applied to sexual orientation–based peremptory challenges, and the plaintiff subsequently appealed.²⁹⁰

The Ninth Circuit, relying on the line drawn in *J.E.B.*, reasoned that, if sexual orientation is a classification subject only to rational basis review, the lower court’s decision to reject the *Batson* challenge was unreviewable.²⁹¹ Accordingly, the Ninth Circuit began by considering whether classifications based on sexual orientation are entitled to heightened scrutiny.²⁹²

In making its determination, the court posited that, since the Supreme Court failed to articulate the standard of review it applied in *Windsor III*, it was necessary to review what the court “actually did.”²⁹³ Three aspects of the Supreme Court’s *Windsor III* analysis persuaded the Ninth Circuit that it engaged in heightened scrutiny.²⁹⁴

First, the Supreme Court did not entertain possible post hoc rationalizations for the enactment of Section Three of DOMA.²⁹⁵ Traditionally, laws survive rational basis review “if any state of facts reasonably may be conceived to justify” the classifications imposed by the law.²⁹⁶ In *Windsor III*, the Ninth Circuit explained, the Supreme Court did not “[conceive] of hypothetical justifications for [DOMA].”²⁹⁷ Nor did the Court consider any of the five rational bases offered by the Bipartisan Legal Advisory Group in its brief.²⁹⁸ Instead, the Court relied on DOMA’s legislative history to evaluate the “essence” of the law and considered its “design, purpose, and effect.”²⁹⁹ Moreover, the Court extensively discussed Congress’s “avowed purpose . . . to impose inequality,” as well as DOMA’s “*demonstrated* purpose” to support its conclusion that Section Three of DOMA was unconstitutional under the Fifth Amendment.³⁰⁰ This consideration of Congress’s actual purpose and the failure to consider hypothetical rational bases, according to the Ninth Circuit, “is antithetical to the very concept of rational basis review.”³⁰¹

290. *Id.*

291. *Id.* at 479–80.

292. *Id.* at 480.

293. *Id.* (explaining that when the Supreme Court has refrained from identifying its method of analysis, the Ninth Circuit analyzes the Supreme Court precedent, “by considering what the Court actually did, rather than by dissecting isolated pieces of text” (quoting *Witt v. Dep’t of Air Force*, 527 F.3d 806, 816 (9th Cir. 2008))).

294. *Id.* The Ninth Circuit considered three factors it previously defined in *Witt*. First, whether the Supreme Court considered possible post hoc rationalization for the law, as is required under rational basis review. *Id.* Second, whether the Court required that the state interest in its action be “legitimate” as the Ninth Circuit stated is “traditionally the case in heightened scrutiny.” *Id.* And finally, whether heightened scrutiny was applied in the cases relied upon by the Court. *Id.* at 480–81.

295. *Id.* at 481.

296. *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

297. *Id.*

298. *Id.* at 481–82.

299. *Id.* at 481 (quoting *Windsor III*, 133 S. Ct. 2675, 2683, 2689 (2013)).

300. *Id.* at 482.

301. *Id.*

Second, the Supreme Court deemed Congress's interest in enacting Section Three legitimate.³⁰² More than that, however, the Court demanded that this legitimate purpose “justify disparate treatment of the group.”³⁰³ Were the Court applying rational basis review, the Ninth Circuit concluded, it would not have identified a legitimate interest in order to “justify” the classification.³⁰⁴ Rational basis, contrastingly, is “unconcerned with the inequality that results from the challenged state action.”³⁰⁵ Yet *Windsor III* repeatedly refers to the harm, injury, and effect of DOMA on gays and lesbians, concluding that no purpose “overcomes” this effect.³⁰⁶ Moreover, the majority was concerned with the “public message sent by DOMA about the status occupied by gays and lesbians in our society,” which tends to impose second-class status on the group.³⁰⁷

Absent among all of this concern was the “strong presumption” of constitutionality and the “extremely deferential posture” typical of rational basis review.³⁰⁸ *Windsor III*'s thorough consideration of DOMA's actual purpose, the harm and injury DOMA inflicted on homosexuals, as well as its balancing of the two, according to the Ninth Circuit, simply do not comport with traditional rational basis review.³⁰⁹

Lastly, the Ninth Circuit considered what it described as “the least important factor”: whether *Windsor III* cited and relied upon cases employing heightened scrutiny.³¹⁰ While the relevant portion of the *Windsor III* opinion relies on few cases,³¹¹ the Ninth Circuit found that the Court relied both on rational basis and heightened scrutiny cases.³¹² Thus, while the Court's reliance was not decisive, it tended to support the application of heightened scrutiny.³¹³

Thus, applying the *Witt* test, the Ninth Circuit concluded that *Windsor III* compelled the application of heightened scrutiny in equal protection cases involving classifications based on sexual orientation.³¹⁴ This

302. *Id.*

303. *Id.* (quoting *Windsor III*, 133 S. Ct. at 2693).

304. *Id.*

305. *Id.* (applying the presumption that state legislatures “have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” (citing *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961))).

306. *Id.* at 483 (“The federal statute is invalid, for no legitimate purpose *overcomes* the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.” (quoting *Windsor III*, 133 S. Ct. at 2696)).

307. *Id.* at 482–83.

308. *Id.* at 483.

309. *Id.*

310. *Id.*

311. *Id.*

312. The Court relied on *Romer*, *Lawrence*, and *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). *Id.* *Romer* applied rational basis review. *Id.* According to both the Supreme Court and the Ninth Circuit, *Moreno* employed “a more searching form of rational basis review.” *Id.* Moreover, the Ninth Circuit's analysis of the *Lawrence* decision in *Witt*, led it to conclude that the Court applied heightened scrutiny in that case as well. *Id.*

313. *Id.*

314. *Id.* at 481.

determination, however, did not similarly compel the prohibition of peremptory strikes on the basis of sexual orientation.³¹⁵

2. Heightened Scrutiny: Necessary But Not Sufficient to Extend *Batson*

The Ninth Circuit pointed out that “[i]n *J.E.B.*, the Supreme Court did not state definitively whether heightened scrutiny is sufficient to warrant *Batson*’s protection or merely necessary.”³¹⁶ Instead, the Court stated, “parties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to ‘rational basis’ review.”³¹⁷

Analyzing the reasoning and rationale of *J.E.B.*, the Ninth Circuit prohibited peremptory challenges based on sexual orientation.³¹⁸ The court pointed out that *J.E.B.* “took *Batson*, a case about the use of race in jury selection, and applied its principles to discrimination against women.”³¹⁹ In doing so, the Ninth Circuit reasoned, the Supreme Court recognized that even groups with a history of discrimination significantly differing from that of African Americans, may be entitled to the protection of *Batson*.³²⁰ Accordingly, the Court’s articulated purposes in deciding *J.E.B.* and *Batson* were applied, and the history of discrimination experienced by gays and lesbians independently analyzed, to justify the Ninth Circuit’s prohibition of sexual orientation–based peremptory strikes.³²¹

First, the Ninth Circuit recognized that, much like strikes on the basis of race and gender, peremptory challenges exercised on the basis of sexual orientation deprive individuals of the right to participate in the judicial system “on account of a characteristic that has nothing to do with their fitness to serve.”³²² While homosexuals have not been systematically excluded from juries in the same open manner as women and African Americans, the “unique experiences of gays and lesbians,” and the history of government-endorsed discrimination against them, compel the same *Batson* protection.³²³ Certainly, homosexuality is not a characteristic

315. *Id.* at 484.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 484–85.

322. *Id.* at 485.

323. *Id.*

In the first half of the twentieth century, public attention was preoccupied with homosexual “infiltration” of the federal government. Gays and lesbians were dismissed from civilian employment in the federal government at a rate of sixty per month. Discrimination in employment was not limited to the federal government; local and state governments also excluded homosexuals, and professional licensing boards often revoked licenses on account of homosexuality. In 1985, the Supreme Court denied certiorari in a case in which a woman had been fired from her job as a guidance counselor in a public school because of her sexuality. Indeed, gays and lesbians were thought to be so contrary to our conception of citizenship that they were made inadmissible under a provision of our immigration laws that required the Immigration and Naturalization Service

obvious on the face of a juror.³²⁴ Until quite recently,³²⁵ however, gays and lesbians did not identify themselves as such for fear that “being openly gay [would result] in significant discrimination.”³²⁶ Second, the Ninth Circuit stated that the Constitution cannot perpetuate the very “state-sponsored group stereotypes rooted in, and reflective of, historical prejudice” that lead to this forced privacy in the first place.³²⁷ For all of these reasons, the Ninth Circuit determined that peremptory strikes based on sexual orientation must be prohibited under *Batson*.³²⁸

In the Second Circuit, after *Windsor II*, homosexuals are no longer a group “normally subject to rational basis review.”³²⁹ As such, under *J.E.B.* they are not a group that automatically can be peremptorily removed from the venire in courts where *Windsor II* is binding.³³⁰ While this suggests that sexual orientation-based strikes *may* be prohibited in the Second Circuit, the court has not yet decided the issue.

While the Second and Ninth Circuits are the only two circuit courts to define homosexuals as a class entitled to heightened scrutiny, several district courts have decided similarly since then.³³¹ Several circuits and district courts, however, have also declined to do so.³³²

C. *Homosexuals Are Not Entitled to Heightened Scrutiny or Batson Protection*

As the Second Circuit pointed out in *Windsor II*, there is much “doctrinal instability” surrounding the issue of the appropriate standard of review to be applied to classifications based on sexual orientation.³³³ Only the Second and Ninth Circuits have expressly decided that homosexuals constitute a

(INS) to exclude individuals “afflicted with psychopathic personality.” It was not until 1990 that the INS ceased to interpret that category as including gays and lesbians. It is only recently that gay men and women gained the right to be open about their sexuality in the course of their military service. As one scholar put it, throughout the twentieth century, gays and lesbians were the “anticitizen.”

Id. at 484–85.

324. *See id.* at 485.

325. *Id.* at 485–86 (“[I]n 1985, only one quarter of Americans reported knowing someone who was gay. By 2000, this number increased to 75 percent of Americans.”).

326. *Id.* at 485.

327. *Id.* at 486 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994)).

328. *Id.*

329. *Id.* at 479.

330. *See J.E.B.*, 511 U.S. at 143.

331. *See, e.g.*, *Latta v. Otter*, 19 F. Supp. 3d 1054, 1074–77 (D. Idaho 2014) (relying on *SmithKline* when deciding that heightened scrutiny applied to sexual orientation classifications when it considered a § 1983 action brought by two same-sex couples seeking to marry in Idaho and two same-sex couples seeking to have their out-of-state marriages recognized by Idaho); *Henry v. Himes*, 14 F. Supp. 3d, 1036, 1054 (S.D. Ohio 2014) (using *SmithKline* as precedent to apply intermediate scrutiny when invalidating a law prohibiting the recognition of same-sex marriages performed in other jurisdictions); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1010 (W.D. Wis. 2014) (agreeing with *SmithKline* that sexual orientation-based classifications necessitate the application of heightened scrutiny but not deeming *SmithKline* binding precedent).

332. *See infra* notes 387–91 and accompanying text.

333. *Windsor II*, 699 F.3d 169, 181 (2d Cir. 2012).

quasi-suspect class entitled to heightened scrutiny.³³⁴ Other circuits apply rational basis review to such classifications. Part II.C.1 examines interpretations of Supreme Court precedent inapposite to the Second and Ninth Circuits' view, that sexual orientation–based classifications are entitled to mere rational basis review. Part II.C.2 discusses the ineligibility, under *J.E.B.*, of sexual orientation–based peremptory strikes to be prohibited in jurisdictions adopting this view and the arguments against extending *Batson* to prohibit such strikes.

1. Sexual Orientation–Based Classifications Are Reviewed for Rational Basis: *DeBoer v. Snyder*

The Ninth Circuit's interpretation of *Windsor III*, and the opinion that the Supreme Court in its actions, rather than its words, has been applying heightened scrutiny to sexual orientation–based classifications, is certainly not a unanimous one. The Sixth Circuit's recent interpretation of rational basis review, as applied to the prohibition of same-sex marriage precipitated by the Michigan Marriage Amendment (MMA) in *DeBoer v. Snyder*,³³⁵ is an appropriate example of just that.

DeBoer reviewed the constitutionality of the voter-approved MMA, which prohibited same-sex marriage.³³⁶ The court addressed the question from many different perspectives, considering arguments for and against the MMA's validity under theories of “rational basis review; animus; . . . [and] suspect classificatio[n],” among others.³³⁷ Under no theory, however, did the court find a reason for “constitutionalizing the definition of marriage and for removing the issue from the place it has been since the Founding: in the hands of state voters.”³³⁸

a. Rational Basis Review

The Sixth Circuit began its rational basis analysis by defining the deference to be effected when applying this standard of review, stating, “[s]o long as judges can conceive of some ‘plausible’ reason for the law—*any* plausible reason, even one that did not motivate the legislators who enacted it—the law must stand, no matter how unfair, unjust, or unwise the judges may consider it as citizens.”³³⁹ Ultimately, the court found two such bases sufficient to meet this “low bar,”³⁴⁰ the first of which is the furtherance of a government interest in regulating sex³⁴¹ and in creating

334. *See supra* Part II.B.1.

335. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

336. *Id.* at 396–97.

337. *Id.* at 402 (“There are many ways . . . to look at this question: originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning. The parties in one way or another have invoked them all.”).

338. *Id.* at 403.

339. *Id.* at 404 (citing *Heller v. Doe*, 509 U.S. 312, 330 (1993)).

340. *Id.*

341. *Id.* (“One starts from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to

stable family units for the creation of children.³⁴² The court viewed the MMA as a state-created incentive for a couple to “stay together for purposes of rearing offspring.”³⁴³ It also held that this legislation is not irrational, but rather, recognizes the “biological reality” that same-sex couples do not have children in the same way that heterosexual couples do.³⁴⁴ The same risk of unintended offspring, therefore, does not exist.³⁴⁵

In recognizing this basis, the court also considered a countervailing policy argument in favor of extending marriage laws to gay couples: gay couples are no less capable than straight couples of sharing loving, affectionate, and committed relationships or of raising children and providing stable families for them.³⁴⁶ Ultimately, however, the court stated that the “signature feature” of rational basis review is that legislation will not be invalidated simply because the government has done too much or too little in addressing a policy question.³⁴⁷ Moreover, rational basis review does not “empower federal courts to ‘subject’ legislative line-drawing to ‘courtroom’ factfinding” which tends to favor a different policy.³⁴⁸ Nor can such found facts be the basis of a ruling of unconstitutionality.³⁴⁹

The second rational basis the Sixth Circuit recognized was a state’s right to “wait and see” before legislating inapposite to traditional societal norms.³⁵⁰ While the plaintiffs argued that the state has acted irrationally in its continued adoption of the traditional definition of marriage “in the face of changing social mores,” the court disagreed.³⁵¹ Eleven years after Massachusetts recognized gay marriage, “the clock has not run on assessing the benefits and burdens of expanding the definition of marriage.”³⁵² Moreover, the court decided, the question of whether maintaining the traditional definition of marriage is worth its cost is one for the legislature, not “life-tenured judges.”³⁵³ To further this point, the court concluded its rational basis analysis by rearticulating its undertaking, stating, “[o]ur task under the Supreme Court’s precedents is to decide whether the law has

regulate sex, most especially the intended and unintended effects of male-female intercourse. Imagine a society without marriage. It does not take long to envision problems that might result from an absence of rules about how to handle the natural effects of male-female intercourse: children.”).

342. *Id.* at 404–05 (“People . . . may well need the government’s encouragement to create and maintain stable relationships within which children may flourish. It is not society’s laws or for that matter any one religion’s laws . . . [a]nd governments typically are not second-guessed under the Constitution for prioritizing how they tackle such issues.” (citing *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970))).

343. *Id.* at 405.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)).

349. *Id.*

350. *Id.* at 406.

351. *Id.*

352. *Id.*

353. *Id.* at 408.

some conceivable basis, not to gauge how that rationale stacks up against the arguments on the other side.”³⁵⁴

b. Animus

Next, the Sixth Circuit explained the very lack of “traditional deference” present in cases like *Romer* and *Lawrence* and relied upon by the Ninth Circuit in *SmithKline*.³⁵⁵ It posited that the cases in which the Supreme Court has struck down state laws under rational basis review are those in which “the novelty of the law and the targeting of a single group for disfavored treatment” are apparent.³⁵⁶ Distinguishing this case from cases like *Romer* and *Cleburne*, the court pointed out that this law was not novel.³⁵⁷ In fact, it codified “a long-existing, widely held social norm already reflected in state law.”³⁵⁸ Moreover, quoting *Windsor III*, the court pointed out that the heterosexual nature of traditional marriage “had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.”³⁵⁹

Further distinguishing this case from other Supreme Court precedents, the court indicated that Michigan’s decision to define marriage in its constitution was not unusual and lacked the “kind of malice or unthinking prejudice the Constitution prohibits.”³⁶⁰ The decisions in *Cleburne* and *Romer*, the Sixth Circuit posited, turned on whether “anything but prejudice to the affected class could explain the law.”³⁶¹ The Court, in those cases, decided that there were none. Here, the Sixth Circuit concluded, plenty of alternative explanations existed.³⁶²

c. Quasi-Suspect Class

Next, the Sixth Circuit considered whether the Supreme Court’s four-part test deemed homosexuals a quasi-suspect class necessitating the application of heightened scrutiny.³⁶³ In opposition to both the Ninth and Second Circuits’ analyses and considering only two of the four factors, the court found that homosexuals do not constitute a quasi-suspect class under this test.³⁶⁴

354. *Id.*

355. *Id.*

356. *Id.* (stating that zoning code applied only to homes for the intellectually disabled in a “neighborhood that apparently wanted nothing to do with them”); *Romer v. Evans*, 517 U.S. 620, 623 (1996) (considering validity of state wide initiative that denied only gays the protection of existing antidiscrimination laws).

357. *DeBoer v. Snyder*, 772 F.3d 388, 408 (6th Cir. 2014).

358. *Id.*

359. *Id.* (quoting *Windsor III*, 133 S. Ct. 2675, 2689 (2013)).

360. *Id.*

361. *Id.* at 410.

362. *Id.*

363. *Id.* at 413.

364. *See id.* at 413–16.

The argument that homosexuals are a quasi-suspect class faced two “impediments”: the first, the Sixth Circuit’s own precedent indicating that rational basis review applies to sexual orientation classifications,³⁶⁵ and the second, the fact that the Supreme Court has never held that sexual orientation classifications should receive heightened review and “has not recognized a new suspect class in more than four decades.”³⁶⁶

First, the Sixth Circuit recognized that homosexuals have suffered a “lamentable” history of discrimination.³⁶⁷ It also pointed out, however, that the traditional definition of marriage being challenged in this case developed “independently of this record of discrimination.”³⁶⁸ Second, the Sixth Circuit disagreed with the Ninth Circuit in concluding that homosexuals as a group are not so politically powerless that “extraordinary protection from the majoritarian political process” is required.³⁶⁹ Instead, the court reasoned that since gay marriage was legalized in Massachusetts eleven years ago, homosexuals have enjoyed “nearly as many successes as defeats and a widely held assumption that the future holds more promise than the past.”³⁷⁰ As such, the court concluded that the Fourteenth Amendment is not designed to protect a group from the reality of democratic initiatives, “some succeed, some fail.”³⁷¹ Accordingly, under the Sixth Circuit’s analysis, homosexuals do not constitute a quasi-suspect class.³⁷²

d. *Windsor III As Precedent*

Lastly, the Sixth Circuit considered whether *Windsor III*, as plaintiffs’ claimed and the Ninth Circuit held, applied heightened scrutiny.³⁷³ It held

365. *Id.* at 413 (citing *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260–61 (6th Cir. 2006); *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir. 1997)).

366. *Id.*

367. *Id.*

368. *Id.* “The traditional definition of marriage goes back thousands of years and spans almost every society in history. By contrast, ‘American laws targeting same-sex couples did not develop until the last third of the 20th century.’” *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 570 (2003)).

369. *Id.* at 415.

This is not a setting in which dysfunction mars the political process. It is not a setting in which the recalcitrance of Jim Crow demands judicial, rather than we-can’t-wait-forever legislative, answers. It is not a setting in which time shows that even a potentially powerful group cannot make headway on issues of equality. It is not a setting where a national crisis—the Depression—seemingly demanded constitutional innovation. And it is not a setting, most pertinently, in which the local, state, and federal governments historically disenfranchised the suspect class, as they did with African Americans and women.

Id.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 413.

that it did not.³⁷⁴ Rather, the Sixth Circuit placed *Windsor III* in its above-mentioned “animus” category with *Romer* and *Cleburne*.³⁷⁵

The Sixth Circuit interpreted *Windsor III* as a decision mostly about federalism rather than as an endorsement of the application of heightened scrutiny.³⁷⁶ It found that the Supreme Court resolved *Windsor III* on the “*Romer* ground,” that “anomalous exercises of power targeting a single group raise suspicion that bigotry rather than legitimate policy is afoot.”³⁷⁷ The reason DOMA was anomalous, the court posited, was because the federal statute at issue “trespassed” on New York’s authority to define marriage.³⁷⁸ Without such an anomaly, there is no reason to infer that a state law’s purpose was to impose a disadvantage, separate status, or stigma on same-sex couples, and traditional rational basis would apply.³⁷⁹

2. Other Circuits Hold That Sexual Orientation–Based Strikes Are Permissible

Only the Eighth, Ninth, and Eleventh Circuits have specifically considered whether peremptory challenges based on sexual orientation are eligible for prohibition under *J.E.B.*³⁸⁰ Both the Eighth and Eleventh Circuits neglected to extend *Batson* to prohibit sexual orientation–based peremptory challenges.

a. Sexual Orientation–Based Strikes Are Permissible Unless the Supreme Court Holds Otherwise

First, all circuits which apply rational basis review to classifications based on sexual orientation are precluded from extending *Batson* to prohibit peremptory strikes on the basis of sexual orientation.³⁸¹ *J.E.B.* explicitly permits peremptory strikes based on a characteristic defining a group entitled to rational basis review.³⁸² Accordingly, in the Sixth Circuit, and other circuits applying rational basis review, sexual orientation–based peremptory challenges are necessarily permissible. Unsurprisingly, the Eleventh and Eighth Circuits declined to extend *Batson* when they had the opportunity, due primarily to the Supreme Court’s failure to do so.

Prior to the Ninth Circuit’s decision in *SmithKline*, the Eighth Circuit chose not to extend *Batson* in *United States v. Blaylock*.³⁸³ Not electing to

374. *Id.*

375. *Id.* at 414.

376. *Id.* at 413.

377. *Id.* at 414.

378. *Id.*

379. *Id.*

380. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 475 (9th Cir. 2014); *Sneed v. Florida Dep’t of Corr.*, 496 F. App’x 20 (11th Cir. 2012); *United States v. Blaylock*, 421 F.3d 758 (8th Cir. 2005).

381. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994) (holding group must be entitled to more than rational basis review to benefit from the protection of *Batson*).

382. See *supra* notes 180–82 and accompanying text.

383. 421 F.3d 758, 769–70 (8th Cir. 2005).

engage in the Supreme Court's four-part quasi-suspect inquiry, the Eighth Circuit reasoned that, "[a]lthough the California Supreme Court has held sexual orientation should be a protected class for jury selection purposes, and the Ninth Circuit has assumed, without deciding, sexual orientation qualifies as a *Batson* classification, neither the Supreme Court nor this circuit has so held."³⁸⁴ Similarly, in *Sneed v. Florida Department of Corrections*,³⁸⁵ the Eleventh Circuit dismissed an ineffective assistance of counsel claim based on an attorney's failure to object to a peremptory strike of a homosexual juror, stating, "the Supreme Court has never held that homosexuality is a protected class for purposes of analyzing discrimination in jury selection under *Batson*."³⁸⁶

Moreover, since the Ninth Circuit's decision in *SmithKline*, several district courts have declined to adopt its rationale for want of binding precedent. In *Geiger v. Kitzhaber*,³⁸⁷ the District Court of Oregon refused to consider *SmithKline* binding precedent.³⁸⁸ It reasoned that at least one judge of the Ninth Circuit made a sua sponte call for a rehearing en banc.³⁸⁹ Thus, no mandate issued from the case and it is not yet a final and binding decision.³⁹⁰ While the court recognized that it could independently reach the same conclusion as the *SmithKline* court, it ultimately determined that was not necessary in this case.³⁹¹

*b. Batson Should Not Be Extended to Prohibit Peremptory Strikes
Based on Sexual Orientation*

Even if the Sixth Circuit's view is rejected, and homosexuals are deemed a quasi-suspect class, it must be independently considered whether *Batson* should be expanded to prohibit sexual orientation-based peremptory strikes. This section will discuss the view, often appearing in dissenting or concurring opinions, that *Batson*'s principles should not be applied to prohibit peremptory strikes based on any characteristics other than race.

In Justice O'Connor's concurrence in *J.E.B.*, she warned of the potential costs the Court's extension to gender might have on the value of the peremptory challenge.³⁹² The peremptory challenge's purpose is to enable parties to impanel fair and impartial juries.³⁹³ "[B]y enabling each side to exclude those jurors it believes will be most partial toward the other," extreme biases for one party or another are eliminated from the venire.³⁹⁴ The very nature of a peremptory strike—that it is exercised without a stated

384. *Id.* at 769.

385. 496 F. App'x 20 (11th Cir. 2012).

386. *Id.* at 27.

387. 994 F. Supp. 2d 1128 (D. Or. 2014).

388. *Id.* at 1141.

389. *Id.*

390. *Id.*

391. *Id.*

392. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 147–51 (1994) (O'Connor, J., concurring).

393. *Id.* at 147.

394. *Holland v. Illinois*, 493 U.S. 474, 484 (1990).

reason—is the source of its value.³⁹⁵ This nature allows lawyers to strike jurors on the basis of their experience, on often “inarticulable” clues and hunches.³⁹⁶

According to Justice O’Connor, with each constitutional limit on the use of peremptory challenges, “we force lawyers to articulate what we know is often inarticulable.”³⁹⁷ In doing so, peremptory challenges become “less discretionary” and biased jurors are more likely to make it onto the jury.³⁹⁸ In its extension of *Batson* to gender-based peremptory strikes, the Court “[took] a step closer to eliminating the peremptory challenge, and diminished the ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes.”³⁹⁹ Analogously, again extending *Batson* to prohibit sexual orientation-based peremptory challenges will further deplete the value of the procedure.⁴⁰⁰

Moreover, in his *J.E.B.* dissent, Justice Scalia doubted whether the Constitution supports the limitation of the exercise of peremptory strikes at all.⁴⁰¹ He reasoned that since all groups are equally subject to the peremptory challenge, “it is hard to see how any group is denied equal protection.”⁴⁰² Justice Scalia also challenged the majority’s limitation of *Batson*’s scope based on the standard of review to which a group is entitled.⁴⁰³ The majority rejected the respondent’s argument that the peremptory challenge of the men in this case furthered the government’s

395. *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

396. *J.E.B.*, 511 U.S. at 148.

397. *Id.*

398. *Id.*

399. *Id.* at 149–50. “[T]o say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.” *Id.* at 149. Saying gender does not matter as a matter of law is also somewhat contradictory to past fair cross section cases holding that woman bring a unique perspective and set of experiences to the jury. *Id.* at 157–58 (Scalia, J., dissenting).

If asked whether the racial or gender composition of a jury might have anything to do with its eventual verdict, most Americans would probably agree that it does. The assumption underlying this opinion is that men and women, blacks and whites, the rich and the poor, may see the world in very different ways and that jurors’ differing world views may color their impressions of a case so much so that different jurors may reach different decisions about a just verdict.

SEAN G. OVERLAND, *THE JUROR FACTOR: RACE AND GENDER IN AMERICA’S CIVIL COURTS* 11 (1973). “[R]esearch on juror decision-making in criminal trials with racial undertones, such as cases in which the victim and the defendant are from different racial backgrounds, has shown that blacks and whites often view the case very differently.” *Id.* at 20. A national opinion poll taken to measure reactions to the O.J. Simpson trial, for example, revealed that 77 percent of white poll takers thought Simpson was guilty, while only 29 percent of black poll takers thought he should be convicted. *Id.* Moreover, studies show that women are more likely to convict in rape cases than are men. REID HASTIE ET AL., *INSIDE THE JURY* 140–41 (1983).

400. See *J.E.B.*, 511 U.S. at 149–50 (O’Connor, J., concurring).

401. *Id.* at 159 (Scalia, J., dissenting).

402. *Id.* Justice Scalia states that he might think differently if a pattern of peremptory strikes evidenced the systematic exclusion of a group from the venire. *Id.* at 160. He indicates that here, that was not the case. *Id.* For every man stricken from the venire by one party, a woman was stricken by the other. *Id.*

403. *Id.* at 160–61.

interest in procuring an impartial jury by eliminating a group that may have been partial to the defendants.⁴⁰⁴ The majority also stated that it refused to accept an argument based on “the very stereotype[s] the law condemns.”⁴⁰⁵ Justice Scalia, however, failed to see a reason why the law condemns stereotyping of groups entitled to heightened or strict scrutiny but not those entitled to rational basis review.⁴⁰⁶ Accordingly, he questioned whether characteristic-based strikes could even rationally further the government’s interest in impaneling an impartial jury.⁴⁰⁷

Justice Scalia also expressed a concern for the cost of this, and any further, extension of *Batson*.⁴⁰⁸ Stating that “there really is no substitute for the peremptory,” he reasoned that criminal defendants would be most affected by the majority’s decision.⁴⁰⁹ Moreover, recognizing that the “biases that go along with group characteristics tend to be biases that the juror himself does not perceive,” it would be “fruitless” to inquire about them.⁴¹⁰ Without a fully powerful peremptory strike, therefore, many jurors’ subliminal prejudices will go unchallenged.⁴¹¹

It is clear that there are both costs and benefits to extending *Batson* to prohibit sexual orientation–based peremptory challenges. Yet there are equally crippling costs and meaningful benefits to maintaining the status quo. It now must be considered whether, in the *Batson* realm, we can have our cake and eat it too.

III. *BATSON*’S HOLDING SHOULD BE BOTH NARROWED AND EXPANDED

Any proposed change to the *Batson* regime must consider the two constitutional rights affected by it: a criminal defendant’s Sixth Amendment right to an impartial jury and a juror’s Fourteenth Amendment right to equal protection under the laws.⁴¹² When *Batson* was decided, the Supreme Court seemingly turned its focus away from maintaining a powerful peremptory strike and prioritized the safeguard of jurors’ equal protection rights. This Note attempts to preserve that priority but also revitalize the power of the peremptory challenge.

Part III.A delves into the inconsistencies plaguing the *Batson* regime, exploring the limits *J.E.B.* places on *Batson* and the flaws of *J.E.B.*’s limiting principle. Part III.B proposes that *Batson* be both narrowed and expanded to better balance the two constitutional rights at issue.

404. *Id.* at 160.

405. *Id.* at 161.

406. *Id.*

407. *Id.*

408. *Id.* at 161–62.

409. *Id.* at 162.

410. *Id.*

411. *Id.*

412. *See supra* notes 43–46, 109–62 and accompanying text.

A. *The Batson Regime's Plague: Inconsistency*

There are two reasons the current *Batson* framework is ineffective. First, the stated and apparent purposes of *Batson* and its progeny are inconsistent with *Batson's* scope. While *Batson's* rationale can seemingly be employed to protect jurors from discrimination based on characteristics other than race and gender, *J.E.B.* greatly hinders that possibility.⁴¹³ Second, *Batson* rigidly applies standards of judicial review in a way that creates a constitutional legal fiction. Under this application, as a matter of constitutional law, race and gender *never* have a relevant impact on a juror's ability to be impartial, whereas a juror's sexual orientation *always* does.⁴¹⁴

1. The *Batson* Regime's Purpose Seeks to Protect More Groups than *J.E.B.'s* Limiting Principle Would Allow

When *Batson* was decided, both its holding and its purpose were very focused.⁴¹⁵ The Supreme Court sought only to eradicate the racially discriminatory exercise of peremptory strikes by prosecutors.⁴¹⁶ This focus preserved the value of the peremptory strike and strictly limited *Batson's* application.⁴¹⁷ As *Batson's* application and purpose have been expanded, and that focus diluted, a limiting principle was necessary to maintain the utility of the peremptory challenge.⁴¹⁸

In *J.E.B.*, the Court articulated the needed limiting principle.⁴¹⁹ While peremptory strikes based on race and gender were prohibited, parties could still exercise peremptory challenges against any group "normally subject to 'rational basis' review."⁴²⁰ This section discusses why *Batson's* broadly understood purpose cannot be reconciled with *J.E.B.'s* explicit allowance of discriminatory peremptory strikes against certain groups.

a. *Batson and J.E.B.: The Reason Peremptory Strikes Based on Race and Gender Are Prohibited*

In both *Batson* and *J.E.B.*, the Supreme Court offered several rationales for its limitations on the exercise of peremptory challenges. First, when deciding *Batson*, the Court largely relied on the principles set forth in *Strauder*, indicating that the purposeful discrimination employed during jury selection violated a defendant's Equal Protection rights.⁴²¹ Elaborating further, the Court specified that the state unconstitutionally discriminated

413. See *infra* Part III.A.1.

414. See *infra* Part III.A.2.

415. See *supra* Part I.B.2.

416. See *supra* Part I.B.2.

417. See *supra* Part I.B.2.

418. See *supra* notes 180–82 and accompanying text.

419. See *supra* notes 180–82 and accompanying text.

420. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994).

421. See *supra* note 111 and accompanying text.

against excluded jurors by relying on race to assess their competence.⁴²² “A person’s race,” the Court explained, “simply ‘is unrelated to his fitness as a juror.’”⁴²³ Moreover, the Court concluded that the injuries precipitated by purposeful discrimination extended beyond the courtroom to undermine the public’s confidence in the “fairness of our system of justice.”⁴²⁴

In *J.E.B.*, the Supreme Court responded to several arguments that *Batson*’s rationale could not be applied to justify the prohibition of gender-based peremptory challenges.⁴²⁵ Analogizing, the Court ultimately held that, like race, gender “is an unconstitutional proxy for juror competence and impartiality.”⁴²⁶ In concluding so, the Court cited the history of discrimination against women in the United States, deciding that in order to expand *Batson*, the Court

need not determine . . . 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”⁴²⁷

Moreover, *J.E.B.*’s holding, extending *Batson* to prohibit gender-based strikes, implies that narrowly viewing *Batson*’s purpose as specific to race is untenable. The Court reasoned broadly that, “[W]hether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.”⁴²⁸ The Court recognized that veniremen “have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.”⁴²⁹ In making these broad statements, the Court left a serious question unanswered: Why only race and gender?

*b. Inconsistencies Between the Court’s Limiting Principle
and its Reasoning*

Batson’s rationale, especially as it has been more recently interpreted in *J.E.B.*, can seemingly be employed to justify the prohibition of peremptory strikes based on other cognizable group characteristics. The Supreme Court explicitly hindered courts from doing so, however, when it articulated *J.E.B.*’s limiting principle.

Admittedly, the need for such a limiting principle is quite impressive. Peremptory strikes serve several important functions, not the least of which,

422. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

423. *Id.* at 87 (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946)).

424. *See supra* note 115 and accompanying text.

425. *J.E.B.*, 511 U.S. at 129, 136.

426. *Id.* at 129.

427. *Id.* at 136; *see supra* note 161 and accompanying text.

428. *J.E.B.*, 511 U.S. at 128. “The community is harmed by the State’s participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.” *Id.* at 140.

429. *Id.* at 141–42.

is its status as an important procedural safeguard of a criminal defendant's right to an impartial jury.⁴³⁰ The further limited the exercise of peremptory challenges becomes, the less able defendants are to protect that right.⁴³¹ The issue is not at all that a limiting principle exists, but rather that the chosen limiting principle quite seriously fails to serve *Batson*'s purposes.

Consider that the groups *Batson* protects are not uniquely vulnerable to discrimination, whereas, at least one group to which *J.E.B.* denies this protection, is vulnerable. Currently, *Batson* and *J.E.B.* protect two groups that, historically, have been rather immune to discrimination: whites and men.⁴³² In *Batson*, the Supreme Court assessed the constitutionality of peremptory strikes excluding blacks from a jury.⁴³³ It held more broadly, however, that "race" could not motivate a strike.⁴³⁴ This protects whites from discrimination during voir dire as much as it protects blacks.⁴³⁵ Similarly, and quite strangely, *J.E.B.* cited the history of discrimination against women to justify its conclusion that the respondent's gender-based strikes against men were unconstitutional.⁴³⁶ Yet, in all but two circuits, the level of judicial scrutiny applied to classifications based on sexual orientation renders the history of discrimination against homosexuals irrelevant to justify *Batson*'s extension.⁴³⁷

c. Sexual Orientation: An Example of the Inconsistency

Sexual orientation is an obvious illustration of the incongruence of *Batson*'s rationales and *J.E.B.*'s limiting principle. While *J.E.B.* prevents *Batson* from being applied to prohibit sexual orientation-based peremptory strikes in all but two circuits, *Batson* and *J.E.B.*'s rationales effortlessly justify their prohibition. When deciding whether to prohibit peremptory strikes based on race and gender, the Court considered several issues. These include: (1) whether a characteristic is related to one's fitness as a juror, (2) whether discrimination against a group "undermines" the public's confidence in the justice system, and (3) whether the group defined by the characteristic has historically experienced discrimination.⁴³⁸ Consider these factors as applied to sexual orientation.

First, sexual orientation, like race and gender, is entirely unrelated to a juror's ability to impartially evaluate a case.⁴³⁹ One need not be an expert of any kind to realize that sexual orientation is not a characteristic having any effect on one's intelligence, ability to listen, reason, or apply the law to

430. See *supra* Part I.A.1 (discussing merits of peremptory challenge procedure).

431. See *supra* Part II.C.2.b.

432. See *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding race-based peremptory strikes are unconstitutional); see also *J.E.B.*, 511 U.S. 127 (holding that gender-based peremptory strikes are unconstitutional).

433. See *supra* Part I.B.2.

434. See *supra* Part I.B.2.

435. See *supra* Part I.B.2.

436. See *supra* notes 158–62 and accompanying text.

437. See *supra* Part II.B.2.; *supra* notes 180–81 and accompanying text.

438. See *supra* Part III.A.1.a.

439. See *supra* notes 265–69 and accompanying text.

a set of facts. Not only is this issue “not much in debate,” but a majority of cases which have “meaningfully considered” the question so hold.⁴⁴⁰

Second, as the Court stated in *J.E.B.*, jurors have a right not to be “summarily” dismissed based on assumptions which tend to reinforce historical prejudice.⁴⁴¹ Such an allowance would send a message to the public that certain individuals are “presumed unqualified by state actors to decide important questions.”⁴⁴² In fact, it seems certain that permitting citizens to be dismissed from juries based solely on their sexual orientation, or any characteristic not affecting their fitness as a juror, perpetuates this appearance of unfairness, and results in a “loss of confidence” in the judicial system.⁴⁴³

Third, as recognized by the Second Circuit in *Windsor II*, homosexuals have endured government-sponsored discrimination since, at least, the 1920s.⁴⁴⁴ Yet, despite the simplicity with which these factors justify the prohibition of sexual orientation-based peremptory challenges, *J.E.B.*'s limiting principle remains an obstacle.⁴⁴⁵ This obstacle is caused, principally, by its rigid application of the three-tiered system of judicial review.⁴⁴⁶

2. *J.E.B.*'s Limiting Principle Rigidly Applies Standards of Judicial Review in a Way That Fails to Consider the Factual Circumstances of Each Case

J.E.B. rigidly utilizes the three-tiered system of judicial review applied in all Equal Protection cases to control *Batson*'s expansion.⁴⁴⁷ This section discusses how *J.E.B.*'s flawed limiting principle creates a legal fiction whereby race and gender are never constitutionally relevant to a juror's ability to be impartial, and sexual orientation is always relevant. It also demonstrates the ways in which this limiting principle is inconsistent with the spirit of the Fourteenth Amendment.

No matter the basis of a discriminatory peremptory strike, or the level of judicial scrutiny applied to review it, the exerciser of a peremptory strike has the same compelling, important, or legitimate interest.⁴⁴⁸ This interest is in safeguarding a criminal defendant's Sixth Amendment right to an impartial jury.⁴⁴⁹ After *Batson*, regardless of the factual circumstances of a case, a race-conscious peremptory strike will *never* survive strict scrutiny as a narrowly tailored means of furthering this compelling interest.⁴⁵⁰ Likewise, after *J.E.B.*, gender-based explanations will *never* be thought to

440. See *supra* notes 265–69 and accompanying text.

441. See *supra* note 429 and accompanying text.

442. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994).

443. *Id.* at 140.

444. See *supra* notes 265–69 and accompanying text.

445. See *supra* notes 180–81 and accompanying text.

446. See *infra* Part III.A.2.

447. See *supra* Part I.C.1.

448. See *J.E.B.*, 511 U.S. at 143.

449. *Id.*

450. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

further this important interest under intermediate scrutiny.⁴⁵¹ Both of these principles are supported by explanation and reasoning.⁴⁵² *J.E.B.*'s limiting principle, on the other hand, was articulated without any justification.

J.E.B.'s allowance of discriminatory peremptory strikes against some groups suggests that peremptory challenges based on characteristics defining groups entitled to rational basis review are *always* deemed rationally related to furthering the state's legitimate interest.⁴⁵³ This, seemingly, cannot be true. In light of the fact that sexual orientation does not bear on a juror's fitness to serve, how can a sexual orientation-based strike rationally further the interest of impanelling an impartial jury, in say, an arson case? In *SmithKline*, there was, at the very least, a rational stereotype-based argument that a homosexual juror may be biased against a company affecting the cost of HIV medication, considering the gay community's historical relationship with the disease.⁴⁵⁴ In an arson case, by contrast, no similar rationality exists. A homosexual juror seemingly would be no more or less likely to be partial than a heterosexual juror. Yet, under *Batson*, sexual orientation is a permissible basis for peremptory dismissal in all but the Ninth Circuit.⁴⁵⁵

Moreover, as Justice O'Connor articulates in her *J.E.B.* concurrence, this system fails to consider that race, gender, and other similar characteristics matter.⁴⁵⁶ Studies have shown that, in certain types of cases, one's race, gender, and other characteristics truly do affect whether one votes to convict or not.⁴⁵⁷ Even without empirical studies, one need not be racist, sexist, or homophobic to infer that such defining characteristics would greatly impact, for example, a juror's evaluation of an alleged hate crime against a member of a group to which the juror also belongs.⁴⁵⁸

Simply stated, it is quite contradictory to say that, on the one hand, "jurors are not expected to come into the jury box and leave behind all that their human experience has taught them,"⁴⁵⁹ and, on the other hand, preclude litigants from considering the effects of human experience resulting from one's race or gender.⁴⁶⁰ Justice O'Connor posited that this application of the three-tiered system of judicial review has created a legal fiction.⁴⁶¹ As a matter of constitutional law, she stated, race and gender are *never* relevant when exercising peremptory strikes.⁴⁶² This Note expands on that idea. Not only are race and gender *never* relevant, but under the current *Batson* regime, sexual orientation is *always* relevant.

451. *See generally J.E.B.*, 511 U.S. at 143.

452. *See supra* notes 111–35, 158–62 and accompanying text.

453. *See supra* notes 180–85 and accompanying text.

454. *See supra* Introduction.

455. *See supra* Part II.B.2.

456. *See supra* note 399 and accompanying text.

457. *See supra* note 399 and accompanying text.

458. *See J.E.B.*, 511 U.S. at 149 (O'Connor, J., concurring).

459. *Beck v. Alabama*, 447 U.S. 625, 642 (1980).

460. *See supra* notes 111–35, 158–62 and accompanying text.

461. *See J.E.B.*, 511 U.S. at 149.

462. *Id.*

Justice Scalia further illuminated the flaws of the *Batson* regime in his *J.E.B.* dissent, where he discussed the irrationality of the majority's limiting principle.⁴⁶³ To him, it seemed as though there was no reason to conclude that a stereotype-motivated peremptory strike furthered a government interest *only* if the stereotyped person happens to be a member of a group entitled to mere rational basis review.⁴⁶⁴

Justice Scalia's discussion of the limiting principle highlights yet another inconsistency plaguing the *Batson* regime. While *Batson* and *J.E.B.* expressly prohibit court-sponsored discrimination, *J.E.B.* also expressly sanctions it. It forces one to consider whether the Equal Protection Clause is more faithfully served by the pre-*Batson* regime where all groups are subject to discriminatory peremptory strikes (as Justice Scalia argues) or the current regime where some groups are and others are not?⁴⁶⁵

Further exasperating the unequal protection afforded certain groups under *Batson* is the current circuit split facilitated by *J.E.B.*'s limiting principle. The principle forces a court seeking to end court-sponsored discrimination of homosexuals first, independently to prove (as the Ninth and Second Circuits have) that homosexuals are entitled to heightened scrutiny.⁴⁶⁶ Some courts, however, have simultaneously expressed the opinion that homosexuals should be entitled to heightened scrutiny and refused to apply the standard absent the Supreme Court's endorsement.⁴⁶⁷ Other courts have argued that heightened scrutiny should not be applied.⁴⁶⁸ This is quite problematic.

First, under the Supreme Court's own four-part test, homosexuals seemingly constitute a quasi-suspect class.⁴⁶⁹ Second, for years, even absent the prerequisite quasi-suspect status, the Supreme Court has been applying a standard of review more rigorous than traditional rational basis to classifications involving homosexuals.⁴⁷⁰ The Supreme Court's reluctance to define homosexuality as a suspect class is steadfast, however. Most recently, in *Windsor III*, the Supreme Court neither stated which level of scrutiny it was applying nor engaged in an analysis even resembling traditional rational basis review.⁴⁷¹ Moreover, as Justice Scalia points out in his dissent, "The opinion does not resolve and indeed does not even mention what had been the central question in [the] litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality."⁴⁷² As a result of the

463. *See supra* notes 401–07 and accompanying text.

464. *See supra* notes 401–07 and accompanying text.

465. *See supra* notes 401–02 and accompanying text.

466. *See supra* Part II.B.1.

467. *See supra* Part II.C.2.a.

468. *See supra* Part II.C.1.a.

469. *See supra* Part II.B.1.a.

470. *See supra* Part II.B.1.a.

471. *Windsor III*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) ("As nearly as I can tell, the Court[']s . . . opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework.")

472. *Id.*

Court's avoidance of this issue, lower courts choosing to wait for the Supreme Court to define sexual orientation as a quasi-suspect class are stuck endorsing discrimination of homosexuals based on historically informed stereotypes, until the Court decides to address the question.⁴⁷³

In sum, the problem precipitated by *J.E.B.*'s limiting principle is that a group that seemingly deserves *Batson*'s protection is entitled to such in only the Ninth Circuit and eligible for it in just one other.⁴⁷⁴ This "conflict of authority" is eerily similar to the one the Court meant to solve by granting certiorari in *J.E.B.*⁴⁷⁵

B. How Batson's Holding Should Be Both Narrowed and Expanded

While the stated criticisms of the *Batson* regime motivate this Note to suggest that *Batson* should be applied to prohibit sexual orientation-based peremptory strikes, as in the Ninth Circuit, it also recognizes that this would impermissibly burden a defendant's ability to protect his Sixth Amendment right to an impartial jury. For this reason, this Note suggests, not only that *Batson* be expanded but also that its holding be narrowed to re-empower the peremptory strike.

1. Proposed Limiting Principle

First, this Note suggests that *Batson*'s protection should be afforded to groups defined by immutable characteristics that do not affect one's competence as a juror. Whereas the group a juror freely associates with may lead to logical inferences regarding their opinions and biases, immutable characteristics are not usually as informative. Moreover, generalizations made on the basis of immutable characteristics are very often rooted in historical stereotypes. The groups we freely associate with, on the other hand, provide factual bases for such group generalizations.

This limiting principle would solve two problems. First, by expanding *Batson*'s application to more groups, *J.E.B.* would no longer prevent *Batson* from prohibiting purposeful discrimination. Second, by decoupling *Batson* from the three-tiered system of judicial review even those courts which apply rational basis review to sexual orientation classifications would be able to prohibit sexual orientation-based classifications.

2. Narrowing *Batson*'s Scope

To compensate for the proposed expansion's hindrance on a defendant's ability to protect his Sixth Amendment right to an impartial jury, *Batson*'s first step should be altered. This Note proposes that a *prima facie* case of intentional discrimination be established in only two circumstances.

473. See *supra* Part II.B.2.

474. See *supra* Part II.B.1.

475. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130 (1994) ("We granted certiorari to resolve a question that has created a conflict of authority—whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race.").

First, a prima facie case of discrimination must be found where a pattern of peremptory strikes indicates that a group is being systematically excluded from the jury. Succinctly justifying this prohibition, Justice Marshall stated, “[i]t is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.”⁴⁷⁶

Second, a prima facie case of discrimination must also be found where (1) very convincing evidence of discrimination exists *and* (2) proving a “pattern” of strikes against a certain group is impossible because only one member of that group is present on the venire. Such a system would necessarily allow a prima facie case to be found in a situation similar to that in *SmithKline*, where the only self-identified homosexual member of the venire was peremptorily stricken.⁴⁷⁷ The relationship of the gay community to HIV, along with counsel’s failure to ask any questions regarding other bases of exclusion, leads to the permissible inference, sufficient to establish a prima facie case, that his peremptory strike may have been motivated by the juror’s sexual orientation.⁴⁷⁸ While perhaps over-inclusive, this principle ensures that discrimination against a numerical minority on the venire does not go unchecked, and that a fair cross-section of the community may potentially include its minority members.

By making it more difficult to establish a prima facie case of discrimination, it allows peremptory strikes to be exercised with more discretion.⁴⁷⁹ In doing so, it may be that a peremptory strike exercised on the hunch that a person’s race, gender, sexual orientation, et cetera has rendered him or her biased. And admittedly, isolated instances of such would be unchallengeable. Yet it is not certain or even probable that the number of discriminatory peremptory strikes detected by the court will be affected. Without the strong systematic exclusion or pretext evidence this Note would require, it is likely the Court will accept any plausible reason for a strike, regardless of its truth or relevance.⁴⁸⁰

Furthermore, this cost is certainly balanced by the benefit of extending *Batson*’s protection to several historically discriminated against groups that are not currently eligible for it. In providing this protection, this resolution also re-empowers the peremptory strike by making an effective challenge less common and thereby restores some of the practice’s discretionary nature.

CONCLUSION

Consider again the example presented in the Introduction of this Note. When a *Batson* challenge was made following the peremptory strike of a

476. *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).

477. *See supra* Introduction.

478. *See supra* Introduction.

479. *See supra* note 398 and accompanying text.

480. *See supra* note 172 and accompanying text.

suspected homosexual from the venire, the judge replied, “Well, I don’t know . . . whether *Batson* ever applies to sexual orientation.”⁴⁸¹ In so stating, this judge expressed doubt whether court-sponsored discrimination on the basis of sexual orientation is permissible. The answer to that question should clearly be: “No.”

Batson and subsequent cases flaunt the ideal that discrimination against jurors will not be tolerated, and yet it is. It may be that voir dire proceedings are not effectively designed to render the reliance on “group stereotypes rooted in, and reflective of, historical prejudice” unnecessary.⁴⁸² It may be that discrimination is an unfortunate means to a necessary end. While the solution this Note proposes does not claim to solve all of these problems, it does solve one.

In *J.E.B.*, the Court, quoting *Strauder*, derisively described the allowance of peremptory strikes based on gender as “practically a brand upon [women], affixed by the law, an assertion of their inferiority.”⁴⁸³ Extending *Batson* to prohibit the exercise of peremptory strikes based on a juror’s sexual orientation, at the very least, eliminates this “brand” on the gay community.

481. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 475 (9th Cir. 2014).

482. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994).

483. *Id.* at 141 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).