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J.E.B. v. Alabama Ex Rel. T.B.: Excellent Ideology, Ineffective Implementation.

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RECENT DEVELOPMENT

J.E.B. v. ALABAMA EX REL. T.B.: EXCELLENT IDEOLOGY, INEFFECTIVE IMPLEMENTATION

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> [W]e must be ever on our guard, lest we erect our prejudices into legal principles.[1]

I. INTRODUCTION

In 1991, the State of Alabama, on behalf of T.B., the mother of a minor child, filed a complaint against J.E.B. for paternity and child support.[2] The trial court assembled a panel of thirty-six potential jurors—twelve

1. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
2. J.E.B. v. Alabama *ex rel.* T.B., ___ U.S. ___, ___, 114 S. Ct. 1419, 1421, 128 L. Ed. 2d 89, 97 (1994).

men and twenty-four women.[3] After the court excused three prospective jurors for cause, only ten males remained in the venire.[4] The State used nine of its ten peremptory challenges to remove men, and J.E.B. used all but one of his peremptory strikes to eliminate women.[5]

J.E.B. objected to the State's peremptory challenges on the ground that the gender-based strikes violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[6] J.E.B. argued that the United States Supreme Court decision of *Batson v. Kentucky*,[7] which prohibits the use of race-based peremptory challenges, also prohibits the use of gender-based peremptory strikes.[8] The trial court refused to extend *Batson* to include a ban on the use of gender-based peremptory challenges and subsequently empaneled the all-female jury.[9] The jury ultimately found J.E.B. to be the father of T.B.'s minor child, and the court ordered J.E.B. to pay child support.[10]

Refusing to extend the scope of *Batson*, the Alabama Court of Civil Appeals affirmed the trial court's ruling.[11] The Supreme Court of Alabama denied certiorari without explanation.[12] The United States Supreme Court granted certiorari to determine whether gender-based peremptory challenges violate the Equal Protection Clause.[13] The Court, in a majority opinion joined by seven Justices, held that gender-based peremptory strikes violate the constitutional guarantee of equal protection under the law.[14]

II. EQUAL PROTECTION SCRUTINY AND THE PEREMPTORY CHALLENGE

Attorneys may strike potential jurors from the venire using either a challenge for cause or a peremptory challenge.[15] Attorneys may solicit as many challenges for cause as necessary to ensure the impartiality of a

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3. *Id.*

4. *Id.* at ___, 114 S. Ct. at 1421-22, 128 L. Ed. 2d at 97.

5. *Id.* at ___, 114 S. Ct. at 1422, 128 L. Ed. 2d at 97.

6. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1422, 128 L. Ed. 2d at 97. J.E.B. made this objection before the court empaneled the jury. *Id.*

7. 476 U.S. 79 (1986).

8. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1422, 128 L. Ed. 2d at 97.

9. *Id.*

10. *Id.*

11. J.E.B. v. Alabama *ex rel.* T.B., 606 So. 2d 156, 157 (Ala. Civ. App. 1992), *rev'd*, ___ U.S. ___, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

12. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1422, 128 L. Ed. 2d at 97-98.

13. *Id.* at ___, 114 S. Ct. at 1422, 128 L. Ed. 2d at 98.

14. *Id.* at ___, 114 S. Ct. at 1429-30, 128 L. Ed. 2d at 106-08.

15. *See* TEX. R. CIV. P. 227 (explaining process for challenging jurors). Rule 227 states:

jury.[16] Peremptory challenges, however, are limited in number, allowing an attorney to strike only those potential jurors who appear to be biased in some way against that attorney's case.[17] Traditionally, attorneys have

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A challenge to a particular juror is either a challenge for cause or a peremptory challenge. The court shall decide without delay any such challenge, and if sustained, the juror shall be discharged from the particular case. Either such challenge may be made orally on the formation of a jury to try the case.

Id. The federal rule regarding challenges for cause and peremptory challenges explains that "[t]he court may permit the parties and their attorneys to conduct the examination of prospective jurors. . . . [T]he court shall permit the parties . . . to conduct . . . such further inquiry as it deems proper." FED. R. CIV. P. 47; *see* Eric K. Ferraro, Comment, United States v. De Gross*: The Ninth Circuit Expands Restrictions on a Criminal Defendant's Right to Exercise Peremptory Challenges*, 23 GOLDEN GATE U. L. REV. 109, 112–13 (1993) (explaining that challenge for cause and peremptory challenge system are indispensable part of jury selection); Joshua E. Swift, Note, Batson*'s Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 336 (1993) (defining challenges for cause and peremptory challenges).

16. TEX. R. CIV. P. 228, 229. Rule 228 states:

[A] challenge for cause is an objection made to a juror, alleging some fact which by law disqualifies him to serve as a juror in the case or in any case, or which in the opinion of the court, renders him an unfit person to sit on the jury. Upon such challenge the examination is not confined to the answers of the juror, but other evidence may be heard for or against the challenge.

TEX. R. CIV. P. 228. Expanding on Rule 228, Rule 229 provides, in pertinent part: "When twenty-four or more jurors . . . are drawn . . . if either party desires to challenge any juror for cause, the challenge shall then be made." TEX. R. CIV. P. 229. The federal rule regarding challenges for cause simply states that "[t]he court may for good cause excuse a juror from service during trial or deliberation." FED. R. CIV. P. 47(c); *see* Swain v. Alabama, 380 U.S. 202, 220 (1965) (setting standard for challenges for cause). In *Swain*, the United States Supreme Court ruled that the reason given for a challenge for cause must be "narrowly specified, provable and legally cognizable basis of [a juror's] partiality." *Id.*; *see also* Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 519 (1992) (stating that challenges for cause must be based on "compelling reason" for excusing jurors).

17. 28 U.S.C. § 1870 (1994). Section 1870 further provides: "In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." *Id.* Similarly, Rule 233 of the Texas Rules of Civil Procedure explains that "each party to a civil action is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court." TEX. R. CIV. P. 233; *see* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (stating that peremptory challenges, although limited in number, serve important function of ensuring jury impartiality); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (explaining that peremptory challenges are usually exercised for no reason other than to remove biased jurors); *see also* Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 519 (1992) (recognizing that attorneys primarily exercise peremptory challenges to remove biased individuals from venire); Barbara L. Horowitz, Comment, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 U. CIN. L. REV.

not been required to provide an explanation for striking a particular juror.[18]

In the landmark decision of *Batson v. Kentucky*,[19] the United States Supreme Court applied equal protection scrutiny to race-based peremptory challenges.[20] In *Batson*, the Court analyzed the trial of an African-American defendant in which the prosecutor systematically eliminated every African-American from the venire.[21] The majority explained that the Court historically has attempted to eliminate racial discrimination from the jury selection process.[22] Prior to the *Batson* ruling, however, the Court had limited its review of discriminatory peremptory strikes by emphasizing that a state's purposeful attempt to exclude a person from jury service because of race violated only the criminal defendant's Sixth

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1391, 1394 (1993) (arguing that litigators should not have to explain their peremptory strikes because bias in jurors is sometimes difficult to perceive and articulate).

18. *See* TEX. R. CIV. P. 232 (providing, in pertinent part, that "[a] peremptory challenge is made to a juror without assigning any reason therefor"); Holland v. Illinois, 493 U.S. 474, 484 (1990) (explaining that peremptory challenges are invaluable in attaining impartiality in juries because biased jurors are removed). In *Holland*, the Court stated that, "[p]eremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury." *Id.*; *see also* Barbara L. Horowitz, Comment, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 U. CIN. L. REV. 1391, 1393–94 (1993) (stating that ability of litigators to remove venirepersons they perceive are biased is integral in attaining impartial juries); Joshua E. Swift, Note, Batson*'s Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 338 (1993) (explaining that attorneys often base their peremptory strikes on inarticulable reasons).

19. 476 U.S. 79 (1986).

20. *Batson*, 476 U.S. at 89. The Court in *Batson* asserted that equal protection scrutiny should be utilized whenever a question of discrimination arises in any stage of the jury selection process. *Id.* at 88-89.

21. *Id.* at 83. After all four African-Americans were struck from the venire, the court empaneled a jury composed solely of Caucasians. *Id.* The jury subsequently convicted the African-American defendant of aggravated burglary and receipt of stolen goods. *Id.*

22. *Id.* at 88. The Court explained that the history of protecting the integrity of the jury trial system rested on maintaining equality in the jury selection process. *Id.* Many United States Supreme Court cases reflect this ideology. *See, e.g.*, Akins v. Texas, 325 U.S. 398, 403 (1945) (maintaining that excluding jurors on basis of race violates potential juror's right to equal protection); Martin v. Texas, 200 U.S. 316, 321 (1906) (holding that juries should be chosen in nondiscriminatory manner); Strauder v. West Virginia, 100 U.S. 303, 306-07 (1880) (establishing that excluding African-Americans from jury duty violates Sixth Amendment); *see also* Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 523–31 (1992) (tracing Supreme Court's history of intervention in racially discriminatory jury selection practices).

Amendment guarantee to a fair trial.[23] In *Batson*, the Court expanded this rationale by holding that race-based peremptory challenges violate both the criminal defendant's and the potential juror's right to equal protection under the law.[24] Thus, the Court applied strict scrutiny to race-based peremptory strikes and held that the state's interest in achieving an impartial jury was not compelling in the face of the invidious discrimination promoted by the use of race-based peremptory challenges.[25]

In *Edmonson v. Leesville Concrete Co.*,[26] the Court dramatically extended the scope of *Batson* by prohibiting the use of race-based peremptory challenges in civil litigation.[27] The *Edmonson* Court reasoned that, although private parties usually are not subject to the controls of the Equal Protection Clause, litigants become state actors when they participate in an activity that is dominated by government authority.[28] The

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23. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 492-93 (1977) (holding that underrepresentation of Hispanics on jury violated defendant's right to representative jury); Whitus v. Georgia, 385 U.S. 545, 549-50 (1967) (ruling that indictment could not stand when members of defendant's racial minority were kept from grand jury); Hernandez v. Texas, 347 U.S. 475, 477-78 (1954) (deciding that, when litigators excluded potential jurors of same racial minority as defendant from jury, defendant's right to equal protection was violated); *Akins*, 325 U.S. at 403 (indicating that purposeful discrimination on part of state during jury selection process violated defendant's right to equal protection); Norris v. Alabama, 294 U.S. 587, 589-90 (1935) (finding that exclusion of all African-Americans from jury infringed on African-American defendant's right to equal protection); *Martin*, 200 U.S. at 319 (holding that striking all African-Americans from venire denied African-American defendant's right to equal protection).

24. *Batson*, 476 U.S. at 87. The Court asserted that discrimination in voir dire harms both the defendant and the potential juror. *Id.* Thus, the Court explained that a discriminatory practice which violates the defendant's right to equal protection under the law violates the potential juror's right as well. *Id.* at 87-88.

25. *Id.* at 97-98. Once the defendant demonstrated that he was a member of a cognizable group and that the prosecutor discriminatorily used his peremptory strikes to eliminate all of the potential African-American jurors from the venire, the Court required an equal protection analysis of the action. *Id.*

26. 500 U.S. 614 (1991).

27. *See Edmonson*, 500 U.S. at 629 (expanding *Batson* rationale to encompass civil litigants because peremptory strikes are state authorized, and as such, persons exercising them are state actors). The Court also expanded the scope of the *Batson* ruling in *Powers v. Ohio*, holding that a defendant may initiate *Batson* claims on behalf of a potential juror even when the defendant is of a different race than the excluded potential juror. Powers v. Ohio, 499 U.S. 400, 415 (1991). The Court held that a defendant satisfies the criteria for third-party standing because: (1) a defendant is closely related to a potential juror because, if discrimination existed in the voir dire process, the defendant's conviction may be overturned; and (2) the potential juror has no means of redress at the time of exclusion. *Id.* at 414-15.

28. *Edmonson*, 500 U.S. at 621–22. The Supreme Court asserted that, in determining whether an activity is dominated by state authority, the court must examine: (1) whether the participant relies on governmental assistance or benefits; (2) whether the participant is

Court asserted that state legislatures authorize the use of peremptory challenges; consequently, whenever a criminal or civil litigant exercises a peremptory strike, that litigant exercises the strike with state authority.[29] As a result, the Court concluded that civil litigants become state actors when exercising peremptory challenges.[30] Thus, under *Edmonson*, the equal protection restrictions *Batson* placed on peremptory challenges govern every litigant's use of peremptory strikes.[31]

III. GENDER AND THE PEREMPTORY CHALLENGE

A. *Equal Protection Scrutiny Afforded Gender Classifications*

During the mid-1970s, the Supreme Court established that courts may apply equal protection scrutiny to gender classifications.[32] In *Reed v. Reed*,[33] the Court applied equal protection scrutiny to an Idaho law because it favored men with respect to appointment as the administrator of a decedent's estate.[34] The Court held that a state-promoted gender classification must substantially further an important government interest to be constitutional.[35] Using this standard, the *Reed* Court reasoned that

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performing a traditional government function; and (3) whether the injury suffered is aggravated in some way by the incident of governmental authority. *Id.*

29. *Id.* at 624. The Court explained that a party exercising a peremptory challenge invokes the authority of the trial court and is therefore a state actor. *Id.*

30. *Id.* The Court contended that once the government authorizes a private party to choose the government's employees or officials, that private party is subject to constitutional restrictions. *See id.* at 625 (asserting that jurors are government employees charged with dispensing justice).

31. *See id.* at 630 (ruling that *Batson* governs not only criminal litigants, but civil litigants as well); Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 40–41 (1993) (explaining that expansion of *Batson* to civil cases rested on fact that government participation in peremptory challenge system was significantly overt and that potential jurors struck from both criminal and civil cases suffered same injury).

32. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 198-99 (1976) (holding that suspect gender classifications must substantially further important state interest); Schlesinger v. Ballard, 419 U.S. 498, 506-07 (1975) (recognizing that important state interest must be more than merely administrative convenience); Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (recognizing gender classifications as suspect).

33. 404 U.S. 71 (1971).

34. *Reed*, 404 U.S. at 74-75. The Court asserted that although the Idaho statute did not deny women the ability to become administrators, because the law treated women as a different class, equal protection analysis was necessary to assure that the different treatment was not arbitrary. *Id.*

35. *Id.* at 76. In *Reed*, the Court stated that "[a gender] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Id.* (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). *Reed* established that gender classifications are suspect and should undergo equal

gender classifications are "somewhat" suspect because they promote archaic and overbroad stereotypes of both women and men.[36] The Court concluded that the Idaho law preferring men over women as administrators did not substantially further the important state interest in efficient estate probate.[37]

The standard of review established in *Reed* for gender classifications employs a less exacting criteria than that applied to racial classifications.[38] The Supreme Court has established that racial classifications are inherently suspect, and as a result, courts apply strict scrutiny to determine whether a racial classification substantially furthers a compelling state interest.[39] In contrast, the Court has held that gender classifications

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protection scrutiny. *Id.* at 75–76; *see, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982) (reaffirming application of "substantial relation" test to gender classifications); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (stating that gender classifications need exceedingly persuasive justification to be valid); Califano v. Goldfarb, 430 U.S. 199, 204–07 (1977) (applying substantial relation test to state law allotting more social security benefits to widows than to widowers upon death of spouse and finding gender-based discrimination against female wage-earners unconstitutional); *see also* Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 632 n.47 (1994) (explaining lesser degree of scrutiny gender classifications currently receive under Equal Protection Clause).

36. *See Reed*, 404 U.S. at 75-76 (stating that states cannot legislate different treatment of gender classifications on basis of criteria totally unrelated to legislative objective); *see also Craig*, 429 U.S. at 198-99 (noting that many gender classifications are based on "outdated misconceptions" about women); *Schlesinger*, 419 U.S. at 506–07 (acknowledging that gender classifications reflect "archaic and overbroad" generalizations about men and women); Susan L. McCoin, Note, *Sex Discrimination in the Voir Dire Process: The Rights of Prospective Female Jurors*, 58 S. CAL. L. REV. 1225, 1232 (1985) (asserting that Supreme Court began to recognize, during mid-1970s, inherent dangers of gender classifications promoting antiquated stereotypes of women).

37. *See Reed*, 404 U.S. at 76-77 (characterizing preference of men as estate administrators as arbitrary and without logical basis).

38. *See* Deborah L. Rhode, *Equal Protection: Gender and Justice*, *in* JUDGING THE CONSTITUTION 265, 272 (Michael W. McCann & Gerald L. Houseman eds., 1989) (noting that, although racial classifications receive strict equal protection scrutiny, gender classifications receive lower level of scrutiny that is less inspective). *Compare* Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (explaining that racial classifications receive "exacting [equal protection] scrutiny" and must substantially further compelling state interests to be constitutional) *with Craig*, 429 U.S. at 198-99 (asserting that, for Oklahoma law allowing women to buy beer at younger age than men to be constitutional, law must further important state interest). *But see* Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 37 n.11 (1992) (contending that suspect race- and gender-based classifications should both receive strict scrutiny).

39. *See, e.g.*, *Palmore*, 466 U.S. at 434 (asserting that, to be valid, racial classification must be necessary to accomplishing compelling legislative goal); Loving v. Virginia, 388 U.S. 1, 11 (1967) (ruling that racial classifications receive strict scrutiny and that such classifications must be necessary to accomplish compelling legislative intent); Brown v. Board of

are only "quasi-suspect," so lower courts apply mid-level scrutiny to determine whether a gender classification substantially furthers an important state interest.[40] Courts applied this mid-level scrutiny to suspect gender classifications subsequent to the *Reed* ruling, and it represents the standard courts apply today.[41]

B. *Historical Treatment of Women and Jury Service*

In the mid-1940s, prior to the expansion of equal protection to gender classifications, many states explicitly banned women from jury service.[42] Many appellate courts viewed women as too fragile to cope with the

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Educ., 347 U.S. 483, 493–95 (1954) (establishing that racial classifications are suspect and must undergo equal protection analysis); *see also* M. GLENN ABERNATHY, CIVIL LIBERTIES UNDER THE CONSTITUTION 476-77 (5th ed. 1989) (contending that, when government legislates or acts on basis of racial classification, compelling state interest must be proven to justify classification); Michael W. McCann, *Equal Protection for Social Inequality: Race and Class in Constitutional Ideology*, *in* JUDGING THE CONSTITUTION 231, 242 (Michael W. McCann & Gerald L. Houseman eds., 1989) (discussing evolution of Equal Protection Clause's treatment of racial classifications to position of being inherently suspect and subject to strict scrutiny to ensure that no state-promoted invidious discrimination exists).

40. *Craig*, 429 U.S. at 197-98. The Court in *Craig* further defined gender classifications as quasi-suspect and held that a state-promoted gender classification must substantially further an important state interest to be constitutional. *Id.*; *see* M. GLENN ABERNATHY, CIVIL LIBERTIES UNDER THE CONSTITUTION 488 (5th ed. 1989) (explaining that Supreme Court has taken "three-tiered" approach to suspect classifications and that, although racial classifications receive highest level of scrutiny, gender classifications receive middle-tier level of scrutiny); Deborah L. Rhode, *Equal Protection: Gender and Justice*, *in* JUDGING THE CONSTITUTION 272 (Michael W. McCann & Gerald L. Houseman eds., 1989) (explaining that, in mid-1970s, Supreme Court used intermediate level of equal protection scrutiny when analyzing gender classifications, determining such classifications were quasi-suspect); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 304 (1991) (noting that gender classifications receive intermediate equal protection scrutiny).

41. *See Hogan*, 458 U.S. at 725 (holding that gender classifications must be substantially related to sufficiently important government interest); *Craig*, 429 U.S. at 197-98 (ruling that gender classifications must further important state interest to be constitutionally valid); *see also* Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 37 n.11 (1992) (recognizing that suspect gender classifications receive intermediate scrutiny). *See generally* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985) (holding that quasi-suspect classifications, such as gender, must substantially further important state interest to be regarded as constitutional).

42. *See* Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 39 (1992) (discussing automatic exemptions that, for many years, excluded women from jury service); *cf.* Ballard v. United States, 329 U.S. 187, 192–93 (1946) (ruling that automatic exclusion of women from federal juries violates defendant's right to jury composed of cross-section of community). The *Ballard* decision was the first to discuss, in the same context, women serving on juries and the importance of a jury composed of a cross-section of the community. *Id.* at 193–94.

graphic details of some criminal cases, and others thought that a woman's duty existed solely as a wife and mother.[43] This discrimination continued throughout the mid-1960s, when some states provided women with an automatic exemption from jury duty unless they expressly volunteered to serve.[44]

Although the Supreme Court did not apply equal protection scrutiny in *Taylor v. Louisiana*,[45] the Court addressed the systematic exclusion of women from jury service.[46] In *Taylor*, Louisiana's constitutional and statutory provisions required an exemption for women from petit jury service unless they filed a written declaration affirming their desire to serve.[47] The Court held that by excluding women from jury duty, even through an exemption process, the state violated a criminal defendant's Sixth Amendment guarantee to a fair trial.[48] Thus, in response to *Taylor*'s pro-

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43. *See* Hoyt v. Florida, 368 U.S. 57, 62 (1961) (explaining that courts have considered women "the center of home and family life"); Bailey v. State, 219 S.W.2d 424, 428 (Ark. 1949) (considering criminal cases too degrading and foul for women); *see also* Laura G. Dooley, *Sounds of Silence on the Civil Jury*, 26 VAL. U. L. REV. 405, 408 (1993) (explaining reasons why women were precluded from jury service); Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115, 1136-38 (1994) (surveying history of exempting women from jury service after passage of Nineteenth Amendment); *cf.* United States v. De Gross, 960 F.2d 1433, 1438–39 (9th Cir. 1992) (en banc) (recognizing that archaic gender stereotypes prevented women from jury service).

44. *See Hoyt*, 368 U.S. at 62 (upholding statute exempting women from jury duty unless they volunteered to serve because women's first duty was to home and family life); *De Gross*, 960 F.2d at 1438 (explaining rationale promulgated when courts supported automatic exemptions of women from jury service); *see also* Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115, 1137–38 (1994) (explaining that, as recently as 1968, some states totally banned women from serving as jurors).

45. 419 U.S. 522 (1975).

46. *Taylor*, 419 U.S. at 533-35. *Taylor* represented the first case to address the exclusion of women from jury service and a defendant's right to a jury composed of a cross-section of the community. *Id.* at 533-35; *see* Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115, 1131 (1994) (explaining that *Taylor* established that women are to be included in jury pools on equal basis to men); *see also* Note, *Beyond* Batson*: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1925 (1992) (explaining that courts did not confront issue of women and jury duty until recently).

47. *Taylor*, 419 U.S. at 525-26. The Louisiana statute and constitutional provisions expressly stated that a woman would not be selected for jury duty unless she filed a written declaration with the county clerk affirming her desire to serve. *Id.* at 523. At most, 10% of the women in the Louisiana parish had filed written declarations expressing their desire to serve. *Id.* at 524. In *Taylor*, no female potential jurors were drawn from the jury pool. *Id.*

48. *Taylor*, 419 U.S. at 537. The Court rationalized that excluding women from jury duty violated the defendant's Sixth Amendment rights because the jury was not chosen from a fair cross-section of the community. *Id.* The Court stated that "the fair-cross-sec-

hibition against gender discrimination in relation to jury service and *Batson v. Kentucky*'s mandate that equal protection scrutiny be applied to discriminatory peremptory challenges, the federal appellate courts began grappling with applying equal protection scrutiny to gender-based peremptory strikes.[49]

C. *The Federal Circuit Courts' Application of Equal Protection Scrutiny to Gender-Based Peremptory Challenges*

Four United States Courts of Appeals have addressed the constitutionality of gender-based peremptory challenges.[50] The Fourth, Fifth, and Seventh Circuits held that *Batson v. Kentucky* does not apply to gender for two reasons: (1) women are not members of a numerical minority; and (2) as potential jurors, women do not encounter the same barriers

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tion requirement [is] fundamental to the jury trial guaranteed by the Sixth Amendment" and that all-male juries are not usually representative of the communities they serve. *Id.* at 530, 537. This ideology continued in subsequent Court decisions. *See* Duren v. Missouri, 439 U.S. 357, 360, 370 (1979) (invalidating statute that authorized exemption for women who asked not to serve as jurors).

49. *See* United States v. Broussard, 987 F.2d 215, 218–20 (5th Cir. 1993) (interpreting Supreme Court's use of equal protection analysis in *Batson* as applying solely to race-based peremptory strikes); *De Gross*, 960 F.2d at 1437–43 (referring to *Taylor* and *Batson* as establishing standard in favor of applying equal protection scrutiny to gender-based peremptory strikes); United States v. Nichols, 937 F.2d at 1257, 1262 (7th Cir.) (refusing to apply equal protection scrutiny to gender-based peremptory strikes), *cert. denied*, 112 S. Ct. 989 (1992); United States v. Hamilton, 850 F.2d 1038, 1042–43 (4th Cir. 1988) (declining to apply equal protection analysis utilized in *Batson* to gender-based peremptory strikes); Patrick J. Guinee, Comment, *The Trend Toward the Extension of* Batson *to Gender-Based Peremptory Challenges*, 32 DUQ. L. REV. 833, 842 (1994) (concluding that expansion of *Batson* by Ninth Circuit to include gender-based peremptory strikes was logical development of equal protection rationale); Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying* United States v. De Gross *to All Heightened Scrutiny Groups in the Exercise of Peremptory Challenges*, 77 MINN. L. REV. 689, 704, 709 (1993) (asserting that precedent supporting elimination of gender discrimination practices in voir dire and *Batson*'s elimination of race-based peremptory strikes constituted sufficient reasons to examine gender-based peremptory strikes with equal protection scrutiny).

50. *See* United States v. Broussard, 987 F.2d 215, 218-20 (5th Cir. 1993) (refusing to extend scope of *Batson* to include peremptory strikes based on gender); United States v. De Gross, 960 F.2d 1433, 1437-43 (9th Cir. 1992) (en banc) (extending *Batson* to prohibit peremptory strikes based on gender); United States v. Nichols, 937 F.2d 1257, 1262 (7th Cir.) (refusing to extend *Batson* to prohibit gender-based peremptory strikes), *cert. denied*, 112 S. Ct. 989 (1992); United States v. Hamilton, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (ruling that *Batson* does not prohibit use of gender-based peremptory strikes), *cert. denied*, 493 U.S. 1069 (1990); *see also* Patrick J. Guinee, Comment, *The Trend Toward the Extension of* Batson *to Gender-Based Peremptory Challenges*, 32 DUQ. L. REV. 833, 841–42 (1993) (analyzing federal circuit courts' decisions regarding expansion of *Batson* to include ban on gender-based peremptory strikes).

racial minorities face.[51] In addition, these courts refused to extend the scope of *Batson* because of the lower level of scrutiny applied to gender classifications.[52] As a result, these courts considered the mid-level scrutiny afforded suspect gender classifications insufficient to strike state statutes that would not withstand the strict scrutiny standard courts apply to race-based peremptory strikes.[53] Thus, a majority of the circuit courts considering the issue declined to expand *Batson* to gender-based peremptory challenges.[54]

In 1992, the Ninth Circuit distinguished itself from the majority view by expanding the rationale of *Batson* to include gender-based peremptory strikes.[55] In *United States v. De Gross*,[56] the Ninth Circuit ruled that,

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51. *See Broussard*, 987 F.2d at 220 (explaining that, because women are not racial minorities, women do not face barriers in attempting to serve on juries). The Fifth Circuit Court of Appeals stated that experience regarding the analysis of peremptory strikes "has not demonstrated a similar and sufficient need for" expanding *Batson* to gender. *Id.*; *see also Nichols*, 937 F.2d at 1264 (holding that racially neutral explanations are valid even when gender is used to eliminate minority women); *Hamilton*, 850 F.2d at 1042-43 (interpreting *Batson* as applying only to race and refusing to extend decision to encompass gender-based peremptory strikes); *cf.* Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1172 (1993) (explaining how exclusion of racial minorities and women from jury service grew out of same historical context and that, for women on juries subsequent to *Batson* ruling, exclusion exists in same discriminatory form).

52. *See Broussard*, 987 F.2d at 218 (explaining that gender classifications receive intermediate level of equal protection scrutiny, which is lesser standard than that which *Batson* afforded race-based peremptory strikes); *Nichols*, 937 F.2d at 1262 (refusing to extend *Batson* to gender because gender does not warrant same level of equal protection scrutiny as race); *Hamilton*, 850 F.2d at 1042–43 (asserting that Supreme Court intended to limit *Batson* to race and that race is sole classification receiving strict scrutiny today).

53. *Broussard*, 987 F.2d at 219–20. The *Broussard* court summarized the views of the other circuit courts when it stated that *Batson* should not extend to gender because racial discrimination is unique and that gender discrimination simply does not receive the same high level of equal protection scrutiny applied to race in *Batson*. *Id.*; *see* Barbara L. Horowitz, Comment, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 U. CIN. L. REV. 1391, 1422–23 (1993) (discussing majority view in circuit courts that *Batson* cannot be expanded to include gender because intermediate level of scrutiny gender receives does not equate to strict level of scrutiny applied to race-based peremptory strikes).

54. *Broussard*, 987 F.2d at 219. The court examined the minority view established by the Ninth Circuit in *De Gross* and expressly ruled the opposite, adhering to the majority view that courts should not extend the scope of *Batson*. *Id.*; *see* Note, *Beyond* Batson*: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992) (recognizing division among federal and state courts regarding whether to expand *Batson* to include gender-based peremptory strikes, with majority of courts ruling against expansion).

55. *See De Gross*, 960 F.2d at 1438–39 (stating that use of gender-based peremptory strikes violated defendant's right to jury composed of fair cross-section of community); Patrick J. Guinee, Comment, *The Trend Toward the Extension of* Batson *to Gender-Based*

because a defendant is entitled to a jury selected in a nondiscriminatory manner, gender-based peremptory strikes violate a defendant's right to equal protection under the law.[57] The court also explained that gender-based peremptory challenges violate both the potential juror's and the defendant's equal protection rights because gender, like race, is unrelated to an individual's ability to serve on a jury.[58] Finally, the court held that the Equal Protection Clause limits both a criminal defendant's and a prosecutor's use of peremptory strikes.[59] Because of the Ninth Circuit's holding in *De Gross*, a split existed among the circuit courts, creating inconsistent standards regarding the use of peremptory challenges.[60]

Peremptory Challenges, 32 DUQ. L. REV. 833, 842 (1994) (noting Ninth Circuit's divergence in *De Gross* from other circuit courts that previously ruled on constitutionality of gender-based peremptory strikes); Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying* United States v. De Gross *to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 MINN. L. REV. 689, 705–09 (1993) (analyzing *De Gross* ruling and finding that it was first decision to correctly interpret *Batson* as encompassing ban on gender-based peremptory strikes).

56. 960 F.2d 1433 (9th Cir. 1992).

57. *See De Gross*, 960 F.2d at 1438 n.6 (explaining that language in *Batson* referring to race was not meant to be limiting, but may be expanded to include gender). The Ninth Circuit stated that the language and rationale promoted in the *Batson* decision, combined with the heightened scrutiny afforded suspect gender classifications, warranted the expansion of *Batson* to include a ban on gender-based peremptory challenges. *Id.* at 1437-39; *see also* Eric K. Ferraro, United States v. De Gross*: The Ninth Circuit Expands Restrictions on a Criminal Defendant's Right to Exercise Peremptory Challenges*, 23 GOLDEN GATE U. L. REV. 109, 110–11 (1993) (analyzing Ninth Circuit's ruling in *De Gross* and how it diverged from other circuit courts); Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying* United States v. De Gross *to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 MINN. L. REV. 689, 710 (1993) (explaining rationale promulgated in *De Gross* majority opinion).

58. *See De Gross*, 960 F.2d at 1439 (finding that striking female venirepersons was discriminatory and violated Equal Protection Clause because gender, like race, has no bearing on performance of jury duty); *see also* Patrick J. Guinee, Comment, *The Trend Toward the Extension of* Batson *to Gender-Based Peremptory Challenges*, 32 DUQ. L. REV. 833, 842 (1994) (explaining that exclusions based on gender assume that (1) one gender is incompetent to serve, and (2) gender reflects partiality).

59. *See De Gross*, 960 F.2d at 1439-41 (discussing how Equal Protection Clause limits defendant's use of peremptory challenges). Based on Supreme Court precedent, the *De Gross* court held that any exercise of peremptory challenges constitutes state action subject to constitutional control. *Id.* at 1440–41; *see also* Eric Ferraro, United States v. De Gross*: The Ninth Circuit Expands Restrictions on a Criminal Defendant's Right to Exercise Peremptory Challenges*, 23 GOLDEN GATE U. L. REV. 109, 128-131 (1993) (analyzing rationale promoted in *De Gross* limiting defendants' exercise of peremptory strikes, and explaining that majority was correct in holding that defendants act on state authority when exercising peremptory challenges).

60. *See De Gross*, 960 F.2d at 1437–39 (expanding *Batson* to encompass ban on gender-based peremptory challenges). *Contra Nichols*, 937 F.2d at 1262 (refusing to extend *Batson* to encompass gender); *Hamilton*, 850 F.2d at 1042 (narrowly reading *Batson* and

IV. THE DECISION OF *J.E.B. V. ALABAMA EX REL. T.B.*

In *J.E.B. v. Alabama ex rel. T.B.*, the United States Supreme Court addressed the division in the federal circuit courts.[61] Justice Blackmun, writing for the majority, explained that equal protection scrutiny is applied when state actors intentionally discriminate on the basis of gender.[62] Justice Blackmun chronicled the history of excluding women from juries and supported the extension of *Batson v. Kentucky* by asserting that, "with respect to jury service, African-Americans and women share a history of total exclusion."[63] After finding similar discrimination in the use of race- and gender-based peremptory strikes, Justice Blackmun applied mid-level equal protection scrutiny to the use of gender-based peremptory challenges.[64]

Justice Blackmun analyzed whether the use of gender-based peremptory strikes substantially furthers the important state interest of attaining an impartial jury.[65] Justice Blackmun asserted that gender-based peremptory challenges harm litigants and the community by fostering invidious group stereotypes.[66] Justice Blackmun stated that, by exercising gender-based peremptory challenges, state actors ratify and reinforce prejudicial views of women and men.[67] Litigators could erroneously use gender-based peremptory strikes, in Justice Blackmun's opinion, to eliminate potential jurors who are members of racial minorities.[68] Justice Blackmun explained that the party alleging gender discrimination in the

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also refusing to prohibit gender-based peremptory strikes). In *Broussard*, decided one year after *De Gross*, the Fifth Circuit refused to adopt the Ninth Circuit's rationale, holding that *Batson* does not extend to gender. *Broussard*, 987 F.2d at 219-20. The Fifth Circuit reasoned that, whereas the Supreme court applied a strict scrutiny analysis to prohibit race-based peremptory strikes in *Batson*, gender-based classifications are entitled only to mid-level scrutiny. *Id.*

61. J.E.B. v. Alabama *ex rel.* T.B., ___ U.S. ___, ___, 114 S. Ct. 1419, 1429-30, 128 L. Ed. 2d 89, 106-07 (1994).

62. *Id.* at ___, 114 S. Ct. at 1425, 128 L. Ed. 2d at 101–02. Justice Blackmun noted that, when confronted with a suspect gender classification, the Court must undertake an equal protection analysis to determine its constitutionality. *Id.*

63. *Id.* at ___, 114 S. Ct. at 1422-25, 128 L. Ed. 2d at 98-101. Furthermore, Justice Blackmun argued that, although discriminatory views against women have not been identical to those held against racial minorities, the two groups' similar experiences often overshadow any differences. *Id.*

64. *Id.* at ___, 114 S. Ct. at 1425-26, 128 L. Ed. 2d at 101-103.

65. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1425-26, 128 L. Ed. 2d at 101-02.

66. *Id.* at ___, 114 S. Ct. at 1426-27, 128 L. Ed. 2d at 104.

67. *Id.* Justice Blackmun asserted that the community is harmed as a result of state-promoted gender discrimination in the way that such discrimination may raise significant questions regarding the fairness of courtroom proceedings. *Id.* at ___, 114 S. Ct. at 1427, 128 L. Ed. 2d at 104.

68. *Id.* at ___, 114 S. Ct. at 1430, 128 L. Ed. 2d at 107.

jury selection process must present prima facie evidence of intentional discrimination before the proponent of the peremptory challenge is forced to explain the basis for the strike.[69] The proponent's explanation for the peremptory challenge must simply be based on a characteristic other than gender.[70]

Justice O'Connor, concurring, stated that although the Equal Protection Clause prohibits the government from excluding potential jurors on the basis of their gender, this prohibition constitutionalizes the jury selection process and erodes the peremptory challenge system.[71] Justice O'Connor asserted that, by requiring an explanation for a peremptory strike, such strikes become less discretionary and more similar to challenges for cause.[72] Furthermore, although she recognized the importance of eliminating the discriminatory use of peremptory challenges, Justice O'Connor contended that civil litigants are not state actors when exercising such challenges.[73] As a result, she concluded, any application of equal protection scrutiny should be limited to the government's use of race- and gender-based peremptory strikes.[74]

Justice Kennedy, in a separate concurrence, explained that, although protecting potential jurors from discrimination is important, assuming that a jury must be composed of members of a particular race or gender is incorrect.[75] Justice Kennedy asserted that eliminating discriminatory peremptory strikes does not imply that the resulting jury should be comprised all or in part of a litigant's race or gender.[76] Such an assumption, he argued, undermines the constitutional guarantee to an impartial jury and erroneously suggests that potential jurors from different backgrounds are inherently biased.[77] The elimination of discriminatory peremptory

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69. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1429-30, 128 L. Ed. 2d at 106-07.

70. *Id.* at ___, 114 S. Ct. at 1430, 128 L. Ed. 2d at 107.

71. *Id.* at ___, 114 S. Ct. at 1432–33, 128 L. Ed. 2d at 108 (O'Connor, J., concurring). By "constitutionalizing" the peremptory strike, Justice O'Connor referred to the application of constitutional scrutiny to the use of gender-based peremptory strikes. *Id.* at ___, 114 S. Ct. at 1433, 128 L. Ed. 2d at 108.

72. *Id.* at ___, 114 S. Ct. at 1431, 128 L. Ed. 2d at 109.

73. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1432, 128 L. Ed. 2d at 110 (O'Connor, J., concurring).

74. *Id.* at ___, 114 S. Ct. at 1432–33, 128 L. Ed. 2d at 110.

75. *Id.* at ___, 114 S. Ct. at 1434, 128 L. Ed. 2d at 112 (Kennedy, J., concurring). However, Justice Kennedy expressed his complete agreement with the majority that the Equal Protection Clause prohibits gender discrimination in the jury selection process. *Id.*

76. *Id.*

77. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1434, 128 L. Ed. 2d at 112 (Kennedy, J., concurring).

challenges, Justice Kennedy concluded, should not foster prejudicial views regarding people from different backgrounds.[78]

Chief Justice Rehnquist joined Justice Scalia's dissent and also wrote an independent dissent.[79] The Chief Justice asserted that the mid-level standard of review afforded to gender classifications did not lend itself to a scrutinizing review of the State of Alabama's intentions.[80] According to Chief Justice Rehnquist, because men and women are different, they bring biases attributable to their gender into the jury room.[81] The Chief Justice asserted that the use of gender-based peremptory strikes keeps these biases out of the jury room.[82] Thus, Chief Justice Rehnquist concluded that gender-based peremptory challenges substantially further the state's interest in guaranteeing an impartial jury.[83]

Justice Scalia wrote a dissent joined by Chief Justice Rehnquist and Justice Thomas.[84] Justice Scalia challenged the majority in *J.E.B.* and *Batson* and argued that, because all racial and ethnic groups are subject to nonspecific peremptory challenges, no one particular group is denied equal protection.[85] Justice Scalia asserted that J.E.B. and the State of Alabama demonstrated the evenhanded nature of the peremptory challenge system because each used peremptory strikes to eliminate both men and women.[86] Justice Scalia maintained that expanding the *Batson* holding to include gender damages the role of peremptory challenges by inhibiting litigators from excluding prospective jurors they perceive to be unfairly biased against their case.[87] Justice Scalia also contended that the judicial system will suffer from extensive collateral litigation resulting from appeals based on challenged peremptory strikes.[88] Justice Scalia

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78. *Id.* Justice Kennedy emphasized that jurors sit as individuals, not as representatives of a particular racial or gender group. *Id.*

79. *Id.* at ___, 114 S. Ct. at 1434, 128 L. Ed. 2d at 113 (Rehnquist, C.J., dissenting).

80. *Id.* at ___, 114 S. Ct. at 1435, 128 L. Ed. 2d at 113.

81. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1435, 128 L. Ed. 2d at 114 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist contended that men and women differ not only biologically, but in experience as well. *Id.*

82. *Id.*

83. *Id.* The Chief Justice argued that gender-based peremptory strikes are not derogatory or invidious, whereas race-based peremptory strikes may possess these characteristics. *Id.*

84. *Id.* at ___, 114 S. Ct. at 1436, 128 L. Ed. 2d at 114 (Scalia, J., dissenting).

85. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1437, 128 L. Ed. at 116 (Scalia, J., dissenting).

86. *Id.* Justice Scalia contended that in the instant case, neither party suffered any injury because both sides struck male and female venirepersons. *Id.* at ___, 114 S. Ct. at 1436–37, 128 L. Ed. 2d at 115.

87. *Id.* at ___, 114 S. Ct. at 1438-39, 128 L. Ed. 2d at 117-18.

88. *Id.* at ___, 114 S. Ct. at 1439, 128 L. Ed. 2d at 118.

concluded that, by abolishing the use of gender-based peremptory strikes, the Court has placed the peremptory challenge in danger of extinction.[89]

V. *J.E.B.* Is Excellent in Its Ideology, But Ineffective in Its Implementation

The Supreme Court correctly decided *J.E.B. v. Alabama ex rel. T.B.* for several reasons. First, once the Court has applied equal protection scrutiny in favor of protecting a particular group, it traditionally applies the same analysis to all other protected groups that are similarly situated.[90] Thus, when the *J.E.B.* Court determined that gender and race are similarly situated regarding discrimination in the jury selection process, it correctly applied equal protection scrutiny to the use of gender-based peremptory strikes.[91] Second, in undertaking this analysis, the Court applied mid-level equal protection scrutiny to gender-based peremptory challenges.[92] The lesser standard of scrutiny the *J.E.B.* Court applied to

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89. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1439, 128 L. Ed. 2d at 118 (Scalia, J., dissenting).

90. *See* Craig v. Boren, 429 U.S. 190, 208 (1976) (asserting that Equal Protection Clause should be applied when states promote invidious discrimination against particular groups). In *Craig*, the Court established the mid-level tier of the three-tier approach to equal protection analysis to ensure that, when easily identifiable groups are similarly situated, they may be afforded the correct level of equal protection scrutiny. *Id.* at 197; *see* Reed v. Reed, 404 U.S. 71, 75–76 (1971) (applying similar equal protection analysis to gender as that which had been previously applied to race); *see also* Bernard H. Siegan, The Supreme Court's Constitution 138 (1987) (asserting that, in *Reed*, Court intended to ensure that persons similarly situated will be treated alike); Deborah L. Rhode, *Equal Protection: Gender and Justice*, *in* Judging the Constitution 265, 270–72 (Michael W. McCann & Gerald L. Houseman eds., 1989) (detailing Supreme Court's expansion of equal protection afforded racial classifications to gender classifications, albeit on lesser level of scrutiny, once Court determined that gender classifications suffered discrimination similar to that which racial minorities encountered). *But see* Kenneth Karst, *Suspect Classification*, *in* Civil Rights and Equality 285, 286 (Leonard W. Levy et al. eds., 1989) (arguing that, since late 1970s, cases suggest Court's desire to limit equal protection expansion to newly defined suspect classifications).

91. *See* J.E.B. v. Alabama *ex rel.* T.B., ___ U.S. ___, ___, 114 S. Ct. 1419, 1425, 128 L. Ed. 2d 89, 101 (1994) (determining that, because racial minorities and women share similar history of being excluded from jury service, equal protection analysis must be applied to gender-based peremptory strikes); *Reed*, 404 U.S. at 75–76 (utilizing equal protection scrutiny usually applied to racial classifications regarding gender classification when Court found state-promoted invidious discrimination); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 304 (1991) (asserting that Court expanded equal protection scrutiny, which usually applied only to race, because states had denied women fundamental rights in comparable fashion as racial minorities).

92. *See J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1425, 128 L. Ed. 2d at 101-02 (applying intermediate scrutiny to determine whether gender-based peremptory strikes substantially furthered State of Alabama's interest in achieving impartial jury).

gender-based peremptory strikes correctly followed precedent treating gender as a quasi-suspect classification.[93] Third, the Court traditionally has sought to terminate state practices that discriminate against easily identifiable groups.[94] Thus, the *J.E.B.* Court accurately ruled that the invidious prejudicial views promoted by gender classifications outweighed the State of Alabama's interest in using gender-based peremptory challenges to attain an impartial jury.[95] For these reasons, *J.E.B.* is theoretically correct and exemplifies the proper expansion of the Equal Protection Clause to regulate the discriminatory use of peremptory strikes.[96]

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93. *See Craig*, 429 U.S. at 197 (asserting that, since gender classifications receive intermediate scrutiny, classification must substantially further important government interest to be constitutional); *Reed*, 404 U.S. at 75 (holding that gender classifications are suspect and subject to equal protection scrutiny); *see also* JOAN HOFF, LAW, GENDER, AND INJUSTICE 249 (1990) (noting that courts used intermediate level of scrutiny applied in *Craig* in subsequent cases involving suspect gender classifications).

94. *See* Batson v. Kentucky, 476 U.S. 79, 88 (1986) (asserting that, whenever purposeful discrimination on part of state is proven, Equal Protection Clause is violated); Washington v. Davis, 426 U.S. 229, 240–41 (1976) (stating Court's principle that invidious state-promoted discrimination cannot survive equal protection scrutiny); Graham v. Richardson, 403 U.S. 365, 374–75 (1971) (forbidding states from using discriminatory class distinctions as basis to deny public services). In *Graham*, the Court reiterated its policy that suspect classifications based on race, nationality, or alienage are inherently suspect and subject to strict equal protection scrutiny. *Graham*, 403 U.S. at 371–72; *see* M. GLENN ABERNATHY, CIVIL LIBERTIES UNDER THE CONSTITUTION 476-77 (5th ed. 1989) (contending that courts apply equal protection scrutiny to any state action that discriminates against easily identifiable groups or violates fundamental rights).

95. *See J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1430, 128 L. Ed. 2d at 107 (holding that Equal Protection Clause prohibits gender-based discrimination in jury selection process); *see also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (finding that discrimination in jury selection process harms surrounding community because it raises serious doubts with regard to fairness of proceedings being conducted in courtroom); Powers v. Ohio, 499 U.S. 400, 415 (1991) (stating that Fourteenth Amendment mandates elimination of invidious discrimination in jury selection process); M.A. Widder, Comment, *Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection*, 67 TUL. L. REV. 2311, 2331 n.84 (1993) (asserting that standard for determining whether gender discrimination in jury selection process is unconstitutional rests on determination that discrimination imposed is invidious).

96. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1972) (subjecting gender classification to strict judicial scrutiny and holding that, like racial classifications, gender classifications are inherently suspect); *see also* DEBORAH L. RHODE, JUSTICE AND GENDER 88–89 (1989) (arguing that plurality in *Frontiero* correctly applied equal protection scrutiny to suspect gender classifications because racial minorities and women experience similar forms of discrimination); Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying* United States v. De Gross *to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 MINN. L. REV. 689, 710-11 (1993) (claiming that *Batson* doctrine should apply to all groups receiving heightened equal protection scrutiny because such groups are almost always subjected to similar discrimination).

A positive outcome of the *J.E.B.* decision is its influence on the manner in which lower courts review gender classifications.[97] In *J.E.B.*, Justice Blackmun's majority opinion recognized that African-Americans and women share a history of total exclusion from jury service.[98] For the first time, the Court acknowledged that members of racial and gender classifications experience the same kinds of discrimination with respect to jury service.[99] Traditionally, gender classifications have received only mid-level scrutiny because gender discrimination is perceived as less prejudicial than racial discrimination.[100] Thus, *J.E.B.* marks a shift in the Court's attitude toward increased recognition of instances in which race and gender classifications are similarly situated.[101] In response to this shift, lower

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97. *See* United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc) (expanding *Batson* to include ban on gender-based peremptory challenges). The United States Court of Appeals for the Ninth Circuit expanded *Batson* because it found that race and gender discrimination in the judicial system equally fostered prejudice in the community. *Id.*; *see J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1436, 128 L. Ed. 2d at 115 (Scalia, J., dissenting) (asserting that trend is developing in regard to expanding review of suspect gender classifications); *see also* Laura G. Dooley, *Sounds of Silence on the Civil Jury*, 26 VAL. U. L. REV. 406, 416–17 (1993) (arguing that civil juries are not representative, and that equal protection scrutiny must expand to compensate for this discrepancy); Note, *Beyond* Batson*: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1935 (1992) (urging recognition of shared history of exclusion of racial minorities and women from political process).

98. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1425, 128 L. Ed. 2d at 101.

99. *See id.* (asserting that, although prejudicial attitudes toward women are not identical to those encountered by racial minorities, similarities between them overpower any differences); *see also* Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1172 (1992) (contending that history of exclusion of women from jury service arose out of same events and historical period in which racial minorities suffered exclusion); Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115, 1160 (1994) (arguing that women's movement mirrored African-Americans' long struggle in attaining nondiscriminatory jury selection processes and that *J.E.B.* recognizes this shared history).

100. *See* United States v. Broussard, 987 F.2d 215, 220 (5th Cir. 1993) (arguing that persons subjected to discrimination on basis of their gender do not encounter same level of prejudice that racial minorities have faced); *cf.* Note, *Beyond* Batson*: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992) (contending that, because race and gender share history of total exclusion in regard to jury service, gender should be considered as discriminatory as race).

101. *See generally* Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1160–62 (1993) (arguing that attitude which distinguishes race and gender discrimination in jury service is erroneous because history of exclusion of both groups is shared); Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115, 1159–60 (1994) (asserting that women's struggles in removing barriers to jury service mirrored those undertaken and won by African-Americans, and acknowledging Court's treatment of race- and gender-based peremptories as equally unconstitutional); Note, *Beyond* Batson*: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1935 (1992) (con-

courts may begin to view gender classifications with greater suspicion and extend racial discrimination precedents to protect gender classifications.[102]

Although the *J.E.B.* decision is exemplary in theory, implementing the ruling will prove ineffective.[103] For example, although the majority opinion explained the procedure for challenging the constitutionality of a suspicious peremptory strike, the Court failed to provide a sufficient standard for judges to apply when evaluating suspect explanations.[104] Litigators may easily fabricate facially neutral explanations to mask gender-

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tending that traditional exclusion of potential jurors on basis of race and gender warrants courts' equal scrutiny).

102. *See De Gross*, 960 F.2d at 1438 (utilizing rationale applied to race-based peremptory strikes and applying it to suspect gender-based peremptories); *see also* Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying* United States v. De Gross *to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 MINN. L. REV. 689, 706–10 (1993) (acknowledging Supreme Court's assertion that lower court implementation of broad construction of *Batson* is correct); Note, *Beyond* Batson*: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921, 1935 (1992) (asserting that *Batson* may correctly be applied to gender-based peremptory strikes).

103. *See* Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 631–33 (1994) (predicting that *J.E.B.* will be ineffective because *Batson* failed to eliminate racial discrimination in voir dire). The *Batson* decision is ineffective because the "facially neutral explanation" standard is too easily circumvented. Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 526–30. Many litigants responding to *Batson* claims have stated absurd explanations for striking potential minority jurors. *See, e.g.*, United States v. Daly, 974 F.2d 1215, 1219 (9th Cir. 1992) (upholding explanation that stated reason for striking potential minority juror was that he appeared to be "a loner"); United States v. Clemons, 941 F.2d 321, 322 (5th Cir. 1991) (allowing challenge to African-American male on grounds that he wore ponytail as facially neutral strike); United States v. Nicholson, 885 F.2d 481, 483 (8th Cir. 1989) (upholding elimination of potential minority jurors even though prosecutor could not remember reason or explanation given for striking them); *see also* Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 58 (1993) (explaining difficulty in implementing *Batson* because pretextual explanations may hide discrimination); Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of* Batson v. Kentucky, 25 WILLAMETTE L. REV. 293, 316–22 (1989) (describing cases in which explanations in response to alleged discriminatory peremptory challenges either succeeded or failed, alluding to disparate treatment of explanations in general).

104. *See J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1429-30, 128 L. Ed. 2d at 106-07 (explaining how parties alleging gender discrimination may challenge particular peremptory strikes, yet neglecting to set standard of review for explanations given for such strikes); *see also* Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of* Batson v. Kentucky, 25 WILLAMETTE L. REV. 293, 316–22 (1993) (examining how lower courts disparately treat explanations given for challenged peremptories).

based strikes,[105] and trial court judges will likely face difficulty in determining whether an explanation for striking a particular juror is a "neutral, legitimate reason, or a pretext for discrimination."[106] As a result, litigators will retain the ability to effectively eliminate potential jurors on the basis of their race or gender.[107] Without adequate instruction concerning

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105. Hernandez v. New York, 500 U.S. 352, 353 (1991). In *Hernandez*, with a Hispanic defendant on trial, a prosecutor struck all Hispanics from the venire on the ground that because each spoke Spanish, none would abide by the official English interpretation of Spanish-speaking witnesses. *Id.* The Supreme Court upheld this explanation as facially neutral. *Id.* at 361; *see* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 770 (arguing that *Hernandez* represents ease with which litigants may still successfully exercise race-based peremptory strikes because of standard that does not question facially neutral explanations). Because *J.E.B.* relies on the same "facially neutral" standard, litigators may continue to invent explanations that appear to be gender-neutral, but which actually constitute pretexts for discrimination. *See J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1430, 128 L. Ed. 2d at 107 (validating explanations that are merely based on some juror characteristic other than gender).

106. *See Hernandez*, 500 U.S. at 360 (ruling that facially neutral explanations for suspect peremptory strikes are constitutional despite disparate impact on particular racial groups). In *Hernandez*, the Supreme Court required the defendant challenging the peremptory strike to show purposeful discrimination promoted by the state. *Id.*; *see* State v. Jackson, 368 S.E.2d 838, 841 (N.C. 1988) (upholding explanation for striking two African-American women because both were unemployed); *see also* Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 54 (1994) (discussing whether explanation for peremptory strike offered in *Hernandez* was racially neutral or discriminatory); Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 631 (1994) (examining holding in *Hernandez* and explaining Court's use of "credibility" standard); Alan B. Rich, *Peremptory Jury Strikes in Texas After* Batson *and* Edmondson, 23 ST. MARY'S L.J. 1055, 1071–72 (1992) (asserting that multitude of variables may constitute facially neutral explanations). Rich has contended that each of the following may constitute a facially neutral explanation:

> (1) prior involvement with the criminal justice system; (2) problems relating to the juror information card; (3) objectively determinable voir dire problems; (4) subjective impressions from voir dire; (5) relationships between a venireman or a venireman's family and others involved in the case, such as a party, witness, judge, or lawyer; (6) a venireman's similar characteristics to those of the opposing party or counsel; (7) a venireman's age; (8) a venireman's marital and parental status; (9) a venireman's prior jury, witness or litigation experience; (10) a venireman's health; (11) a venireman's willingness to serve on the jury; (12) a venireman's dress or appearance; (13) a venireman's employment; (14) a venireman's religion or religious involvement; (15) a venireman's exposure to pre-trial publicity or possible familiarity with subject matter; (16) a venireman's ties to the community; (17) a venireman's geographic origin; (18) a venireman's place on the panel; and (19) miscellaneous explanations.

Id.

107. *See Hernandez*, 500 U.S. at 365 (upholding elimination of potential Hispanic jurors on ground that they spoke Spanish). The Supreme Court confirmed in *Hernandez* that any explanation will be accepted as long as it is facially neutral. *Id.* at 361–62; *see*

a standard for reviewing explanations, lower courts will render conflicting rulings, once again creating inconsistency in the law regarding the nature of peremptory challenges.

Furthermore, because *Batson v. Kentucky* is ineffective in eliminating racial discrimination in the jury selection process, subsequent rulings that rely on the *Batson* rationale, like *J.E.B.*, will also be ineffective.[108] The troubled implementation of the *Batson* decision should serve as a warning that, although equal protection scrutiny may be applied to other protected groups subjected to discriminatory peremptories, the ultimate result is a burden on the peremptory challenge rather than a solution to the problem of discrimination in the jury selection process.[109]

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supra note 103 (demonstrating ease with which litigators may circumvent *Batson*-type mandates); *see also* Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1830–31 (1993) (asserting that litigators are still able to successfully exercise race-based peremptory strikes because discriminatory intent may be hidden in racially neutral explanations); Alan B. Rich, *Peremptory Jury Strikes in Texas After* Batson *and* Edmondson, 23 ST. MARY'S L.J. 1055, 1094 (1994) (asserting that disparate strikes are invalid to extent that they solely challenge minority venirepersons for traits nonminorities also possess and if explanations are based on group biases).

108. *See Hernandez*, 500 U.S. at 361 (illustrating ease, through elimination of potential Hispanic jurors, with which litigators may still discriminate by using peremptory strikes). By upholding the elimination of potential jurors because they spoke the same language as the defendant and the witnesses, the *Hernandez* Court essentially proved that the facially neutral standard for reviewing explanations masks discriminatory intent. *See id.* (upholding elimination of Hispanic venirepersons who spoke same language as defendant and witnesses as facially neutral use of peremptory strikes); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 799–800 (asserting that facially neutral standard for explanations hides discriminatory intent and leads to elimination of minorities from jury service); Lawrence Elmen, Jr., Note, *Peremptory Challenges After* Batson v. Kentucky*: Equal Protection Under the Law or an Unequal Application of the Law?*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 481, 501–02 (1994) (implying that *Batson* is ineffective because litigators may easily hide discriminatory intent in facially neutral explanations).

109. *See Broussard*, 987 F.2d at 219 (asserting that expanding *Batson* to include gender-based peremptory strikes would result in burden on entire peremptory challenge system); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 554–55 (1992) (arguing that *Batson* does not rid jury selection process of racial discrimination and that peremptory challenge system is burdened because of facially neutral explanation standard); Barbara L. Horowitz, Comment, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 CIN. L. REV. 1391, 1429–30 (1993) (arguing that *Batson* fails to eliminate discrimination in voir dire because it burdens peremptory challenges to point that successfully exercising them is impossible); Paul Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. REV. 1533, 1574–75 (1991) (contending that *Batson* materially changed peremptory challenge system and that it has proved unsuccessful in eliminating racial discrimination in voir dire).

One burden that will result from the *J.E.B.* ruling, as Justice Scalia described, is collateral litigation.[110] Although the *Batson* decision did not result in an overwhelming increase in collateral litigation, expanding its rationale in cases like *J.E.B.* to a multitude of different protected groups will undoubtedly increase collateral litigation because of the sheer number of groups that will be able to raise *Batson* claims.[111] *Batson* could easily be expanded to encompass bans on peremptory challenges based on religion, national origin, or even age.[112] As a result, litigators should not be surprised when courts force them to explain every peremptory strike exercised.[113] Thus, as *Batson* and subsequent rulings like

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110. *See J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1439, 128 L. Ed. 2d at 118 (Scalia, J., dissenting) (explaining that, by expanding *Batson* to other groups receiving heightened equal protection scrutiny, substantial amount of collateral litigation will result, overburdening entire justice system); Patrick J. Guinee, Comment, *The Trend Toward the Extension of* Batson *to Gender-Based Peremptory Challenges*, 32 DUQ. L. REV. 833, 845 (1994) (asserting that expansion of *Batson* to include gender-based peremptory strikes will increase collateral litigation and lengthen voir dire).

111. *See J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1431, 128 L. Ed. 2d at 108 (O'Connor, J., concurring) (conceding that *Batson* increased collateral litigation, but contending that state and federal trial courts were not overly burdened); Barbara L. Horowitz, Comment, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 CIN. L. REV. 1391, 1429–31 (1993) (arguing that, if *Batson* is expanded to all protected groups, collateral litigation will substantially increase); *see also* Brief for Respondent at 12, J.E.B. v. Alabama *ex rel.* T.B., ___ U.S. ___, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (No. 92-1239) (stating that Alabama appellate courts addressed 40 cases based on *Batson* claims during 1992); Joshua E. Swift, Note, Batson*'s Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 357–58 (1993) (contending that implementing *Batson* has increased collateral litigation).

112. *See J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1438, 128 L. Ed. 2d at 117 (Scalia, J., dissenting) (claiming that, once *Batson* is expanded to include gender-based peremptory challenges, it will be expanded to include other protected groups such as religion); Brief for Respondent at 10, *J.E.B.* (No. 92-1239) (arguing that *Batson* might apply to age, although age is not protected under Equal Protection Clause, if attorney could prove bias against young defendants); *see also In re* Griffiths, 413 U.S. 717, 721 (1973) (holding that national origin is suspect classification that receives strict scrutiny). *Batson* could be expanded to every protected group entitled to heightened scrutiny. Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying* United States v. De Gross *to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 MINN. L. REV. 689, 710–12 (1993) (maintaining that *Batson* could be applied to all protected groups because most protected groups experience similar forms of discrimination in jury selection process).

113. *E.g., J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1438, 128 L. Ed. 2d at 117 (Scalia, J., dissenting); Barbara L. Horowitz, Comment, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 CIN. L. REV. 1391, 1430 (1993); *see* Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 636 (1994) (contending that Court's probable expansion of *Batson* would overwhelmingly burden jury selection process).

J.E.B. fail to eliminate discrimination in the jury selection process, lower courts are left with a confusing burden on the peremptory challenge system.[114]

The Supreme Court faces two options as a result of the *J.E.B.* decision: (1) continue to modify the peremptory challenge by expanding equal protection to all groups receiving heightened scrutiny;[115] or (2) eliminate the peremptory challenge completely.[116] The continued modification of the peremptory challenge through the expansion of *Batson* in cases like *J.E.B.* will not end discrimination in the jury selection process.[117] However, absent application of equal protection scrutiny to prejudicial peremptory strikes, discrimination will continue to run rampant throughout the peremptory challenge system.[118] Ultimately, the Court will be forced

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114. *See* Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of* Batson v. Kentucky, 25 WILLAMETTE L. REV. 293, 310 (1989) (analyzing lower courts' approach in evaluating explanations and finding disparate treatment).

115. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1438, 128 S. Ct. at 117 (Scalia, J., dissenting). Justice Scalia asserted that, because the majority applied equal protection scrutiny to gender-based peremptory strikes and expanded the *Batson* rationale, other protected groups, like religion, will be afforded the same remedy. *Id.* By expanding *Batson*, Justice Scalia argued, the Court inextricably changed the peremptory strike. *Id.* at ___, 114 S. Ct. at 1438, 128 L. Ed. 2d at 117; *see* Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1179 (1992) (contending that, because *Batson* ruling established that some peremptory strikes need explanations, Court really created "modified peremptory").

116. *See Batson*, 476 U.S. at 102-03 (Marshall, J., concurring) (asserting that forcing litigators to explain reasons for their peremptory strikes will not end racial discrimination in jury selection process). According to Justice Marshall, the only way to eliminate racial discrimination in the jury selection process is to eliminate the peremptory strike altogether. *Id.* at 103; *see* Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 555 (1992) (arguing that, because *Batson* does not eliminate discrimination and creates burdens, peremptory challenge system should be abolished).

117. *See* Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 635 (1994) (arguing that explanation system established in *Batson* is inherently defective and fails to end discrimination in voir dire). *J.E.B.* relies on the facially neutral explanation standard the Court created in *Batson*. *J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1429-30, 128 L. Ed. 2d at 106-07 (1994). Therefore, cases that rely on this standard will not prevent discrimination. *See* United States v. Lorenzo, 995 F.2d 1448, 1454 (9th Cir. 1993) (accepting explanation excluding last potential minority juror based on juror's long, unkempt hair as facially neutral); United States v. Uwaezhoke, 995 F.2d 388, 391 (3d Cir. 1993) (ruling that excluding minority venireperson because she lived on rental property as single parent was based on facially neutral explanation).

118. *See* United States v. Omoruyi, 7 F.3d 880, 881 (9th Cir. 1993) (eliminating unmarried female venirepersons because prosecutor feared they would be attracted to defendant); *Broussard*, 987 F.2d at 220 (upholding peremptory strikes based solely on gender); Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L.

to weigh the issues of judicial economy, the ineffectiveness of the *Batson* ruling, and the difficulty litigators will encounter without a peremptory challenge system against the constitutional guarantee of equal protection under the law afforded potential jurors by the *Batson* and *J.E.B.* decisions.[119] Until the Court addresses *Batson*'s ineffectiveness, subsequent rulings like *J.E.B.* will not solve the problem of race and gender discrimination in the jury selection process, and the peremptory challenge system will remain troubled by inconsistency.[120]

The *J.E.B.* and *Batson* decisions, though correct ideologically, have completely altered the nature of the peremptory strike.[121] Requiring an explanation for striking a particular juror is so contrary to the basic prin-

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REV. 625, 633 (1994) (discussing defense attorneys' manual, published in 1991, that demonstrates extent to which prejudicial views may invade jury selection process). The manual Professor Morehead discussed asserts that people from the Mediterranean are desirable jurors for the plaintiff, whereas Italian, Spanish, and French jurors sympathize more with the "emotional side of a lawsuit." Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 633 (1994). The manual further contends that jurors descending from German, Scandinavian, Swedish, Finnish, Dutch, Nordic, Scottish, Asiatic, and Russian ancestors typically favor the prosecution. *Id.*

119. *See Batson*, 476 U.S. at 107-08 (Marshall, J., concurring) (arguing that, although peremptory challenge is important tool litigators use in selecting jurors, it is not constitutionally guaranteed, whereas defendant's right to equal protection under law is guaranteed by Fourteenth Amendment); Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1175–77 (1993) (analyzing issues concerning possible elimination of peremptory challenge system); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 564 (1992) (discussing factors to be considered in determining whether to eliminate peremptory challenge system).

120. *Compare* State v. Jones, 358 S.E.2d 701, 703 (S.C. 1987) (ruling that striking every potential juror of same race as defendant automatically violates *Batson*) *with* Phillips v. State, 496 N.E.2d 87, 89 (Ind. 1986) (holding that eliminating three out of four potential jurors of same race as defendant does not raise per se inference of racial discrimination in use of peremptory strikes).

121. *See J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1429-30, 128 L. Ed. 2d at 106-07 (holding that, when peremptory strike is challenged on ground that it was exercised on basis of gender, explanation must be given stating reason particular juror was struck); *id.* at ___, 114 S. Ct. at 1431, 128 L. Ed. 2d at 109 (O'Connor, J., concurring) (noting that, because *Batson* and *J.E.B.* require litigators to explain peremptory challenges, such challenges have become less discretionary and more closely resemble challenges for cause); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 567 (1992) (contending that *Batson* decision completely changed peremptory challenge system because litigators must now state reasons for striking jurors); Patrick J. Guinee, Comment, *The Trend Toward the Extension of* Batson *to Gender-Based Peremptory Challenges*, 32 DUQ. L. REV. 833, 845 (1994) (arguing that *Batson* doctrine overwhelmingly burdens peremptory challenge system because every peremptory strike may theoretically be challenged as gender-based); Barbara L. Horowitz, Comment, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 U.

ciple of peremptory challenges that peremptory strikes no longer truly exist.[122] That is not to suggest, however, that *J.E.B.* and *Batson* were incorrectly decided.[123] The most important consideration regarding the peremptory challenge system is maintaining integrity in the jury selection process.[124] Courts cannot allow race and gender discrimination to continue hidden in the peremptory challenge system that *J.E.B.* and *Batson* modified.[125] Nevertheless, under future expansions of *J.E.B.* and *Batson*, lower courts will only become more confused and the peremptory challenge system will become more obscure.[126] Eliminating the peremptory

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CIN. L. REV. 1391, 1428-30 (1993) (explaining that *Batson*'s alteration of peremptory challenge system has rendered peremptory challenges virtually impossible to exercise).

122. *See J.E.B.*, ___ U.S. at ___, 114 S. Ct. at 1431, 128 L. Ed. 2d at 108-09 (O'Connor, J., concurring) (asserting that demanding explanations for challenged peremptory strikes erodes peremptory challenge system); *see also* Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 638 (1994) (arguing that *Batson* inextricably altered nature of peremptory challenge system by requiring explanations for strikes).

123. *See* Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115, 1127 (1994) (insisting that *J.E.B.*'s expansion of *Batson* rationale is correct because Equal Protection Clause mandates protection for easily identifiable groups wrongly subjected to state-promoted discrimination).

124. *See Batson*, 476 U.S. at 87–88 (asserting that discrimination in jury selection process harms excluded venireperson and also undermines public confidence in fairness of justice system); Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1176 (1993) (advocating progress toward eliminating discrimination in jury selection process so that United States may continue evolution of multiracial democracy).

125. *See* Joshua E. Swift, Note, Batson*'s Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 356 (1993) (arguing that facially neutral standard for reviewing explanations only superficially checks egregious discrimination); *supra* note 103 (illustrating that standard established by Batson *and J.E.B.* likely will be ineffective); *cf. Omoruyi*, 7 F.3d at 881 (ruling that striking potential female jurors because of concern that single women would be attracted to defendant impermissibly discriminated on basis of gender rather than on permissible basis of marital status).

126. *Compare* People v. Parker, 519 N.E.2d 703, 705 (Ill. App. Ct. 1988) (establishing that striking potential jurors that are of same race as defendant automatically constitutes *Batson* violation) *with* Allen v. State, 726 S.W.2d 636, 639 (Tex. App.—Eastland 1987) (determining that exclusion of all potential jurors of same race as defendant does not constitute *Batson* violation per se), *aff'd*, 769 S.W.2d 563 (Tex. Crim. App. 1989) (affirming on procedural grounds). These cases demonstrate lower courts' problematic implementation of *Batson*. *See* Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of* Batson v. Kentucky, 25 WILLAMETTE L. REV. 293, 312-315 (1993) (discussing lower-court implementation of *Batson* ruling and finding that lower courts treat facially neutral explanation standard with great disparity).

strike is the only way to eradicate invidious discrimination in the jury selection process and promote consistency in the law.[127]

In eliminating the peremptory strike, however, the Court or the state legislatures must provide litigants with an alternative method for excluding biased jurors.[128] For example, one alternative to the peremptory challenge system is the affirmative selection process.[129] In this process, once all challenges for cause are made, both litigants prepare a preferential list of all the potential jurors in the venire.[130] Once prepared, the

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127. *See Batson*, 476 U.S. at 102-03 (Marshall, J., concurring) (asserting that eliminating peremptory strike is only solution to problem of discrimination in voir dire); 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, 208-09 (1989) (arguing that, because *Batson* is ineffective, abolishing entire peremptory challenge system is only means that will eliminate discrimination and promote stability in voir dire); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 371 (1992) (promoting abolition of peremptory challenge system because basic principles behind peremptory strikes are offensive to Constitution and to American concepts of justice); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 554–55 (1992) (arguing that, because peremptory challenge system and Equal Protection Clause inherently conflict, only solution is to abolish peremptory strikes altogether); Patrick J. Guinee, Comment, *The Trend Toward the Extension of* Batson *to Gender-Based Peremptory Strikes*, 32 DUQ. L. REV. 833, 845–46 (1994) (contending that peremptory challenge system is so burdened by *Batson* that Court should abolish it).

128. *See, e.g.*, Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1831 (1993) (asserting that Supreme Court might adopt affirmative action tenets or quotas to ensure minority participation in jury service); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 557–58 (1992) (recommending that challenge for cause system be expanded to provide parties sufficient latitude in questioning to cover scope of peremptory challenge system); Andrew G. Gordon, Note, *Beyond* Batson v. Kentucky*: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685, 713–14 (1993) (suggesting that, to eliminate discrimination in jury selection process, American Bar Association should adopt ethical rule prohibiting attorneys from discriminating on basis of race, gender, religion, or national origin); M.A. Widder, Comment, *Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection*, 67 TUL. L. REV. 2311, 2331–32 (1993) (proposing that Court adopt system of jury selection which mandates that jury selected reflect demographic composition of community).

129. *See* Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1179 (1992) (asserting that affirmative selection process is attractive alternative to peremptory challenge system because it eliminates stigma some potential jurors who are discriminated against may feel); Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1039–40 (1991) (proposing use of affirmative selection scheme); Hans Zeisel, Comment, *Affirmative Peremptory Juror Selection*, 39 STAN. L. REV. 1165, 1170 (1987) (suggesting versions of affirmative selection method).

130. Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1179 (1992). Professor Babcock asserts that discrimination will be

court compares the lists and chooses a jury from those persons specified on both lists.[131] As the affirmative selection process demonstrates, other ways exist to select the members of a jury that are not as discriminatory as the current peremptory challenge system.[132] Eliminating the peremptory challenge system is a serious proposition; however, if the Supreme Court truly meant to eliminate race and gender discrimination in the jury selection process through the *Batson* and *J.E.B.* decisions, it is the only effective remedy.[133]

VI. CONCLUSION

The United States Supreme Court's ruling in *J.E.B. v. Alabama ex rel. T.B.* represents a commendable attempt to eliminate gender discrimination in the jury selection process. The equal protection analysis the courts have applied to race-based peremptory challenges opened the door for other protected groups, such as gender classifications, to also receive relief from discriminatory peremptory strikes. By expanding the scope of *Batson v. Kentucky* to include gender-based peremptory challenges, the Court demonstrated that other groups receiving protection under the Equal Protection Clause are sure to be afforded similar relief. *J.E.B.* is a

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eliminated through the list-making process because each litigant will probably place the jurors they prefer in opposite order. *Id.*

131. *Id.* Professor Babcock contends that potential jurors appearing on both lists will be seated first. *Id.* Then, the court will strike the potential jurors appearing on only one list until all the peremptory strikes allotted to each party are exhausted. *Id.* Professor Babcock's procedure could be modified to the extent that *every* person in the venire appears on each list. Then, a jury would be chosen from those jurors who are ranked highest on *both* lists.

132. *See* Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 75–76 (1992) (asserting that system of proportionate gender representation would eliminate gender-based discrimination in voir dire by eliminating disproportionate jury pools); Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1831 (1993) (arguing that affirmative action or quota system of jury selection would eliminate discrimination in jury selection process by guaranteeing minority representation on juries); M.A. Widder, Comment, *Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection*, 67 TUL. L. REV. 2311, 2331–33 (1993) (asserting that mandated demographic representation on juries will eliminate discrimination in voir dire).

133. *See supra* note 128 and accompanying text; *see also* Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 639 (1994) (contending that, because *Batson* fails to eliminate discrimination in jury selection process, Court should abolish peremptory challenge system to ensure equality in voir dire); Paul Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. REV. 1533, 1575 (1991) (arguing that, because inherent conflict exists between peremptory challenge system and equal protection doctrine, peremptory challenges cannot survive).

correct expansion of a decision that promotes the basic tenets of the Equal Protection Clause.

However, because *Batson* is ineffective in eliminating race-based discrimination in the jury selection process, *J.E.B.* will be equally ineffective in eliminating gender-based discrimination. The Court must question the further expansion of *Batson* before broadening the scope of that decision to include other protected groups. If *Batson* and *J.E.B.* cannot solve the problem of discriminatory peremptory strikes, any further expansion will simply continue to complicate the peremptory challenge system without solving the problem. Modifying the peremptory challenge by further expanding the *Batson* rationale will lead the jury selection process down a slippery slope of equal protection analysis, resulting in inconsistent lower court rulings with regard to peremptory strikes and increased litigation. The only solution that will truly eliminate discrimination and stabilize the jury selection process is to abolish the peremptory challenge system in favor of an alternative such as the affirmative selection process.

VII. EPILOGUE

On December 14, 1994, in *Casarez v. State*,[134] the Texas Court of Criminal Appeals held that *Batson v. Kentucky* prohibits the use of religion-based peremptory challenges.[135] The court rationalized that, because the United States Supreme Court expanded *Batson* to prohibit gender-based peremptory strikes in *J.E.B. v. Alabama ex rel. T.B.*, all groups receiving heightened scrutiny under the Equal Protection Clause are potentially protected from discriminatory peremptory challenges.[136] Applying strict equal protection scrutiny, the court held that the State's interest in obtaining a fair and impartial jury was not compelling in light of the biases promoted through the use of religion-based peremptory challenges.[137]

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134. Casarez v. State, No. 1114-93, 1994 Tex. Crim. App. LEXIS 140 (Dec. 14, 1994).

135. *Id.* at *32. Judge Baird authored the majority opinion, to which Presiding Judge McCormick, joined by Judges White and Meyers, dissented. *Id.* at *38.

136. *Id.* at *19-*20. The court relied heavily on the analytical framework developed in *J.E.B.*, which Judge Baird asserted establishes that the Equal Protection Clause should be applied to discriminatory peremptory strikes when they are exercised against a protected group. *Id.* at *18-*20. The court applied equal protection scrutiny to religion-based peremptory strikes solely on the ground that religious classifications receive strict equal protection scrutiny. *Id.* at *32.

137. *Id.* at *32. The court made a blanket assertion that peremptory strikes exercised against groups receiving heightened equal protection scrutiny are automatically questionable. *Id.* at *20; *see* Craig v. Boren, 429 U.S. 190, 208 (1976) (establishing that when one cognizable group is afforded equal protection, other easily identifiable groups subjected to similar discrimination should receive same protection). However, the Court of Criminal Appeals did not address the issue of whether potential jurors challenged because of their religion are similarly situated to potential jurors struck because of their race or gender.

The *Casarez* ruling indicates that the journey down the slippery slope of equal protection analysis has now begun.[138] Similar extensions of *Batson* and *J.E.B.*, while well intended, will undoubtedly lead to countless conflicting lower court rulings, overwhelming collateral litigation, and the eventual demise of the peremptory challenge system.

Casarez, 1994 Tex. Crim. App. LEXIS 140, at *73 (Meyers, J., dissenting). As dissenting Judge Meyers stated, the two types are distinguishable because peremptory challenges based on race or gender do not involve a juror's personal attitudes or opinions, whereas religion-based peremptory strikes concern a juror's beliefs and attitudes. *Id.* Judge Meyers wrote:

> Persons of the same race or sex . . . are not distinguished by their beliefs, attitudes or convictions. Because all varieties of political, moral, and religious tenets are commonly shared by people of many different races and by both sexes, race and sex clearly do not reveal anything especially relevant about a prospective juror's beliefs.

Id. Judge Meyers concluded that, as a result of *Batson*'s expansion to religion-based peremptory strikes, the basic tenet of the peremptory challenge—striking potential jurors because of their personal biases—is frustrated. *Id.* at *76.

138. Justice Scalia, in his *J.E.B.* dissent, correctly predicted that the next expansion of *Batson* would prohibit religion-based peremptory challenges. J.E.B. v. Alabama *ex rel.* T.B., ___ U.S. ___, 114 S. Ct. 1419, 1438, 128 L. Ed. 2d 89, 117 (1994)(Scalia, J., dissenting). *Casarez* is but one recent decision following this approach. *See, e.g.*, People v. Crittendon, No. S010685, 1994 Cal. LEXIS 6570, at *25 (Cal. Dec. 22, 1994) (explaining that any peremptory challenges exercised on presumptions based on group bias—those based on race, religion, ethnicity, and gender—which are used to strike potential jurors are unconstitutional); Joseph v. State, 636 So. 2d 777, 780 (Fla. Dist. Ct. App. 1994) (ruling that peremptory challenge of Jewish venireperson, solely because she was Jewish and her surname alluded to such, violated Florida's constitutional guarantee prohibiting discrimination based on cognizable group membership); Commonwealth v. Carleton, 641 N.E.2d 1057, 1059 (Mass. 1994) (holding that peremptory elimination of all potential jurors with Irish-sounding surnames was based solely on jurors' obvious membership in ethnic group and thereby unconstitutional).