Notes

Unresolved Differences: Constitutionality of Religion-Based Peremptory Strikes, The Need For Supreme Court Adjudication

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I. Introduction

Recent years have seen rapid and profound changes in the law governing the use of a fundamental tenet of the American jury trial system, the peremptory strike. In the landmark case of *Batson v. Kentucky*,[1] the United States Supreme Court held that a prosecutor's exercise of a peremptory strike to eliminate a potential juror on the basis of his race violates the Equal Protection Clause of the Fourteenth Amendment.[2] A short time later, in *Powers v. Ohio*,[3] the Supreme Court extended the *Batson* equal protection analysis to prohibit a prosecutor from striking a juror on the basis of his race, even if the defendant is of a race different from that of the excluded juror.[4] The Court then quickly used this same equal protection justification to prohibit civil litigants[5] and criminal defendants[6] from exercising racially discriminatory peremptory strikes. Most recently, in *J.E.B. v. Alabama ex rel. T.B.*,[7] the Court extended its equal protection analysis to prohibit peremptory strikes which discriminate on the basis of gender.[8] The question remains whether the Supreme Court will apply this same equal protection analysis to eliminate religiously discriminatory peremptory strikes.[9]

This note argues that the United States Supreme Court must soon resolve this issue. Misapplication of the equal protection analytical framework established in *Batson* and *J.E.B.*, coupled with state and lower court

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1. 476 U.S. 79 (1986).

2. *Id.* at 89. The Court ruled that a prosecutor could not strike potential jurors of the same race as the defendant simply on the assumption that they would not be able to impartially consider a case against a member of their own race.

3. 499 U.S. 400 (1991).

4. *Id.* at 415.

5. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629 (1991).

6. *See* Georgia v. McCollum, 505 U.S. 42, 48-49, 59 (1992).

7. 511 U.S. 127 (1994).

8. *Id.* at 141, 146.

9. In *Davis v. Minnesota*, 511 U.S. 1115 (1994), *denying cert. to* 504 N.W.2d 767 (Minn. 1993), the Court denied certiorari in an appeal of the Minnesota Supreme Court's decision holding that *Batson's* Equal Protection Clause analysis was specifically limited to race, and thus did not prohibit religion-based peremptory strikes. Justice Thomas, joined by Justice Scalia, filed a written dissent from the denial of certiorari in which he argued that the Court's Equal Protection analysis in *J.E.B. v. Alabama*, which prohibited peremptory strikes based on gender, an intermediate scrutiny classification, specifically required the Court to address whether peremptories based on religion, a classification warranting strict scrutiny, were also prohibited. *Id.* at 116-118 (Thomas, J., dissenting from denial of certiorari).

inconsistencies in determining the constitutionality of religion-based peremptory strikes provide a clear mandate to the Supreme Court to address this question. Part II of this note develops the background of the peremptory strike and traces the development of the issue of whether religion-based peremptories are constitutional. In part III, the note outlines the analytical framework provided by *Batson* and *J.E.B.* for addressing the equal protection issues involved in religion-based peremptory strikes. Part IV then examines *Casarez v. Texas*,[10] the first post-*J.E.B.* attempt to address the issue of religion-based peremptory strikes, and argues that despite the analytical framework established in *J.E.B.* for analyzing the question there is inconsistency as to application of the structure. Finally, part V looks at the inconsistent treatment of the issue by both state and federal courts and concludes that the issue must be addressed by the Supreme Court.

II. The Peremptory Challenge: its Background and the Development of Restraints

The peremptory challenge has long been regarded as a fundamental component of the American judicial system. In contrast to a strike for cause, which requires that the litigant establish a sufficient showing of prejudice on the part of the potential juror before striking, the peremptory strike traditionally can be exercised for any purpose, thus allowing litigants to assemble a panel of jurists they believe to be both fair and impartial.[11] But the peremptory challenge long predates American jurisprudence. Traceable to the Romans, the peremptory strike was subsequently adopted by English common law, from which it made its way into American jurisprudence.[12] Quickly ingrained in American common law, the first Congress made peremptory strikes a part of federal law,[13] and the states soon followed this lead by passing statutes ensuring the defendant's right to peremptory challenges.[14]

Peremptories quickly developed as "one of the most important of the rights secured to the accused,"[15] a right so important that "the denial or impairment of the right is reversible error without a showing of prejudice."[16] Today this right to strike a juror based upon the "sudden impressions and

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10. 913 S.W.2d 468 (Tex. Crim. App. 1995).

11. *Id.* at 494.

12. *See* Carolyn Clause Garcia, *Strike Three and It's Out---There Goes the Peremptory*, HOUS. LAW Nov.-Dec. 1991, at 22, 23 (tracing history of peremptory challenge beginning with Roman law); David Everett Marko, *The Case Against Gender-Based Peremptory Challenges*, 4 HASTINGS WOMEN'S L.J. 109, 110-111 (1993) (describing origin of modern criminal peremptory challenge).

13. *See* Swain v. Alabama, 380 U.S. 202, 214 (1965); 4 BLACKSTONE'S COMMENTARIES 353 (15th ed. 1809).

14. *Swain*, 380 U.S. at 216.

15. Pointer v. United States, 151 U.S. 396, 408 (1894).

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

unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another"[17] is viewed as fundamental to the jury trial system, allowing all litigants to impanel a jury that they feel is relatively free of partialities and prejudices.

Despite this revered status that peremptory strikes have enjoyed among litigants, in 1965 the United States Supreme Court gave the first indication that the power of such strikes was not unlimited. In *Swain v. Alabama*, the Court addressed allegations of racial discrimination in the use of peremptories by the State of Alabama.[18] Reluctantly, [19]the *Swain* Court created the first real constraint on the peremptory challenge by prohibiting prosecutors from systematically excluding members of one race from the jury.[20] Nevertheless, the difficult standard of showing systematic exclusion on the basis of race prevented the Court's ruling from significantly impinging on the peremptory challenge.[21]

Batson v. Kentucky, recognizing this difficulty, overruled *Swain*.[22] The *Batson* Court held that a prosecutor may not strike potential jurors who are members of the defendant's race "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[23] This restriction on the peremptory strike was declared necessary to protect the right of the defendant to a fair trial, to safeguard the right of the individual juror to participate in the judicial process, and to prevent the "public confidence in the fairness of our system of justice" from being undermined.[24]

Batson replaced the systematic discrimination requirement of *Swain* with a new test for establishing a prima facie case of discrimination. First, the defendant "must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."[25] Then, he must demonstrate that "these facts and any other relevant circumstances raise an inference that the

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17. *Id.* at 220 (citing Lewis v. United States, 146 U.S. 370, 376 (1892)).

18. In *Swain*, the black defendant, whom an all-white jury had convicted of rape and sentenced to death, alleged that the State of Alabama had committed an "invidious discrimination in the selection of jurors" by keeping blacks off the jury and, consequently, had violated the Equal Protection Clause. *Id.* at 203-204. The defendant based his equal protection claim on *Strauder v. West Virginia*, 100 U.S. 303 (1880) which held that the Fourteenth Amendment prohibited governments from denying blacks the right to be a part of the jury venire. *Id.* at 203.

19. It is important to recognize that the *Swain* case was decided during the height of the Civil Rights movement. While a study of the role the Civil Rights movement played in ending the discriminatory use of peremptory challenges and indeed, in bringing about the demise of the traditional peremptory challenge itself, would be very interesting, such an inquiry is beyond the scope of this note.

20. *Swain*, 380 U.S. at 223-224.

21. *See* Batson v. Kentucky, 476 U.S. 79, 92-93 (1986).

22. *Id.* at 100-01 (White, J., concurring).

23. *Id.* at 89.

24. *Id.* at 87-88.

25. *Id.* at 96 (citation omitted).

prosecutor used [peremptory strikes] to exclude the veniremen . . .."[26] Once the defendant has met this burden, the prosecution must offer a race-neutral explanation for striking the juror, or the strike will be overruled.[27]

Within just a few years, the Court extended the *Batson* doctrine to prohibit all peremptory strikes based solely on race, regardless of the race of the party exercising the strike.[28] Then, in *J.E.B.*, the Court further restricted peremptory strikes, declaring that the equal protection rationale which prevented racially discriminatory application of peremptories also prohibited striking jurors on the basis of gender alone.[29]

The extension of *Batson*'s Equal Protection analysis to gender soon raised the issue of whether other invidious types of discrimination based on classifications such as religion would also receive protection under the *Batson* doctrine.[30] This question has never been adequately addressed. The Supreme Court specifically refused to hear the issue, denying certiorari in *Davis v. Minnesota*,[31] a case in which the Minnesota Supreme Court declared that *Batson* would not apply to religious discrimination in the use of peremptory strikes.[32] In light of the Supreme Court's holding in *J.E.B.*,[33] which extended the *Batson* analysis to prohibit peremptory strikes based on gender, a classification reviewed under intermediate scrutiny, the result in *Davis v. Minnesota* was clearly erroneous. Nevertheless, the Supreme Court refused to hear the case, and this denial of certiorari has contributed to the confusion among both litigants and judges who must confront the issue despite the inconsistent treatment among the various states.

III. *Batson* and *J.E.B.*, an Equal Protection Framework for Peremptory Challenges

The jury selection process has long been subject to Equal Protection Clause analysis.[34] Nevertheless, application of the Equal Protection Clause to

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26. *Id.* The court also noted that ". . . the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'." *Id.* (citation omitted).

27. *Id.*

28. *See McCollum*, 505 U.S. 42 (1992) (criminal defendants may not racially discriminate in use of peremptory strikes); Powers v. Ohio, 499 U.S. 400 (1991) (prosecutors cannot peremptorily strike juror based on race even if juror is from racial group different from defendant); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (civil litigants may not strike jurors based on race alone).

29. *J.E.B.*, 511 U.S. at 141, 146.

30. *See Davis*, 504 N.W.2d 767; *Casarez*, 913 S.W.2d 468.

31. 114 S. Ct. 2120.

32. 504 N.W.2d at 771.

33. *J.E.B.* was decided in April of 1994, eight months after the Minnesota Supreme Court's decision in *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994).

34. *Strauder*, 100 U.S. 303, was the first application of the Equal Protection Clause to the selection of juries. In *Strauder*, the Supreme Court held that a statute which prohibited blacks from serving on grand or petit juries violated the Equal Protection Clause. *Id.* at 310-312.

peremptory challenges is a more recent phenomenon.[35] As with most applications of the Equal Protection Clause, the first peremptory strike challenges which applied an Equal Protection analysis focused on race. Race, however, has not ended the Supreme Court's application of the Equal Protection Clause to peremptory challenges; indeed, it has provided the framework for analyzing the discriminatory use of peremptory challenges against other classifications entitled to Equal Protection Clause treatment.

To properly understand the analytical framework that the Supreme Court has developed for reviewing the discriminatory exercise of peremptory strikes, one must first consider traditional Equal Protection analysis. Central to Equal Protection Clause jurisprudence is the idea that the government must treat citizens as individuals and not simply as components of a racial, religious, sexual, or national class.[36] The government generally has been prevented from discriminating against individuals because of their membership in a suspect class, that is, a group which has historically suffered from discrimination.[37] Additionally, the Equal Protection Clause is violated when the members of a class are denied the opportunity to exercise a fundamental right.[38]

In reviewing Equal Protection Clause cases, the Supreme Court has employed three standards of review: strict scrutiny, rational basis, and intermediate scrutiny.[39] As its name implies, the most demanding of these standards is strict scrutiny. To satisfy this high standard, the state must show that the discriminatory classification promotes a compelling government interest and that it is narrowly tailored to achieve that interest.[40] In essence, the state must prove that the classification is based upon an essential government objective which is achieved by the least intrusive means.[41] The strict scrutiny standard has been applied to discriminatory classifications based on race, alienage, and national origin as well as in cases when the exercise of a fundamental right has been impaired.

In contrast, the rational basis standard which has been employed to review general social welfare and economic regulations presumes that the discriminatory classification is valid.[42] Provided that the government is able to demonstrate that the discriminatory classification bears a rational

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35. *Swain*, 380 U.S. 202, the first case to apply the Equal Protection Clause to peremptory strikes, was decided nearly a century after *Strauder*, 100 U.S. 303. Clause Garcia, *supra* note 12, at 23.

36. *Casarez*, 913 S.W.2d at 473-74.

37. *See id.* (applying Equal Protection Clause to race as a suspect class); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-26 (1982) (treating gender as a suspect class for Equal Protection Clause analysis); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.2, (2d ed. 1992).

38. *See* Plyler v. Doe, 457 U.S. 202, 216-17, n. 15 (1982); United States v. Virginia, 116 S. Ct. 2264, 2292 (1996) (Scalia, J., dissenting); *supra* note 35, ROTUNDA & NOWAK, § 18.3.

39. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

40. *Wygant*, 476 U.S. at 274.

41. Fullilove v. Klutznick, 448 U.S. 448, 510 (1980).

42. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 234-35 (1981).

relationship to any legitimate government interest, it will be upheld.[43]

As a balance between these two extremes, the Supreme Court developed the intermediate scrutiny standard of review. The intermediate scrutiny test is met if the government is able to demonstrate that the discriminatory classification is substantially related to an important governmental interest.[44] This standard has traditionally been applied to classifications based on gender or illegitimacy.

Thus under traditional equal protection analysis a discriminatory classification must at least be rationally related to a legitimate government interest. Additionally, any discriminatory classification which is aimed at a suspect class or infringes on a fundamental right must meet the "heightened" equal protection standards of either intermediate scrutiny or strict scrutiny.

In *J.E.B.*, six Supreme Court justices held that the same Equal Protection Clause analysis which prevented the peremptory strikes from being exercised on the basis of race alone would prohibit a potential juror from being stricken solely on the basis of his gender. The Court stated that when a person is excluded from jury service solely on the basis of his race, ethnicity or gender, the "promise of equality dims, and the integrity of our judicial system is jeopardized."[45] In extending the *Batson* analysis to gender, the Supreme Court extended the *Batson* equal protection analysis to those discriminatory classifications subject to heightened equal protection scrutiny, and not just strict scrutiny.[46]

The *J.E.B.* Court determined that gender alone did not provide an accurate predictor of juror attitudes, and thus held that peremptory challenges based upon gender failed to pass the heightened equal protection scrutiny analysis. The Court stated it would "not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'"[47] *J.E.B.*, therefore, served to extend *Batson*'s Equal Protection Clause rationale for preventing the discriminatory use of peremptory strikes to those classifications subject to heightened equal protection scrutiny.[48]

IV. *Casarez*: Applying the Supreme Court's Equal Protection Analysis to Religion-based Peremptory Challenges

In the first case to address the constitutionality of religion-based peremptory challenges since *J.E.B.*, the Texas Court of Criminal Appeals experienced considerable difficulty applying the Supreme Court's standard.

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43. Pennell v. City of San Jose, 485 U.S. 1, 14 (1988).
44. *See Hogan*, 458 U.S. at 724; *Feeney*, 442 U.S. at 273.
45. *J.E.B.*, 511 U.S. at 146.
46. *See id.* at 135-36.
47. *Id.* at 138, (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)).
48. *Id.* at 135-36.

In 1994, the Texas court held in *Casarez v. State*, that the use of religion-based peremptory strikes was an unconstitutional infringement on the Equal Protection Clause.[49] A year later, the court reversed itself, declaring that religion-based peremptory challenges passed Equal Protection Clause analysis and thus were not discriminatory.[50]

On original submission, the Court of Criminal Appeals used principles grounded in established United States Supreme Court authority to determine that religion-based peremptory strikes are unconstitutional.[51] First the court outlined the Equal Protection Clause's application to the jury selection process from *Strauder v. West Virginia*, to the most recent extension in *J.E.B.*[52] The court then analyzed the analytical structure developed in *J.E.B.*[53] for reviewing peremptory strikes used to exclude potential jurors on the basis of classifications subject to heightened equal protection scrutiny.[54] Next, the court traced U.S. Supreme Court adjudication of religious discrimination which determined that religion-based equal protection claims require strict scrutiny.[55]

Finally, the court determined that religion-based peremptory challenges failed the strict scrutiny test as there was no compelling government interest in striking veniremembers based on their religion.[56] In reaching this decision, the court recognized that "peremptory challenges further our need for a 'qualified and impartial jury,' and enable the parties to ascertain and act upon the possibility of bias . . . facilitat[ing] the impaneling of an impartial and unbiased jury."[57] Nevertheless, the court recognized that we do not look to the "value of peremptory challenges as an institution"[58] for a justification of religion-based peremptory challenges. Rather, "we consider whether peremptory challenges based on [religious] stereotypes provide [essential] aid to a litigant's efforts to secure a fair and impartial jury."[59] Concluding that religious affiliation, like race and gender, may not serve to accurately predict a potential juror's attitudes or prejudices, the court held that no compelling justification for religion-based peremptory strikes had been provided by the state.[60]

The court then noted that such a finding does not terminate the use of

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49. 913 S.W.2d at 480.
50. *See id.* at 496.
51. *Id.* at 480.
52. *Id.* at 470-75.
53. *J.E.B.*, 511 U.S. at 134-37.
54. *See Casarez*, 913 S.W.2d at 472-75.
55. *See id.* at 475-79.
56. *See id.* at 480.
57. *Id.* at 479 (quoting State's Brief at 26, 27).
58. *Id.* (quoting *J.E.B.*, 511 U.S. at 1425, 1426).
59. *Id. at 479 (quoting J.E.B.*, 511 U.S. at 137).
60. *Id.* at 480.

peremptory strikes or jeopardize the jury selection process.[61] The rationale for excluding a potential juror on the basis of religion is that the litigant attributes certain beliefs to the veniremember. While the *Casarez* court's original decision held that striking a juror on the basis of religion alone is unconstitutional, it does not necessarily follow that the same juror may not be stricken if he indeed holds the attributed beliefs. The decision simply requires that the perceived bias actually be held by the veniremember and not simply be implied from their religious affiliation. This insistence on actually held beliefs approaches the very purpose of jury voir dire, to "inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular [religious group] unnecessary and unwise."[62]

Thus, rather than destroy an essential element of the jury selection process, the court's holding strengthens it. Eliminating discriminatory practices in the selection of jurors renews respect and confidence in the fairness and integrity of the courts and jury selection process in those persons most important to the jury process, the jurors themselves.

Within a year, however, the court reheard the *Casarez* case, declaring that its "original opinion misapprehended the constitutional significance of peremptory challenges based on criteria implicating First Amendment liberties."[63] However, the court's perfunctory treatment of the First Amendment implications on the issue casts considerable doubt as to whether this was the real reason for granting the rehearing. Rather, the rehearing appears to be nothing more than an opportunistic attempt to capitalize on a change in court personnel[64] with the court simply using this issue as a pretext to re-examine whether the state had established a compelling interest for allowing religion-based peremptory strikes. On rehearing the court reversed its prior decision and concluded that a sufficiently compelling state interest existed to allow religiously discriminatory peremptory strikes.[65] In reversing its prior decision, the court misapplied Equal Protection Clause analysis on several grounds.

The court's claim that it reheard the case to address the constitutional significance of peremptory strikes which impinge on First Amendment liberties provides nothing more than pretextual justification for rehearing the case on the merits. In addressing these First Amendment implications, the court simply establishes that First Amendment protections against religious discrimination have resulted in very little Equal Protection Clause litigation

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61. *Id.*

62. *J.E.B.*, 511 U.S. at 143.

63. *Casarez*, 913 S.W.2d at 493.

64. From the time of the original decision until the rehearing, Justices Keller and Mansfield replaced Justices Campbell and Miller thus reversing the the five votes to four split on the court concerning the issue of religion-based peremptory strikes.

65. *Casarez*, 913 S.W.2d at 496.

based on religious affiliation. However, the court acknowledged that the Equal Protection Clause may be implicated when an individual is discriminated against on the basis of religion, as an individual's religious belief or practice becomes the basis for disparate treatment.[66] The court recognized that when First Amendment religious freedom rights and equal protection issues are so intertwined as to become "virtually indistinguishable," the same constitutional analysis applies "whether raised as an equal protection claim or as a freedom of religion complaint."[67] Thus, if the court had simply addressed the First Amendment implications for which rehearing was granted, the court would not have overruled its prior decision, as the strict scrutiny analysis applied in the equal protection framework on original hearing would also apply to any First Amendment challenge.

However, the court did not restrict itself to addressing First Amendment implications. Instead, the court revisited the issue of whether the state possessed a compelling interest for the religiously discriminatory peremptory strikes. Despite recognizing the same government interest found insufficient at original submission, "that peremptory challenges promote selection of a jury that will be fair and impartial to both parties,"[68] the court reversed its own original opinion. Justice Meyers, writing for the majority, argued that adherence to a religion is inherently premised upon the acceptance and "belief in certain principles, doctrines, or rules"[69] which may be attributed to that religion. Stating that discrimination on the basis of belief is fundamental to the effective exercise of peremptory challenges, the court concluded that such discrimination on the basis of religion is therefore acceptable.[70]

The *Casarez* decision on rehearing incorrectly analyzes the constitutionality of religion-based peremptory challenges for at least three reasons. First, the majority opinion incorrectly assumes that the common doctrinal beliefs of members of a religion necessarily equate to common political, social and philosophical beliefs. Second, the court illogically concludes that because peremptory strikes may generally be exercised to discriminate against certain beliefs, there is necessarily no harm to the excluded juror. Third, even if a compelling government interest in preserving peremptory strikes based on religion is shown, such peremptory challenges are not narrowly tailored to achieve the asserted government interest.

Concerning the court's first fundamental mistake the majority declares that because members of a religious faith share the same doctrinal convictions by definition, then moral, social, political and philosophical beliefs

66. *Id.* at 493.
67. *Id.* at 494 (citing Larson v. Valente, 456 U.S. 228, 244-46 (1982)).
68. *Id.* at 494.
69. *Id.* at 495.
70. *Id.*

characteristic of the faith may fairly be attributed to all of them. This premise is fundamentally flawed for several reasons.

First, such an assumption violates a fundamental tenet of the Equal Protection Clause. Equal Protection Clause analysis is premised upon the view that all levels of government "must treat citizens as individuals, not simply as components of a racial, religious, sexual, or national class."[71] When the litigant attributes social, political, moral or philosophical views to an individual simply because of his religious affiliation, the potential juror is being treated as a component of his religion and not as an individual. Several courts have accordingly held that a showing of individual bias is required to strike a veniremember from the jury, not simply a showing that members of the veniremember's class would likely harbor prejudices.[72]

Second, empirical evidence demonstrates that not every member of a given religion has adopted the views of the religious leaders or establishment.[73] For example, the leadership of the Catholic Church condemns the use of contraceptives, despite the fact that 84% of the members of the Catholic Church oppose this view.[74] As a highly moral issue, this demonstrates that while religious beliefs may influence a person's moral, social and political beliefs, they do not necessarily dictate them. Thus, to attribute the nondoctrinal beliefs of a religion to one of its members may not be justified.

Similarly, attribution of every belief held by a religion to its members is patently illogical. For example, the United Methodist Church has reduced all of the current and official policies adopted by the General Conference of the United Methodist Church to writing in The Book of Resolutions.[75] The Book of Resolutions currently contains official positions on over two hundred subjects including: organ and tissue donation, school busing, suicide, rights of workers, gun control, grand jury abuse, unemployment, and recognition of Cuba.[76] It is illogical to assume that all Methodists share the same position on these issues or are even familiar with the church's official position.

The second fundamental flaw in the court's decision on rehearing is its belief that the individual veniremember excluded on the basis of religion is not harmed.[77] The court concludes that because members of a religion share the tenets of their faith, to discriminate on the basis of religion does not harm an individual because the litigant is simply attributing to the juror beliefs that he

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71. *Id.* at 472-73.

72. *See*, United States v. Greer, 968 F.2d 433, 435 (5th Cir. 1992); Coleman v. United States, 379 A.2d 951, 953 (D.C. App. 1977).

73. *Casarez*, 913 S.W.2d at 501 (Baird dissenting).

74. *Id.* (citing BRENDA MADDOX, THE POPE AND CONTRACEPTION: THE DIABOLICAL DOCTRINE, 29 (1991); and GALLUP, THE GALLUP POLL: PUBLIC OPINION 1993 145 (Scholarly Resources, 1994)).

75. *Id.* (First printed in 1968, the Book of Resolutions is updated every four years to accommodate the many changes in the official policies of the United Methodist Church.)

76. *Id.*

77. *Id.* at 495.

already holds.[78] In addition to the arguments above concerning the fallacy of shared beliefs, this premise also ignores First Amendment principles.

The religious freedom clause of the First Amendment was enacted precisely to prevent discrimination on the basis of one's religious beliefs. To hold, as the *Casarez* court does on rehearing, that the discrimination on the basis of religion in using peremptory strikes does not denigrate the dignity of the potential juror is to deny a fundamental premise of the First Amendment, the right to freely exercise one's religion without being discriminated against by the government.

The court's belief that discriminating on the basis of religion is no different from discriminating on the basis of other beliefs[79] is also unavailing. Here, the court recognizes but essentially refuses to apply the principle which rests at the very heart of this case: discriminatory treatment of religious classifications like those based on race or gender are subject to heightened scrutiny. The court's inability to "reconcile the extension of *Batson* to religious belief without also extending it to constitutionally protected beliefs of other kinds"[80] is quite simply an admission of the court's reluctance to accord religious classifications heightened scrutiny or acknowledge the First Amendment's proscription against religious discrimination.

Finally, after determining that the government has a sufficiently compelling interest in allowing peremptory strikes based on religion, the court simply ignores the narrowly tailored prong of the equal protection test.[81] Application of this test demonstrates that religion-based peremptory strikes are not narrowly tailored to serve the state's asserted interest of providing a fair and impartial trial for two reasons. First, such strikes are based on stereotypical assumptions about the religious views of potential jurors as discussed *supra*. Second, focusing on the actually held beliefs of veniremembers instead of inferring their beliefs from mere religious affiliation is a less restrictive alternative.

Religion-based peremptory challenges violate strict scrutiny because they depend on stereotypical assumptions. No evidence has been provided to demonstrate that religious affiliation alone is an accurate predictor of juror attitudes. While the government clearly has an interest in securing a fair and impartial trial, the lack of evidence supporting religion-based peremptory challenges' role in ensuring an impartial jury guarantees that such peremptories

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78. *Id.*

79. *Id.* The court concludes that "treatment of religious creed as an inappropriate basis for peremptory exclusion cannot rationally be distinguished from a similar treatment of persons on account of their Libertarian politics, their advocacy of communal living, or their membership in the Flat Earth Society."

80. *Id.*

81. For an example of a case which utilizes the "narrowly tailored" prong of the strict scruitny test *See Wygant*, 476 U.S. 267, 274 (1986).

are not sufficiently narrowly tailored to fit the governmental interest.

For a government policy to be narrowly tailored, it must be the least restrictive means available for fulfilling the asserted interest. An actual showing of the potential juror's actual beliefs, rather than mere religious affiliation, would provide a less restrictive alternative for serving the government's interest. In the case of peremptory strikes, the litigant can easily use the voir dire process to accurately ascertain the beliefs of the potential juror.[82] Such questioning would eliminate the discriminatory practice of excluding a juror simply on the basis of his religious affiliation and better serve the state's interest of providing a fair and impartial trial. Because the beliefs of the potential juror would be clearly established, this process would also better serve the interests of the litigants as they would be less likely to strike a juror who at first impression seemed to hold beliefs contrary to their position, but upon greater inquiry may prove sympathetic to their case.

Casarez demonstrates the difficulty courts are likely to encounter in addressing the constitutionality of religion-based peremptory strikes. The reversal of positions taken by the court on the issue, apparently because of a change of personnel on the court, serves to demonstrate the lack of a clear consensus as to how to address this difficult equal protection issue. In addition, the equal protection analysis used by the court on rehearing is both incomplete and inaccurate. For these reasons, *Casarez* demonstrates the necessity for a definitive word on the issue from the United States Supreme Court itself.

V. Conclusion: Inconsistencies Among the States

The legality of peremptory challenges based on religious affiliation has been and remains an issue characterized by inconsistent treatment among various jurisdictions. Prior to the Supreme Court's extension of *Batson* in *J.E.B.* to prohibit gender-based peremptory strikes, some jurisdictions extended the *Batson* doctrine to religious affiliation[83] while others refused to do so.[84] This uncertainty has created much frustration and confusion among both judges and practitioners.

One of the reasons for the confusion is that there has been no real

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82. The veniremember can then be striken for cause if the actually held beliefs are indeed prejuidicial to the litigant. *See* 28 U.S.C. §1866(c)(2).

83. *See, e.g.*, United States. v. Greer, 939 F.2d 1076, 1086 (5th Cir. 1989) (referring to *Batson* as limiting peremptory challenges based on race, religion, and national origin), *reh'g granted*, 943 F.2d 934 (5th Cir. 1991), *cert. denied*, 507 U.S. 962 (1993); State v. Gilmore, 511 A.2d 1150, 1157 (N.J. 1986) (holding that its prohibition of peremptory challenges based on suspect classes, including creed, is consistent with Batson).

84. *See, e.g.*, *Casarez*, 913 S.W.2d 468 (declaring that *Batson* does not extend to cover preemptory strikes based on religion); State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (holding that *Batson* does not extend to religious affiliation), *cert. denied*, 511 U.S. 1115 (1994).

consensus in the rationales of those states which have either allowed or prohibited peremptory strikes based on religious affiliation. Of those states prohibiting peremptories based on religion, some have used an equal protection analysis,[85] while others have declared that peremptories exercised on the basis of some presumed group bias, such as religion,[86] violate their state constitutions.[87]

Because of this inconsistent treatment among the various jurisdictions, and the *Casarez* court's inconsistency and inaccuracy in grappling with the Supreme Court's equal protection analysis, the Supreme Court must address the issue in order to provide consistent and accurate treatment of religion-based peremptory strikes.

85. *See Greer*, 939 F.2d at 1086.

86. Other common groups are race, gender, and national origin.

87. *See* People v. Sanders, 797 P.2d 561, 574 (Cal. 1990) *cert. denied*, 500 U.S. 948 (1991); Joseph v. State, 636 So.2d 777, 780-81 (Fla. Dist. Ct. App. 1994).