Ending a Forced Dichotomy: *Batson*'s Logical Expansion to the Freedom of Association

*Ashlyn Shultz**

I. INTRODUCTION

Since *Batson v. Kentucky*'s landmark decision holding peremptory challenges on the basis of race unconstitutional[1] and subsequent expansion to gender in *J.E.B. v. Alabama ex rel. T.B.*,[2] courts have resisted expanding the prohibitions on peremptory challenges any further.[3] Despite some lower courts expanding *Batson* to religion,[4] others are hesitant to expand *Batson* to any First Amendment rights.[5] By refusing to expand *Batson* to the freedom of association, however, the court forces an artificial dichotomy on the juror, making her choose between her right to protected association and her right and duty to serve as a juror. Some scholars reject this forced dichotomy and are eager to see *Batson*'s expansion to other First Amendment rights.[6] This Comment joins some of the more eager

* J.D. 2022, University of Kansas School of Law, B.S. 2020, Kansas State University. I give my thanks to the editors of the *Kansas Law Review* for their diligent and careful review of this Comment. I also thank my family who, though they will likely not read this Comment all the way through, endlessly encouraged me to "just keep swimming."

1. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

2. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).

3. *See, e.g.*, *id.* at 147 (O'Connor, J., concurring).

4. *See, e.g.*, United States v. Brown, 352 F.3d 654, 669 (2d Cir. 2003); United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997). *But see, e.g.*, State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993); Casarez v. State, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994); United States v. DeJesus, 347 F.3d 500, 502 (3d Cir. 2003).

5. *See* United States v. Villarreal, 963 F.2d 725, 728–29 (5th Cir. 1992) (declining to expand *Batson* to individual political beliefs); Morgan v. City of Albuquerque, 25 F.3d 918, 919 (10th Cir. 1994) (declining to expand *Batson* to personal association with disabled individuals); United States v. Prince, 647 F.3d 1257, 1261–62 (10th Cir. 2011) (declining to expand *Batson* to individual political beliefs).

6. Cheryl G. Bader, Batson Meets the First Amendment: Prohibiting Peremptory Challenges That Violate a Prospective Juror's Speech and Association Rights, 24 HOFSTRA L. REV. 567, 593 (1996).

scholars and argues that *Batson* logically expands to protect jurors from being peremptorily struck on the basis of that juror's protected associations under the First Amendment.

Section II of this Comment delves into *Batson*, its progeny, and lower court approaches to *Batson*'s expansion; additionally, it also gives a brief overview of the freedom of association. Section III.A examines *Batson*'s test for expansion and concludes that freedom of association is included. Section III.B looks at lower court attempts to address *Batson*'s expansion to association and concludes that these cases come up short. Section III.C argues that regardless of *Batson*'s expansion, some peremptory challenges on the basis of association are proxies for unconstitutional discrimination. Section IV concludes.

II. BACKGROUND

Peremptory challenges have been a part of American legal history since its inception.[7] While some trial attorneys and scholars are hesitant to discard the peremptory challenge from their litigation toolbelt,[8] others are more than ready to end its reign.[9] This Section begins in Subsection II.A by examining the peremptory challenge's place in the modern-day jury trial. Subsection II.B walks through *Batson*'s line of cases, briefly reviews lower court decisions expanding *Batson* to religion, and examines lower court attempts to address *Batson*'s relationship to the freedom of association. Subsection II.C concludes by giving a brief overview of the freedom of association.

---

7. Morris B. Hoffman, Peremptory Challenges Should be Abolished: A Trial Judge's Perspective, 64 U. CHI. L. REV. 809, 814 (1997).

8. Laura I. Appleman, Reports of Batson's Death Have Been Greatly Exaggerated: How the Batson Doctrine Enforces a Normative Framework of Legal Ethics, 78 TEMP. L. REV. 607, 639–40 (2005); Barbara L. Horwitz, The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?, 61 U. CIN. L. REV. 1391, 1439–40 (1993); see also Keith A. Ward, "The Only Thing in the Middle of the Road is a Dead Skunk and a Yellow Stripe": Peremptory Challenges—Take 'Em or Leave 'Em, 26 TEX. TECH L. REV. 1361, 1387 (1995) (arguing that courts must either abolish the peremptory challenge or abolish the restrictions on the peremptory challenge to remain logically consistent).

9. See, e.g., Hoffman, supra note 7, at 853; Karen M. Bray, Reaching the Final Chapter in the Story of Peremptory Challenges, 40 UCLA L. REV. 517, 564 (1992); Carol A. Chase & Colleen P. Graffy, A Challenge for Cause against Peremptory Challenges in Criminal Proceedings, 19 LOY. L.A. INT'L & COMPAR. L.J. 507, 536 (1997); Brent J. Gurney, The Case for Abolishing Peremptory Challenges in Criminal Trials, 21 HARV. C.R.-C.L. L. REV. 227, 230 (1986).

A. Peremptory Challenge Procedure

The jury system has existed nearly as long as civilization,[10] but the peremptory challenge does not have such a history. The first system to address something remotely similar to the modern peremptory challenge arose in Ancient Rome, but this system was not the driving force for the practice of peremptory challenges in America.[11] Instead, America adopted its system for peremptory challenges from English common law[12] which gave the defendant thirty-five challenges and the prosecution a potentially infinite number.[13] Modern state and federal peremptory challenges developed simultaneously, and today "every state recognizes some form of peremptory challenges for both sides in criminal and civil cases."[14] The challenges are exercised in voir dire after the litigants have had a chance to challenge potential jury members for cause.[15] Typically, the judge will begin by asking potential jurors questions to determine any biases they may hold, then the litigating attorneys will ask their own questions.[16] If a juror indicates she has an actual bias or is otherwise unfit to serve on the jury, she may be dismissed "for cause."[17] Jurors not dismissed for cause are, by definition, considered impartial and otherwise fit to serve on the jury.[18] Thus, jurors who are peremptorily challenged are not dismissed for any known biases, but often based on the "individual trial attorney's intuition as to the desirability of the particular juror."[19]

---

10. Hoffman, *supra* note 7, at 813–14.

11. *Id.* at 814–16.

12. Robert Wm. Best, Peremptory Challenges in Military Criminal Justice Practice: It Is Time to Challenge Them off, 183 MIL. L. REV. 1, 7 (2005).

13. Hoffman, *supra* note 7, at 820.

14. *Id.* at 827. Under the current rule adopted in 1946, the prosecutor and defendant each have a maximum of twenty peremptory challenges. *Id.* at 826; FED. R. CRIM. P. 24(b). The defendant has more peremptory challenges to exercise than the prosecutor in nine states. Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1507 (2015). The prosecutor is slightly more likely to make an effective peremptory challenge than the defendant. Norbert L. Kerr, Geoffrey P. Kramer, John S. Carroll & James J. Alfini, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 685–86 (1991) ("Thus, prosecutors were not only more sparing in their use of peremptories, they also showed some success in identifying jurors who would be unsympathetic to their case.").

15. Bader, *supra* note 6, at 576.

16. *Id.* at 573; Jonathan S. Tam, *Jury Selection (Federal)*, THOMAS REUTERS PRAC. L., https://1.next.westlaw.com/Document/I1163a635ffab11e498db8b09b4f043e0/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search) (last visited Oct. 10, 2021).

17. Tam, *supra* note 16.

18. Bader, *supra* note 6, at 575–76.

19. *Id.* at 576.

B. Batson's Jurisprudence

Batson's line of cases did not begin with its namesake, but instead began in the late 1800s with *Strauder v. West Virginia*.[20] *Strauder* was the first case to address the use of the peremptory challenge to extend the vestiges of racially motivated exclusions from jury participation.[21] Despite the enactment of the Civil Rights Act of 1875, which criminalized de jure juror exclusion on the basis of race, southern states continued to exclude African Americans from juries and used peremptory challenges as a last defense.[22] *Strauder* ended this de jure exclusion,[23] and later formed a foundation for *Batson*'s decision. *Batson* was then followed by a number of cases testing the boundaries of the peremptory challenge, ending with the Supreme Court's most recent decision in *J.E.B. v. Alabama*.

Although the Supreme Court has declined to expand *Batson* any further, lower courts have picked up *Batson* and carried it to its logical conclusion, prohibiting peremptory challenges on the basis of religion. A full examination of this expansion is beyond the scope of this Comment, though it is helpful to understand why some lower courts have done so.[24] A few lower courts have also started to address the problem of *Batson*'s expansion to the freedom of association.

1. Supreme Court's Approach to First Amendment Protections

The Supreme Court's decision in *Strauder* laid the foundation for

20. Strauder v. West Virginia, 100 U.S. 303 (1879).

21. Hoffman, *supra* note 7, at 829.

22. *Id.* at 828–29.

23. *Id.* at 829.

24. For scholarship dealing with *Batson*'s expansion to religious affiliation, see generally Courtney A. Waggoner, *Peremptory Challenges and Religion: The Unanswered Prayer for a Supreme Court Opinion*, 36 LOY. U. CHI. L.J. 285, 327–28 (2004) (advocating for *Batson*'s expansion to religious peremptory challenges but distinguishing between religious affiliation and held religious beliefs); Benjamin Hoorn Barton, *Religion-Based Peremptory Challenges after* Batson v. Kentucky *and* J.E.B. v. Alabama*: An Equal Protection and First Amendment Analysis*, 94 MICH. L. REV. 191, 193 (1995) (arguing that strict scrutiny is applied to religion-based peremptory challenges and concluding that such peremptory challenges cannot pass strict scrutiny); Christie Stancil Matthews, *Missing Faith in* Batson*: Continued Discrimination against African Americans through Religion-Based Peremptory Challenges*, 23 TEMP. POL. & C.R. L. REV. 45, 66 (2013) (arguing that religion-based peremptory challenges can preserve race-based discrimination); J. Suzanne Bell Chambers, *Applying the Break: Religion and the Peremptory Challenge*, 70 IND. L.J. 569, 570 (1995) (arguing against *Batson*'s expansion to religious peremptory challenges); and Angela J. Mason, *Discrimination Based on Religious Affiliation: Another Nail in the Peremptory Challenge's Coffin?*, 29 GA. L. REV. 493 (1995) (examining where *Batson* stands after an expansion to religious affiliation).

Batson's jurisprudence, even though it was not related to peremptory challenges. In response to an African American man removed from a jury for cause, the Court in *Strauder* struck down a West Virginia law prohibiting African Americans from serving on juries.[25] The Court reasoned that the Fourteenth Amendment was designed to "strike down all possible legal discriminations against" African Americans,[26] so a clearly discriminatory law could not stand against the Fourteenth Amendment.[27]

Nearly a century later, the Supreme Court decided *Swain v. Alabama*. Swain was an African American man convicted of rape by a jury made up entirely of white men.[28] Swain attempted to declare the jury void because of the jury's composition and the discriminatory use of peremptory challenges to strike six African American potential jurors,[29] but was denied by the trial court and the Alabama Supreme Court.[30] The United States Supreme Court ultimately affirmed the state court decisions.[31] The *Swain* Court affirmed that individuals should not be denied participation on a jury merely because of the individual's race,[32] but set a high standard for proving discriminatory peremptory challenges.[33] To prove a peremptory challenge was unconstitutionally exercised on the basis of race, the defendant would have to show the "prosecutor's systematic use of peremptory challenges against [African Americans] over a period of time."[34]

Batson's landmark decision challenged *Swain*'s difficult evidentiary standard and established a new standard in its place. In *Batson*, the petitioner, an African American man, was indicted on charges of second-degree burglary and receipt of stolen goods.[35] A jury entirely made up of white men convicted him on both counts.[36] The petitioner challenged the prosecutor's decision to peremptorily strike all four African American jurors, urging the United States Supreme Court to follow the lead of

25. *Strauder*, 100 U.S. at 304, 310.
26. *Id.* at 310.
27. *Id.* at 308.
28. Swain v. Alabama, 380 U.S. 202, 203, 205 (1965).
29. *Id.* at 205.
30. *Id.* at 203.
31. *Id.* at 228.
32. *Id.* at 204.
33. *Id.* at 227.
34. *Id.*
35. Batson v. Kentucky, 476 U.S. 79, 82 (1986).
36. *Id.* at 83.

several states and hold the conduct unconstitutional.[37] In its decision, the Court reaffirmed that purposefully excluding jurors because of race was a violation of the Equal Protection Clause.[38] The Court also reaffirmed its statement in *Strauder* that a defendant "has no right to a 'petit jury composed in whole or in part of persons of his own race,'" but that the juror does have a right to be tried by a jury whose members were selected in a non-discriminatory way.[39]

In this application of *Strauder*'s principals, the Court decided to abandon *Swain*'s high evidentiary bar in favor of a three-part test. First, the defendant must make out a prima facia case for purposeful discrimination by showing that he is a member of a "cognizable racial group," and the prosecutor exercised his peremptory challenge on account of the juror's race.[40] Second, the burden shifts to the state to counter with a "racially neutral selection criteria and procedure[]."[41] Finally, the trial court determines whether the defendant "established purposeful discrimination."[42]

Batson's jurisprudence was fleshed out in a series of cases spanning two years, beginning with *Powers v. Ohio*.[43] In *Powers*, a white man was indicted on aggravated murder and attempted aggravated murder.[44] During jury selection, the prosecution exercised peremptory challenges on six African American jurors.[45] Each time, the defendant challenged the action and asked the prosecution to explain his reasoning, but the court refused each request and excluded the jurors.[46] Powers was eventually convicted on both counts.[47] Powers argued that the exclusion of the African American jurors was a violation of the Equal Protection Clause, but the Ohio Court of Appeals affirmed the conviction and the Ohio Supreme Court dismissed the case.[48]

The United States Supreme Court granted certiorari to decide whether a white defendant could object to a peremptory challenge exercised against

37. *Id.*
38. *Id.* at 84.
39. *Id.* at 85–86 (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1879)).
40. *Id.* at 96.
41. *Id.* at 93–94 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).
42. *Id.* at 98.
43. Powers v. Ohio, 499 U.S. 400 (1991).
44. *Id.* at 402.
45. *Id.* at 403.
46. *Id.*
47. *Id.*
48. *Id.*

an African American juror,[49] and ultimately concluded that the defendant could.[50] In coming to its conclusion, the Court reasoned that *Batson* was decided to cure more than just the harm to the individual defendant, but also to address the harm to the "excluded jurors and the community at large."[51] The Court highlighted the harm that a juror faces when he is excluded for discriminatory reasons and emphasized the importance of jury service to the individual jurors.[52] "With the exception of voting," the Court wrote, "for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[53] When a court lets discrimination taint the jury selection process, it "damages both the fact and the perception of [the] guarantee" that the jury is a check "against the wrongful exercise of power by the State and its prosecutors."[54] Given this extensive harm to the litigants, the juror, and the judicial process, the Court concluded that the white defendant had standing to challenge a racially discriminatory exercise of peremptory challenges.[55]

The Court's next *Batson* case was decided about two months after *Powers*.[56] In *Edmonson v. Leesville Concrete*, Edmonson, a construction worker, sued Leesville Concrete after being harmed at a job site.[57] At jury selection, Leesville used two of its three peremptory challenges to remove two African American jurors.[58] Edmonson, an African American man, challenged these strikes as a violation of *Batson*.[59] The District Court refused Edmonson's challenge, claiming that *Batson* did not apply in civil cases, and the Fifth Circuit Court of Appeals, sitting en banc, affirmed.[60]

---

49. *Id.* at 404.

50. *Id.* at 415.

51. *Id.* at 406.

52. *Id.* at 407 (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 334–37 (Schocken 1st ed. 1961)) ("I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.").

53. *Id.*

54. *Id.* at 411.

55. *Id.* at 415.

56. *Hernandez v. New York* was the second *Batson* case decided in this two-year period and is largely regarded as expanding *Batson* to ethnicity as well. Bader, *supra* note 6, at 569 n.6. However, the Court merely accepted *Batson*'s expansion to ethnicity without offering any indication of the test for expansion and is thus not relevant to this Comment. *See* Hernandez v. New York, 500 U.S. 352, 355 (1991).

57. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

58. *Id.*

59. *Id.* at 616–17.

60. *Id.* at 617.

The Supreme Court granted certiorari to decide "whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race."[61] The Court concluded that exercising peremptory challenges is sufficiently a state action, and because the harms faced in the civil context are the same as those faced in the criminal context, *Batson* is applicable in the civil context as well.[62]

The following year, the Court additionally fleshed out the details of *Batson*'s application in *Georgia v. McCollum*.[63] In *McCollum*, two white defendants were on trial for aggravated assault and battery against two African Americans.[64] Before jury selection had even begun, the prosecution requested that the defendants be prohibited from exercising peremptory challenges on the basis of race because the defendants had evidenced their intention to exclude African American jurors.[65] The trial court refused, explaining that no state or federal law prohibited the defendant's discriminatory use of peremptory challenges.[66] The Georgia Supreme Court affirmed.[67] The United States Supreme Court granted certiorari and reversed the Georgia Supreme Court's decision, concluding that the defendant's peremptory challenge was sufficient state action and the prosecution had standing to challenge the peremptory challenges.[68] Thus, by the end of 1992, the Court expanded *Batson* to apply to defendants of a different race than potential jurors peremptorily struck,[69] apply in the civil context,[70] and apply regardless of whether the defendant or prosecutor exercised the discriminatory peremptory challenge.[71] These decisions signaled a shift in the Court's concern for the rights of the criminal defendant to the rights of the individual juror.[72]

J.E.B. v. Alabama ex rel. T.B. is the Court's most recent say on the expansion of *Batson*. *J.E.B.* involved a paternity and child support case

61. *Id.* at 616.
62. *Id.* at 628, 630.
63. Georgia v. McCollum, 505 U.S. 42 (1992).
64. *Id.* at 44.
65. *Id.* at 44–45.
66. *Id.* at 45.
67. *Id.*
68. *Id.* at 54–56.
69. Powers v. Ohio, 499 U.S. 400, 415 (1991).
70. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991).
71. *McCollum*, 505 U.S. at 54–55.
72. Kenneth J. Melilli, Batson *in Practice: What We Have Learned about* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 454 (1996).

between T.B. (the mother) and J.E.B. (the alleged father).[73] After for cause challenges were completed, ten of the thirty-three remaining jurors were male.[74] Alabama, on behalf of T.B., exercised nine of its ten peremptory challenges to remove male jurors.[75] J.E.B., in turn, used one of his peremptory challenges to remove a male juror, resulting in an all-female jury.[76] J.E.B. challenged the State's use of peremptory challenges against male jurors as a violation of the Equal Protection Clause, and argued that *Batson*'s logic applied to peremptory challenges exercised on the basis of gender as well as race.[77] The trial court rejected his argument.[78] The Alabama Court of Civil Appeals affirmed the trial court's decision, and the Alabama Supreme Court denied certiorari.[79] The United States Supreme Court granted certiorari and held "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[80]

In coming to its decision, the Court considered the history of the excluded group, stereotypes about the group, and the group's status under the Equal Protection Clause.[81] Despite confusion over which of these rationales is the correct threshold test for *Batson*'s expansion to new groups, scholars and courts alike have concluded that *J.E.B.*'s test for *Batson*'s expansion lies in the scrutiny the excluded group receives under the Equal Protection Clause.[82]

2. Lower Court Approaches to First Amendment Protections

A detailed explanation of lower court decisions to expand *Batson* to religion is beyond the scope of this Comment.[83] However, because the freedoms of religion and association are both protected by the First Amendment, a brief look into lower courts' expansion of *Batson* to religious peremptory challenges is relevant to this analysis. The Seventh

73. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 129–30.

80. *Id.* at 129.

81. *Id.* at 141–42 ("All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.").

82. *See infra* Section III.A.1.

83. *See* sources cited *supra* note 24.

Circuit's decision in *United States v. Stafford*[84] did not expand *Batson* to religious peremptory challenges; however, it did hint that expansion was proper when the court remarked, in dicta, that "[i]t would be improper and perhaps unconstitutional to strike a juror on the basis of his being" religious.[85] In *United States v. Brown*, the Second Circuit took this dicta a step further and actually expanded *Batson* to peremptory challenges exercised on the basis of the juror's religion.[86] In coming to its conclusion, the court determined that *Batson* applied to "any other classification receiving heightened or strict scrutiny under the [Equal Protection] Clause."[87] Because religious challenges are subject to strict scrutiny,[88] and because the litigants, jurors, and community suffer harm from the court's participation in "invidious group stereotypes" when jurors are struck for their religion, the Second Circuit concluded that *Batson* expands to religion.[89]

Lower court decisions considering *Batson*'s expansion to the freedom of association are rare, and none are directly on point. In *United States v. Villarreal*, Villarreal and two other defendants were convicted of murder.[90] Among the defendant's challenges on appeal was the prosecution's discriminatory use of peremptory challenges to dismiss jurors with a "general opposition to the death penalty."[91] The defendants argued that expression of views about the death penalty is expression of a political opinion protected by the First Amendment.[92] Because of political speech's constitutional protection, they argued, *Batson* should expand to

84. United States v. Stafford, 136 F.3d 1109 (7th Cir. 1998).

85. *Id.* at 1114.

86. United States v. Brown, 352 F.3d 654, 669 (2d Cir. 2003).

87. *Id.* at 668.

88. *Id.*

89. *Id.* at 669. The court echoed *J.E.B.*'s analysis that exclusion from "participation in the judicial process" would lead to an "inevitable loss of confidence in our judicial system." *Id.* (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994)). *United States v. Somerstein* reached a similar conclusion by different means, relying instead on the reasoning in Justice Thomas's dissent in *Davis v. Minnesota*, 511 U.S. 1115, 1117 (1994). 959 F. Supp. 592, 595 (E.D.N.Y. 1997). *But see* State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (declining to expand *Batson* to religion because "religious bigotry in the use of the peremptory challenge is not as prevalent, or flagrant, or historically ingrained in the jury selection process as race is," and thus does not create the same societal harm); Casarez v. State, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (declining to expand *Batson* to religion because "in the case of religion, the attribution is not overly broad, and therefore not invidious."); United States v. DeJesus, 347 F.3d 500, 510 (3d Cir. 2003) (holding that strikes based on religious involvement rather than religious affiliation were permissible, but declining to address whether *Batson* expanded to religion).

90. United States v. Villarreal, 963 F.2d 725, 726 (5th Cir. 1992).

91. *Id.* at 728.

92. *Id.*

protect it as well.[93] The Fifth Circuit, however, rejected the defendants' arguments in a few sentences, holding that *Batson* is meant to only address racial discrimination, and the Supreme Court did not intend to eliminate the peremptory challenge by its vast expansion.[94]

In *Morgan v. City of Albuquerque*,[95] the Tenth Circuit had a chance to weigh in on the possible expansion of *Batson* to association with certain persons. Morgan, who had lost her left arm and shoulder blade in an unrelated incident, sued the City of Albuquerque alleging an unlawful arrest.[96] Morgan lost her case and moved for a new trial, "alleging that the district court had improperly allowed Defendants to strike two jurors on the basis of their association with physically disabled people."[97] During jury selection, the City peremptorily challenged two jurors who were not themselves disabled, but claimed to know other disabled individuals.[98] On appeal, the court made clear that it would not decide *Batson* as it applied to physical disability, but only as it applied to the juror's association with some other individual.[99] In its short analysis, the court concluded that *Batson* would not expand in this respect.[100]

In *United States v. Prince*,[101] the Tenth Circuit had another chance to address *Batson*'s expansion. Prince was charged and convicted of "manufacturing marijuana plants" and "making false statements to a federally licensed firearms dealer."[102] Prince asserted a *Batson* challenge because the federal government used its peremptory challenges to remove four jurors who expressed positive views toward the legalization of marijuana.[103] Prince argued that *Batson* protects jurors from peremptory challenges on the basis of their "political or ideological beliefs" as well as their race.[104] The Tenth Circuit again declined to expand *Batson* in this respect, claiming that every court addressing a potential juror's express views has declined to expand *Batson*.[105]

93. *Id.* at 729.
94. *Id.*
95. Morgan v. City of Albuquerque, 25 F.3d 918 (10th Cir. 1994).
96. *Id.* at 919.
97. *Id.*
98. *Id.*
99. *Id.* at 920.
100. *Id.*
101. United States v. Prince, 647 F.3d 1257 (10th Cir. 2011).
102. *Id.* at 1260.
103. *Id.* at 1261.
104. *Id.*
105. *Id.* at 1262–63.

The most recent lower court opinion addressing *Batson*'s expansion to protect association also came from the Tenth Circuit in *Starr v. QuikTrip Corp.*[106] In *Starr*, the plaintiff sued his employer, QuikTrip, after he was fired upon return from his second deployment in the military.[107] During jury selection, QuikTrip exercised two peremptory challenges to remove potential jurors with prior military service.[108] Starr argued the peremptory challenges were unconstitutionally discriminatory, but the court disagreed, reasoning that military service, unlike race, gender, and religious affiliation, was not subject to heightened scrutiny and thus not protected by *Batson*.[109]

C. Fundamentals of Freedom of Association

The freedom of association is an expansive and complex constitutional doctrine, and its minutiae is not relevant to this Comment's analysis. However, an overview of the fundamental cases establishing the freedom of association and its treatment when threatened is useful to understand this Comment's basic argument.

1. Principal Association Cases

NAACP v. Alabama ex rel. Patterson is the principal case establishing the freedom of association.[110] In this case, the Alabama Attorney General demanded to see the NAACP's list of its members in connection with a suit against the NAACP to cease operations in the state.[111] The NAACP refused to produce such a list and was fined $10,000 for civil contempt.[112] "[B]ecause of the importance of the constitutional questions" at hand, the United States Supreme Court granted certiorari.[113] At the core of its decision, the Court recognized a "freedom to engage in association for the advancement of beliefs and ideas" assured by the Due Process Clause and closely related to the freedom of speech.[114]

Subsequent cases tested the boundaries of this doctrine's implication.

106. Starr v. QuikTrip Corp., 726 F. App'x. 692 (10th Cir. 2018).
107. *Id.* at 694.
108. *Id.*
109. *Id.* at 695.
110. NAACP v. Alabama. *ex rel.* Patterson, 357 U.S. 449 (1958).
111. *Id.* at 452–53.
112. *Id.* at 453.
113. *Id.* at 454.
114. *Id.* at 460.

Notably, *Bates v. City of Little Rock* confirmed the "freedom of association for the purpose of advancing ideas and airing grievances" and discussed a "repressive effect" implicating this freedom.[115] Bates, a record keeper for the NAACP, was fined for violating a municipal tax ordinance when he refused to provide a list of NAACP members to the city over fear of retaliation against the members.[116] Siding with Bates, the Court expanded *NAACP v. Alabama*'s reasoning that the requirement to disclose the list of members would "discourage[] new members from joining the organizations and induce[] former members to withdraw."[117] This repressive effect, the Court claimed, was sufficient to implicate the freedom of association on the facts of *NAACP v. Alabama*.[118] The Court further claimed that with such a "significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[119]

The Court in *Roberts v. U.S. Jaycees*[120] expanded on what activities are protected by the freedom of association. The Jaycees organization claimed a violation of its association rights when the Minnesota Supreme Court upheld the state's Human Rights Act, requiring the Jaycees to admit women as full voting members.[121] Although the Court sided against the Jaycees,[122] it did articulate that protected activities include a "pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[123] The government unconstitutionally interferes with this freedom when it, "seek[s] to impose penalties or withhold benefits from individuals because of their membership in a disfavored group."[124] Not every association, however, is covered by this doctrine.

In *City of Dallas v. Stanglin*, the Court refused to overturn a Dallas ordinance permitting only youth between the ages of fourteen and eighteen to enter certain dance halls.[125] The plaintiff claimed that this restriction was a violation of his freedom of association, but the Court disagreed, writing, "[t]hese opportunities might be described as 'associational' in

115. Bates v. City of Little Rock, 361 U.S. 516, 523–24 (1960).
116. *Id.* at 517–20.
117. *Id.* at 524.
118. *Id.*
119. *Id.* (citing *Patterson*, 357 U.S. at 449).
120. Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).
121. *Id.* at 615–17.
122. *Id.* at 628.
123. *Id.* at 622.
124. *Id.* (citing Healy v. James, 408 U.S. 169, 180–84 (1972)).
125. City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989).

common parlance, but they simply do not involve the sort of expressive association that the First Amendment has been held to protect," because "these patrons [do not] 'take positions on public questions'" or engage in similar expressive activities.[126]

2. Types of Association and Treatment When Threatened

The Court has recognized two types of protected associations: intimate associations and expressive associations. Intimate associations are those similar to the associations in *Roberts v. U.S. Jaycees*, having to do with the right of a group "against undue intrusion by the State."[127] Expressive associations are those described above, including "pursuit of . . . political, social, economic, educational, religious, and cultural ends."[128] This Comment is focused only on peremptory challenges as they affect expressive associations.

When the freedom of association is threatened, the violation is analyzed according to strict scrutiny.[129] Although the Court labels the freedom of association as protected by the Fourteenth Amendment's Due Process Clause,[130] the violation of fundamental constitutional rights will also implicate the Equal Protection Clause.[131] Fundamental constitutional rights include those "recognized as fundamental by the Supreme Court."[132] Because the Supreme Court has recognized the freedom of association as a fundamental right,[133] the violation of the freedom of association implicates the Equal Protection Clause, and the violating state action will be analyzed under strict scrutiny.

III. ANALYSIS

Batson's true test for expansion was articulated more clearly in *J.E.B.* and later affirmed by lower courts and scholars. That is, the threshold test

126. *Id.* at 24–25.

127. Roberts v. U.S. Jaycees, 468 U.S. at 618.

128. *Id.* at 622.

129. *Id.* at 623 ("Infringements on [the right to freedom of association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."); *see also* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61, 463 (1958).

130. *Patterson*, 357 U.S. at 460.

131. Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 125 (1989).

132. *Id.* at 125 n.17.

133. *See Patterson*, 357 U.S. at 460.

for *Batson*'s expansion is whether the subject of protection is accorded strict or intermediate scrutiny under the Equal Protection Clause.[134] However, this test may only be applied to expand *Batson* to the freedom of association if the freedom is implicated. Because peremptory challenges on the basis of association disincentivize such associations, this freedom is implicated.[135] Finally, *Batson* logically allows this expansion because the freedom of association is accorded strict scrutiny under the Equal Protection Clause when implicated, and the peremptory challenge fails to pass strict scrutiny.[136] Although lower courts have attempted to address this expansion, they fail to speak meaningfully on the issue.[137] However, even if courts reject this expansion, *Batson*'s basic framework supports protecting jurors from peremptory challenges on the basis of association when a trial attorney uses it as a proxy for racial discrimination.[138]

A. Batson Logically Permits Expansion

Batson lays down a framework for its expansion rooted in the Equal Protection Clause that supports protecting jurors who are peremptorily struck for their protected associations.[139] Peremptory challenges implicate the freedom of association which, in turn, triggers a strict scrutiny analysis. Despite their use, peremptory strikes do not pass this heightened standard of review, and thus do not stand in the way of protecting the freedom of association.

1. *Batson*'s Expansion Test

When the Supreme Court expanded *Batson*'s protection to prohibit peremptory challenges made on the basis of gender in *J.E.B. v. Alabama ex rel. T.B.*, it considered several rationales supporting expansion, including history of the excluded group, stereotypes about the group, and the group's status under the Equal Protection Clause.[140] This leaves the

134. *See, e.g.*, United States v. Brown, 352 F.3d 654, 668 (2d Cir. 2003); Melilli, *supra* note 72, at 454–55.

135. *See infra* Section III.A.2.

136. *See infra* Section III.A.3.

137. *See infra* Section III.B.

138. *See infra* Section III.C.

139. *See infra* Section III.A.1.

140. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 141–42 (1994) ("All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of

reader to reasonably wonder what the threshold test for expansion of *Batson* is and what role these rationales play in that analysis. An analysis of *Batson, J.E.B.*, lower courts', and scholars' views indicate that *Batson*'s threshold test for expansion is whether the group to be protected is accorded strict or intermediate scrutiny under the Equal Protection Clause.[141] The Court's other considerations do not affect the threshold test, but they do inform the Court's reasoning for adopting this test.

The Court's threshold test for determining *Batson*'s expansion hinges on whether the subject of protection is accorded strict or intermediate scrutiny under the Equal Protection Clause.[142] The *J.E.B.* Court, when considering whether *Batson*'s expansion to gender would render the peremptory challenge toothless, concluded that trial lawyers may still peremptorily strike "any group or class of individuals normally subject to 'rational basis' review."[143] In his dissent from denial of certiorari in *Davis v. Minnesota*, Justice Thomas concluded that there is "no principled reason . . . for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause."[144] Additionally, several lower courts, when considering whether *Batson* expands to peremptory strikes on the basis of religion, have concluded that *Batson*'s expansion test is whether the group is accorded heightened scrutiny under the Equal Protection Clause.[145] This view of *Batson*'s expansion test is also strongly supported by scholars.[146] The Court's true test for *Batson*'s expansion, therefore, is whether the subject for expansion is accorded heightened scrutiny under the Equal Protection Clause.

Despite this seemingly clear test, the *J.E.B.* Court confuses the analysis by introducing additional rationales that do not affect the

---

discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.").

141. *See infra* Section III.A.1.

142. *See J.E.B.*, 511 U.S. at 143, 146 (explaining that the court must determine if the discrimination is forbidden by the Equal Protection Clause and noting that peremptory challenges may still be exercised against groups subject to rational basis review).

143. *Id.* at 143.

144. Davis v. Minnesota, 511 U.S. 1115, 1117 (1994) (Thomas, J., dissenting).

145. *See* United States v. Brown, 352 F.3d 654, 667–68 (2d Cir. 2003) (citing *J.E.B.*, 511 U.S. at 143); United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (citing *Davis*, 511 U.S. at 1117 (Thomas, J., dissenting)).

146. *See* Melilli, *supra* note 72, at 455; Vivien Toomey Montz & Craig Lee Montz, *The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law*, 54 U. MIA. L. REV. 451, 465 (2000) (claiming that, according to *Batson*'s expansion test, it should extend to First Amendment rights); Hoffman, *supra* note 7, at 839 (claiming that there is no principled reason that peremptory challenges should not be extended to religion); Bader, *supra* note 6, at 593.

underlying test. The Court first addresses the history of discrimination rationale. The defense argued that gender discrimination ought to be permitted because "'gender discrimination in this country . . . has never reached the level of discrimination' against African Americans."[147] The Court responded that, although gender and racial discrimination are different, the similarities regarding the historical ability to serve on a jury outweigh the differences.[148] Like African Americans, women were completely excluded from jury service for a long period of the country's history.[149] This analysis may cause the reader to reasonably conclude that *Batson* may only be expanded to groups that share a similar history with African Americans or women with respect to jury service. The Court went on, however, to reject this notion, claiming that the examination of similar histories between women and African Americans "is necessary only to acknowledge . . . a history which warrants the heightened scrutiny we afford all gender-based classifications today."[150] In saying this, the Court concluded that considering a group's historical suffering is helpful only to determine whether discrimination against the group is subject to heightened scrutiny. Therefore, if the Court has previously determined that discrimination against a group is subject to heightened scrutiny, then *Batson*'s expansion does not require comparing it to the histories of *Batson*'s already-protected groups.

The *J.E.B.* Court also addressed the role that stereotypes about a group's views play in *Batson*'s expansion analysis. The defense in *J.E.B.* argued that group stereotypes may justify peremptory challenges against the group.[151] Specifically, the defense argued that it was reasonable to strike males from the jury because history showed that men would be more likely to support the alleged father in a paternity action than they would the mother.[152] The Court rejected this assertion, stating that it would "not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'"[153] The Court further explained that the defense's argument would require the Court to accept the same stereotypes that excluded women from juries and would be impermissible if they were

147. *J.E.B.*, 511 U.S. at 135 (quoting Brief for Respondent at 9, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (No. 92-1239)).

148. *Id.*

149. *Id.* at 136.

150. *Id.* (citation omitted).

151. *Id.* at 137 (quoting Brief for Respondent at 10, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (No. 92-1239)).

152. *Id.* at 137–38.

153. *Id.* at 138 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)).

made on the basis of race.[154] The Court staunchly rejected peremptory challenges exercised on the basis of gender as invidious discrimination, concluding that the struck jurors "for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree."[155]

The Court's reasoning in *J.E.B.* is strongly reminiscent of its reasoning in *Batson*, where it wrote that peremptory challenges exercised on the basis of the potential juror's race were exercised "on the false assumption that members of [the juror's] race as a group are not qualified to serve as jurors."[156] The Court repeatedly emphasized the idea that the Equal Protection Clause prohibits discrimination that is based entirely upon an assumption that African American jurors could not act impartially toward an African American defendant.[157] The *J.E.B.* opinion repeatedly emphasized that peremptory challenges may not be exercised on the basis of a group stereotype.[158] Despite this emphasis, the Court did not consider discrimination based on a group stereotype the test for expanding *Batson*'s protections. Instead, the Court considers group stereotypes when determining whether peremptory challenges on the basis of gender "substantially further[] the State's legitimate interest in achieving a fair and impartial trial."[159] The Court, therefore, is not using group stereotypes as the threshold to determine whether *Batson* should expand to the discriminated group, but only to determine whether the discrimination can pass the associated level of scrutiny.

2. Freedom of Association is Implicated by Peremptory Challenges

Before it is possible to determine whether *Batson* should expand to peremptory challenges based on an individual's protected associations, it is necessary to acknowledge how the freedom of association is implicated by peremptory strikes. To more easily understand this application, consider a young citizen who has received her first jury notice in the mail. She is eager to perform her civic duty, so she quickly responds. A few weeks later, the court clerk informs her that she should arrive at the courthouse on a certain date to be asked questions in voir dire. The citizen

154. *Id.* at 139–40.

155. *Id.* at 142.

156. Batson v. Kentucky, 476 U.S. 79, 86 (1986) (citing Norris v. Alabama, 294 U.S. 587, 599 (1935)).

157. *Id.* at 97.

158. *See J.E.B.*, 511 U.S. at 128, 131, 139, 141–42.

159. *Id.* at 136–37.

is emboldened by her chance to serve her community and uses that energy to become a member of the NAACP. When the citizen arrives to the courthouse, she is asked on a form about her associations, and she answers that she is a new member of the NAACP. When the forms are submitted, one of the trial attorneys attempts to remove her for cause because of her participation in the NAACP. The judge refuses, so the lawyer exercises a peremptory challenge to remove the citizen from the jury. The citizen drives home, disheartened that she cannot serve on the jury because of her participation in the NAACP. The citizen is now determined to terminate her membership in the hope that if she is chosen again to serve on a jury, she will not be excluded. Indeed, if she had known that her membership with the NAACP would exclude her from the jury, she never would have signed up in the first place.

This hypothetical is perhaps unrealistic, given that many individuals take measures to avoid jury service, but there are still individuals who would revel at the chance to participate in the legal system.[160] Although the citizen may not realize it, her associational rights have been implicated by being turned away from jury service for no reason other than her membership with the NAACP.

In *Bates v. City of Little Rock*, the Court described this as the "repressive effect."[161] There, the Court recounted how the government's mandate that NAACP membership lists be disclosed in *NAACP v. Alabama* created a "fear of community hostility and economic reprisals . . . [and] discouraged new members from joining the organizations and induced former members to withdraw."[162] Although membership in a group such as the NAACP is less likely to cause fear of violence or economic oppression for the member currently, it may still induce the member to terminate her membership, or refuse membership in the first place, as in the above hypothetical. Professor Cheryl Bader describes a similar effect, which she calls the "chilling effect," regarding

160. There is no shortage of guides with tips to avoid jury duty, and individuals occasionally take more drastic measures to avoid being chosen to serve on a jury. *See, e.g.*, Dave Cheng, *Here's Your Guide to Getting out of Jury Duty*, BUS. INSIDER (Dec. 31, 2013, 9:36 AM), https://www.businessinsider.com/how-do-i-avoid-jury-duty-2013-12 [https://perma.cc/5CEG-49Q7]; Kathianne Boniello, *The Wackiest Excuses People Use to Get out of Jury Duty*, N.Y. POST (Jan. 4, 2015, 8:58 AM), https://nypost.com/2015/01/04/the-wackiest-excuses-people-use-to-get-out-of-jury-duty/ [https://perma.cc/P9ZA-2VLY].

161. Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958)).

162. *Id.*

a potential juror's willingness to exercise the right to free speech.[163] She claims that, while an excluded juror is not expressly precluded from exercising her free speech rights, the juror may be inhibited from exercising these rights "for fear of facing rejection from service on a trial."[164] The excluded juror's free speech rights are thus implicated by a discriminatory peremptory challenge.[165]

The implication of association rights becomes clearer when considering the forced dichotomy the juror faces between her right of association and her duty to serve as a juror. In the most general sense, peremptory challenges exercised because of a potential juror's protected associations forces the juror to choose between her rights. The Supreme Court has clearly established that freedom of association is a fundamental right in its landmark case, *NAACP v. Alabama*.[166] The Court has also expressed the great importance of jury service, stating that it "preserves the democratic element of the law," and is the citizen's "most significant opportunity to participate in the democratic process" outside of voting.[167] Professor Andrew Leipold echoes these endorsements, claiming that jury service is, in fact, a right held by the citizen.[168] When a state actor exercises a peremptory challenge to exclude a potential juror because of her protected association, the actor is essentially telling the potential juror that her mere association makes her unfit to exercise one of the "basic rights of citizenship."[169] Thus, the potential juror is forced to decide which of her rights she must set aside: should she continue to exercise her right of association and be denied her right to serve as a juror, or should she abandon her protected associations to fulfill her civic duty? In a situation where the juror is legally permitted to have her cake and eat it too, she is forced to choose.[170] Thus, in situations such as these, the potential juror's right to association is implicated by the exercise of discriminatory peremptory challenges.

---

163. Bader, *supra* note 6, at 600–01.

164. *Id.* at 601.

165. *Id.*

166. *See supra* Section II.C; *Patterson*, 357 U.S. at 460.

167. Powers v. Ohio, 499 U.S. 400, 407 (1991) (citing Green v. United States, 356 U.S. 165, 215 (1958)).

168. Andrew D. Leipold, Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation, 86 GEO. L.J. 945, 979 (1998).

169. Lockhart v. McCree, 476 U.S. 162, 176 (1986).

170. This famous phrase represents a natural dichotomy—a person cannot simultaneously eat the cake and retain the whole cake. Choosing between two legal rights, on the other hand, is an unnatural dichotomy that is forced on the potential juror.

3. Peremptory Challenges Discriminating Against Association Do Not Pass Strict Scrutiny

With respect to jurisdictions that chose to expand *Batson*'s protections to peremptory challenges exercised on the basis of religion, *Batson*'s lateral expansion to association follows naturally.[171] The rationale that courts employed to expand *Batson* to religion are also applicable to expand *Batson* to association: both religion and association are First Amendment rights accorded strict scrutiny when challenged;[172] the litigants, jurors, and community face the same harm from religion-based and association-based peremptory challenges as they do a race-based or gender-based peremptory challenge;[173] and peremptory challenges are no more persuasive when exercised on the basis of religion than they are when exercised on the basis of association.

With respect to every other jurisdiction, it is necessary to fully analyze whether *Batson* logically expands to protect against peremptory challenges exercised on the basis of protected associations. Recall that *Batson*'s true test, despite several factors seemingly clouding the analysis, is whether the right to be protected is afforded intermediate or strict scrutiny under the Equal Protection Clause. Actions that challenge the right to association are judged according to strict scrutiny.[174] Additionally, the Equal Protection Clause is implicated when government action infringes on a "fundamental constitutional right."[175] A constitutional right is considered fundamental if it is "expressly protected by specific constitutional provisions . . . [or is] recognized as fundamental by the

171. *See* United States v. Brown, 352 F.3d 654, 668 (2d Cir. 2003) (quoting Diesel v. Town of Lewisboro, 232 F.3d 92, 103 (2d Cir. 2000)) (expanding *Batson* to religious affiliation because "[r]eligion, like race and gender, is an 'impermissible consideration' in government decision-making"); United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998) (remarking, in dicta, "[i]t would be improper and perhaps unconstitutional to strike a juror on the basis of his [religious affiliation]."); United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (citing Davis v. Minnesota, 511 U.S. 1115, 1117 (1994) (Thomas, J., dissenting) (using Justice Thomas's *Davis* dissent to expand *Batson* to religion affiliation because it is "accorded heightened scrutiny under the Equal Protection Clause").

172. *Brown*, 352 F.3d at 668.

173. *Id.* at 669 (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128, 140 (1994)).

174. Leipold, *supra* note 168, at 980; *see also* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61, 463 (1958); Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("Infringements on [the right to freedom of association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

175. Galloway, *supra* note 131, at 125.

Supreme Court."[176] The Supreme Court has, in fact, recognized the right of association as a fundamental right.[177] Therefore, infringements on the right of association are addressed under the Equal Protection Clause.[178] Because association is afforded strict scrutiny and is protected by the Equal Protection Clause, *J.E.B.* logically supports *Batson*'s expansion to association.[179] This view of *Batson*'s expansion to the right of association is also shared by several scholars,[180] although only a few have analyzed it beyond a single sentence.[181]

The final step in the expansion of *Batson* is determining whether a peremptory strike exercised on the basis of protected association can withstand strict scrutiny. To withstand strict scrutiny, the peremptory challenge must serve a compelling government interest and its means to serve that interest must be the least intrusive on the right of association.[182] The government has several possible interests for retaining the peremptory challenge, but generally, these interests are less than compelling. Additionally, the peremptory challenge is not the least restrictive means of serving these interests.

To evaluate the first prong of this test, it is necessary to consider the government's possible compelling interests. Professor Andrew Leipold analyzes this question and concludes that the government has a compelling interest in the "defendant's . . . right to an impartial jury[,] the defendant's ability to participate in voir dire[,] and the government's need to preserve public confidence in the courts."[183] There is little doubt that the

176. *Id.* at 125 n.17.

177. *Patterson*, 357 U.S. at 460.

178. Bader, *supra* note 6, at 570.

179. *Id.*

180. *See, e.g.*, Montz & Montz, *supra* note 146, at 465.

181. For scholarship analyzing this expansion in detail, see Bader, *supra* note 6, and Leipold, *supra* note 168. It is difficult to say exactly why there has been little discussion of *Batson* and the freedom of association in the last 20 years. The likely and unsurprising answer is timing and relevance in the public and legal eye. Countless articles were published on *Batson* in the years following the *J.E.B.* decision. *See, e.g.*, Melilli, *supra* note 72. Recently, there has been in influx of scholarship on *Batson*'s relationship to gender identity and sexual orientation. *See, e.g.*, Julia C. Maddera, Batson *in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression*, 116 COLUM. L. REV. 195 (2016); Jessica Satinoff, *Coming out of the Venire: Sexual Orientation Discrimination and the Peremptory Challenge*, 11 FIU L. REV. 463 (2016). This is possibly in response to prominent cases on these subjects that have caught public attention. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the Fourteenth Amendment requires states to recognize same-sex marriage). It is possible that if threats against the freedom of association become a household—and legal—debate in future years, courts and scholars alike will begin to seriously consider *Batson*'s expansion in this way.

182. *See supra* Section II.C.

183. Leipold, *supra* note 168, at 981–82.

defendant's right to an impartial jury is a compelling interest, but the other two potential interests show themselves to be less than compelling when scrutinized.[184] The litigant's participation in the trial becomes less compelling when considering the trial attorney's true motivation: to get a jury that is unfair insofar as it is more likely to decide in that party's favor.[185] Additionally, the defendant's participation seems much less compelling considering that federal law limits the litigants' participation in jury selection.[186] As for concerns regarding the court's legitimacy, the court is likely to suffer not only when persons of a certain race or gender are systematically removed, but also when jurors are removed for their protected associations.[187]

Although the government has a compelling interest in assuring an impartial jury, the peremptory challenge is not the least restrictive means of advancing this interest. Instead, this interest is better addressed by the for cause challenge. By definition, a jury that survives for cause challenges is capable of sitting fairly and impartially. Thus, the peremptory challenge can—at best—do nothing more than to "take an already fair jury and make it *more* fair."[188] The trial lawyer may hesitate to place the burden of assuring a fair trial on the back of the for cause challenge, given that judges may occasionally err in refusing to dismiss jurors for cause.[189] This risk is not so troubling, however, when considering that an "impartial judge has heard the same information that the lawyers heard and considered the arguments by both lawyers on the juror's fitness."[190] Because the judge and trial attorneys have the same information about the juror, it is unlikely that the trial attorneys' intuition would seat a jury any more fair than a judge would.

4. Limitations and Counter Arguments

The principal idea of this Comment—that *Batson*'s own framework logically permits its expansion to association—is not without its limitations or counter arguments. First, the Supreme Court has limited "association" to mean something specific, and only those associations will

184. *Id.* at 982, 985.

185. *Id.* at 985.

186. *Id.*

187. *Id.* at 986.

188. *Id.* at 983.

189. Whether a judge was wrong to refuse a for cause challenge is difficult to observe objectively, but it is reasonable to believe that judges, like every other human being, are not immune to mistakes or misjudgments. *Id.* at 983–84.

190. *Id.* at 984.

be protected by this expansion. Second, this expansion faces the counter argument that a juror's associations actually do tell the trial lawyer something about the juror's thoughts. Finally, the expansion must address a fear that trial attorneys have every time a court threatens to expand *Batson*: that this time, the expansion will be the death of the peremptory challenge.

In *City of Dallas v. Stanglin*, the Supreme Court limited the freedom of association by reaffirming its earlier statement in *Roberts v. U.S. Jaycees*. In *Stanglin*, the plaintiff argued that a local ordinance prohibiting people of certain ages from entering certain dance halls was a violation of their freedom of association.[191] The Court rejected this argument, holding that not every "social association" was sufficient to implicate the First Amendment.[192] Instead, the Court reaffirmed *Roberts*'[193] definition of expressive association: associations for the purpose of "political, social, economic, educational, religious, and cultural ends."[194] Thus, any peremptory challenge on the basis of an association that falls widely outside of the definition in *Roberts* has an unpromising future for protection under even this expansion of *Batson*.

The counter argument immediately lodged against any prospective expansion of *Batson* to the First Amendment is that the potential juror's association tells the trial attorney something about the juror's positions and informs a decision to challenge the juror peremptorily.[195] A trial lawyer may stereotype a potential juror about the views they hold based on their associations, but this alone is not enough to justify a peremptory challenge. Because the potential juror has not been struck for cause, they are, by definition, considered neutral and able to consider the case fairly.[196] The juror's associations may give the trial attorney a hint into the juror's actual beliefs, but without any indication that the juror actually holds those beliefs, the risk that she does hold a certain view is better addressed by the for cause challenge.[197] If the trial attorney has an indication that the juror's

191. City of Dallas v. Stanglin, 490 U.S. 19, 23 (1989).

192. *Id.* at 25.

193. *Id.*

194. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

195. Leipold, *supra* note 168, at 988.

196. Bader, *supra* note 6, at 575–76.

197. Leipold, *supra* note 168, at 988–89. It is difficult to distinguish between the stereotypes a trial attorney believes about a juror based on her associations and the juror's actual views, but the process of making this distinction is beyond the scope of this Comment. Finding this difference is not impossible, however, because several courts have made a similar distinction in the context of religion: although a juror's religious *beliefs* bear some relation to her fitness as a juror, her religious *affiliation*

actual views would make her unfit to serve as a juror, then the court can examine those views independent of her mere association. If the court, viewing all the facts regarding the potential juror's association, determines this risk is not great enough to affect the juror's ability to sit fairly, then the juror's mere association does not pose a significant enough threat to the fairness of the trial that the trial attorney should be allowed to peremptorily challenge the juror.[198] A trial attorney who strikes a juror on the basis of her stated association without any indication of her actual views discriminates against the juror's association because the attorney assumes that a member of such an association per se cannot be impartial.

A final counter argument addressed in every case regarding *Batson*'s expansion, and even *Batson* itself, is that the expansion will be the final blow to the peremptory challenge, effectuating its demise.[199] Another expansion of *Batson* is unlikely to completely eliminate the peremptory challenge. Instead, it will require trial lawyers to be more careful in their reasons for exercising peremptory challenges. Despite *Batson*'s expansion in some states, the peremptory challenge remains a staple tool in jury selection.[200] Another restriction on peremptory challenges will require the trial attorney to be sure that he is challenging a juror because of the juror's actual beliefs, rather than what the trial attorney thinks the juror believes.

Even if this expansion of *Batson* does eliminate the peremptory challenge, it would not be the worst thing to happen to jury selection procedure. Peremptory challenges have been very unpopular in academia for some time.[201] Additionally, trial attorneys are not as accurate in judging juror attitudes as they may think they are.[202] In fact, an empirical

---

is not sufficient grounds for a peremptory challenge. *See, e.g.*, State v. Purcell, 18 P.3d 113, 121 (Ariz. Ct. App. 2001); State v. Hodge, 726 A.2d 531, 553 (Conn. 1999); United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998); People v. Martin, 75 Cal. Rptr. 2d 147, 151 (Ct. App. 1998); United States v. DeJesus, 347 F.3d 500, 510 (3d Cir. 2003).

198. Leipold, *supra* note 168, at 988–89.

199. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 147 (1994) (O'Connor, J., concurring); Ward, *supra* note 8, at 1388; Horwitz, *supra* note 8, at 1428–29; Waggoner, *supra* note 24, at 324–26; Mason, *supra* note 24, at 537–38.

200. *See, e.g.*, United States v. Brown, 352 F.3d 654, 668 (2d Cir. 2003) (extending *Batson* to religion).

201. *See, e.g.*, Hoffman, *supra* note 7, at 809–11; Bray, *supra* note 9, at 564; Chase & Graffy, *supra* note 9, at 536; Gurney, *supra* note 9, at 230; Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 375 (2010). *But see* Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713 (2018) (arguing that despite shortcomings in trial, *Batson* and the peremptory challenges can be useful tools for appeal).

202. Kerr et al., *supra* note 14, at 685; Hans Zeisal & Shari Seidman Diamond, *The Effect of*

study from 1991 concluded that "defense attorneys would have done no worse in exercising their peremptory challenges had they simply flipped coins rather than analyzing [jury] responses."[203] Finally, if the principal point of this Comment is correct and *Batson* does logically expand to protect the freedom of association, a policy question remains: are we willing to put a largely convenient, but not constitutionally mandated,[204] practice ahead of the potential juror's constitutional rights?

B. Examining Lower Court Cases

Very few circuit courts have attempted to answer whether *Batson* should expand to protect association, though the courts that have addressed it appear at first glance to reject *Batson*'s expansion. This apparent rejection is merely that—apparent—because a closer look at these lower court cases reveals that circuit courts have not answered this principal question, in part because of a systematic confusion between the juror's actual views and the views the trial attorney assumes the juror has.

1. The Fifth Circuit

The Fifth Circuit attempted to address this problem in *United States v. Villarreal*.[205] In that case, the State peremptorily struck all jurors expressing an opposition to the death penalty.[206] In response, the defendants argued these jurors were expressing a political opinion and the State could not "discriminatorily exclude[] [potential jurors] from jury participation on the basis of their expression of a political belief."[207] The court considered the success of this argument an expansion of *Batson* and

---

Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, 30 STAN. L. REV. 491, 517 (1978) ("[I]n the aggregate, the prosecutors made about as many good challenges as bad ones. The defense counsel's average performance . . . is slightly better . . . .").

203. Kerr et al., *supra* note 14, at 685. For other scholarship on predicting jury attitudes, see Rachael A. Ream, *Limited Voir Dire: Why It Fails to Detect Juror Bias*, 23 CRIM. JUST. 22, 22 (2009) (arguing that juror bias is not accurately predicted without an expansion of voir dire); and Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 AM. J. TRIAL ADVOC. 285, 297 (1995) (finding that jury demographics can be telling to how jurors will vote in a certain case, but that the predictions are not translatable to other fact patterns). *See also* Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 208–10 (2005) (analyzing the role that conscious and unconscious bias and stereotypes play in the jury selection process).

204. Leipold, *supra* note 168, at 982.

205. United States v. Villarreal, 963 F.2d 725, 728 (5th Cir. 1992).

206. *Id.*

207. *Id.*

ultimately rejected it for two reasons.[208] First, the court asserted that *Batson* and *Powers*, the principal cases at the time, applied only to racial discrimination.[209] Second, the court believed that the expansion of *Batson* in this case would effectively end the peremptory challenge—a result the Supreme Court did not intend when forming the *Batson* jurisprudence.[210]

The *Villarreal* court's first reason for rejecting an expansion of *Batson* is obviously errant given the expansion to gender discrimination in *J.E.B. v. Alabama*. Because *J.E.B.* was decided two years after the Fifth Circuit's decision here, it cannot be held against the court. However, the court's reasoning on this first point is also question-begging. The *Villarreal* court does not seriously consider an expansion of *Batson*, citing that *Batson* had not yet been expanded.[211] In arguing this, the court neglected to address the underlying, crucial question of whether *Batson* ought to be expanded. *Batson* itself gave some inklings of reasoning that could be used for its expansion, such as the Equal Protection Clause more broadly protecting members of a group from an assumption that they are not fit to serve on a jury merely because of their membership in that group.[212] The *Villarreal* court, however, chose to reject *Batson*'s expansion without giving any serious thought to whether *Batson* warranted expansion. Therefore, the *Villarreal* court's first reason does not stand in the way of *Batson*'s expansion.

The *Villarreal* court's second reason for rejecting *Batson*'s expansion errs because it fails to address the crucial distinction between an assumption of a juror's beliefs and the juror's actual beliefs. In *Villarreal*, the State struck potential jurors for their actual views on the death penalty, not for views the State assumed they held.[213] The court assumes that *Batson*'s expansion to prohibit peremptory challenges on the basis of a juror's actual beliefs would eliminate the peremptory challenge,[214] and the court may be correct in assuming that this expansion would render the peremptory challenge powerless. However, *Batson* is not threatened by strikes against jurors for their actual views when those views indicate they are unfit to serve as jurors.[215] Instead, the potential jurors' actual views in

208. *Id.* at 728–29.
209. *Id.* at 729.
210. *Id.*
211. *Id.*
212. Batson v. Kentucky, 476 U.S. 79, 86 (1986).
213. *Villarreal*, 963 F.2d at 728.
214. *Id.*
215. Bader, *supra* note 6, at 602.

Villarreal indicated that they ought to be struck for cause, so *Batson* has no role in this analysis.[216] Because the *Villarreal* court confuses whether *Batson* is actually implicated, their second reason also does not stand against *Batson*'s expansion. However, even if the struck jurors were, for example, part of an anti-death penalty club, the strikes against them would not offend the principal argument of this Comment because they were not struck for their mere association, but for their actual views they indicated to the court.

2. The Tenth Circuit

The Tenth Circuit has decided several cases that look like attempts to address *Batson*'s expansion, the first being *Morgan v. City of Albuquerque*. In *Morgan*, the defendants peremptorily struck two jurors who stated they personally knew disabled persons, in apparent fear that the potential jurors would be overly sympathetic to the plaintiff, who had lost her left arm in an unrelated event.[217] The plaintiff challenged these strikes, but the district court allowed them, "concluding that the principles of *Powers* and *Batson* did not extend to include peremptory strikes on the basis of physical disability."[218] The circuit court ultimately agreed, writing, "there is no support for the proposition that equal protection analysis should be further extended to cover persons who are not members of the group but merely have some association with them."[219]

The *Morgan* court's opinion leaves an answer to the principal question still desired. In the court's brief dismissal of the *Batson* challenge in this case, it remains unclear what the court's reasoning was.[220] The court may have concluded that *Batson* does not expand to protect association, though it is equally plausible the court concluded that the "employment and familial relationships" between the struck jurors and their disabled acquaintances "fall outside the scope of 'associations' protected under the First Amendment."[221]

In *United States v. Prince*, the Tenth Circuit had another chance to approach expansion.[222] In *Prince*, the State peremptorily struck four

216. *Id.*
217. Morgan v. City of Albuquerque, 25 F.3d 918, 919 (10th Cir. 1994).
218. *Id.*
219. *Id.* at 920.
220. Bader, *supra* note 6, at 603.
221. *Id.*
222. United States v. Prince, 647 F.3d 1257, 1261 (10th Cir. 2011).

potential jurors who expressed views that marijuana ought to be legalized.[223] The defendant argued that the potential jurors' answers in voir dire were expressions of their political and ideological beliefs, and because *Batson* protected potential jurors from being peremptorily struck on account of their race, it also must protect potential jurors from being peremptorily struck on account of their political or ideological beliefs.[224] *Prince* is not directly on point to answer whether *Batson* expands to include association rights because it speaks to the right of speech, not association. However, given that both association and speech are First Amendment rights accorded similar review under the Equal Protection Clause when challenged, the analysis is sufficiently similar to warrant review here. Moreover, if the Tenth Circuit made the decision to expand *Batson* to speech, that very precedent would likely be used to expand *Batson* to association, much like the lateral move from religion to association. Therefore, the court's logic used here may be used to determine if the Tenth Circuit would expand *Batson* to association.

Despite the possibilities of using *Prince* to explain the Tenth Circuit's view on expansion of *Batson* to association, the *Prince* opinion still falls short of any such explanation. In explaining why it declined to expand *Batson* in this case, the court pointed to decisions by other courts detailing the difference between the potential juror's actual views and assumed views.[225] The court reiterated, stating, "[t]he fact that a prospective juror is a certain race or sex is not determinative of his ability to be a dispassionate fact-finder. On the other hand, a person's policy views or ideological perspectives on a particular issue may introduce bias and impair a juror's ability to be impartial."[226] In saying this, the court recognized the crucial difference between the potential juror's actual views and the potential juror's assumed views, and rejected the notion that *Batson* expands to protect a juror from being struck for the juror's actual views.[227] The *Prince* court, while acknowledging this crucial difference, failed to address the peremptory strike exercised on the basis of the potential juror's assumed views. A peremptory strike exercised on the basis of a potential juror's protected associations is a strike for the juror's

223. *Id.*

224. *Id.*

225. *Id.* at 1262 (citing United States v. DeJesus, 347 F.3d 500, 511 (3d Cir. 2003); United States v. Stafford, 136 F.3d 1109, 1114 (7th Cir. 1998)).

226. *Prince*, 647 F.3d at 1262–63.

227. *Id.* at 1263.

assumed views, not her actual ones.[228] Therefore, the Tenth Circuit's decision in *Prince* does not help answer this Comment's principal question.

The Tenth Circuit's most recent case that may be interpreted as addressing this question is *Starr v. QuikTrip*, where the plaintiff challenged the defendant's use of peremptory challenges to strike two potential jurors with prior military service.[229] The court acknowledged the test set out in *J.E.B.* allowing for the potential expansion of *Batson* to classifications receiving heightened scrutiny, but declined to expand *Batson* on the facts, stating that "classifications based on military service have never received heightened scrutiny under the Fourteenth Amendment."[230] The *Starr* court's decision offers no further insight into the Tenth Circuit's views on *Batson*'s expansion to association. As the court noted, the classification of military service is not accorded heightened scrutiny, so *Batson*'s test does not favor its expansion. Additionally, military service is not an expressive association within the meaning set out in *Roberts v. U.S. Jaycees*, because it is not an association "for the purpose of engaging in those activities protected by the First Amendment."[231]

C. Some Associations Protected Regardless

Regardless of whether a court expands *Batson* to association, the *Batson* line of cases supports protection for individuals engaged in some expressive associations. Specifically, *Batson* prohibits peremptory strikes of an individual solely for her association with a group primarily focused on one of *Batson*'s already protected groups: race and gender.

1. The Glass Juror

To understand this point more clearly, consider the eager citizen from the previous hypothetical in Section III.A.2 who was peremptorily struck by the plaintiff because of her involvement with the NAACP. Now consider that the citizen is Caucasian, and her answers in voir dire

228. Although a juror's associations may bear some relation to her actual beliefs, this assumption of the juror's beliefs is better addressed by a for cause challenge, rather than a peremptory. *See supra* Section III.A.4. This reasoning is not entirely novel, as several courts have acknowledged that while a juror's religious *beliefs* bear some relation to her fitness as a juror, her religious *affiliation* is not a sufficient basis for a peremptory challenge. *See* cases cited *supra* note 198.

229. Starr v. QuikTrip Corp., 726 F. App'x 692, 694 (10th Cir. 2018).

230. *Id.* at 695.

231. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

regarding her relevant beliefs are identical to another woman who is in all relevant respects the same as the eager citizen, except that she does not associate herself with the NAACP. This other woman, however, was chosen to serve on the jury. The defendant asserts that the peremptory strike was prohibited under *Batson*. The defendant's challenge should not be dismissed on its face, because striking the eager citizen for her participation in the NAACP is actually a proxy for racial discrimination.

The *Batson* line of cases prohibits peremptory challenges exercised on the basis of race or gender and emphasizes that the trial attorney cannot view the potential juror's race or gender as a proxy for her actual views or bias.[232] Put another way, a trial attorney is prohibited from attributing bias to the potential juror merely because of her race.[233] It follows that the trial attorney is also prohibited from taking the possible bias a member of one race might hold and attributing it to the potential juror in order to strike the potential juror. For example, if the trial attorney learns in voir dire that the Caucasian potential juror is a member of a recreational club whose membership is ninety-five percent African American, it would be prohibited for the trial attorney to assume the other members of the club hold a racial bias and then attribute that assumed bias to the potential juror merely because of her membership in the club. In this case, the trial attorney is still attributing bias based on nothing more than a stereotype about a race of people, but the trial attorney happens to be attributing this bias to a potential juror who is merely associated with members of that race.

This comparison can be made clearer by considering how the trial attorney views the potential juror in this circumstance. When the potential juror is, for every reason except her association with a group, milquetoast and able to sit fairly on a jury, the trial attorney will be forced to look only at the juror's association as a source for his peremptory strike. In this way, the attorney stops looking at the juror and her actual beliefs, but instead looks through the juror as if she were made of glass to see the views and membership of her associated group. The attorney then takes the views and membership of that group and attributes them to the potential juror, even if he has no evidence that the juror actually holds those views. Then, when the trial attorney looks at this glass juror, he sees only the members and views he attributed to the juror, and he will then exercise his peremptory challenge based on those views. If the potential juror were African American, it would be impermissible to attribute bias to the juror

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

233. *Id.*

based solely on her race. In the same way, it is impermissible to attribute that same bias to a Caucasian potential juror simply because she is closely associated with a group focused on the advancement of African American people. Therefore, to the extent that the associated group's membership is largely one race or focused on the advancement of a race, the trial attorney is impermissibly treating the potential juror's association as a proxy for race, and in turn, impermissibly using that race as a proxy for bias.

Batson emphasized that the harm caused by discriminatory peremptory challenges is not only to the parties in the litigation, but also the public and the institution of the court.[234] When the court allows a juror to be struck for a stereotype rather than the juror's actual views or bias, it "undermine[s] public confidence in the fairness of our system of justice."[235] The evolution of *Batson*'s jurisprudence from its namesake to *Georgia v. McCollum* shows that *Batson*'s concern for the subject of this harm has shifted from the criminal defendant to the potential juror facing exclusion.[236] Potential jurors face harm because the court ratifies their exclusion for reasons not related to their bias, "signal[ing] to them that they are not full members of the community," and "reinforc[ing] stereotypes regarding those who are full citizens and those who are not."[237]

When the glass juror is excluded for bias attributed to her, she faces the same harm *Batson* recognized. By allowing the glass juror's exclusion, the court ratifies stereotypes surrounding the racial group and treats that race as a proxy for bias. The court then ratifies the attribution of that bias to the glass juror even though she has not indicated any actual bias toward that race that would warrant her exclusion. In this way, the court treats the glass juror as less worthy than her peers to participate in the judicial process, even though she has not indicated that she is unfit. This ratification also harms the racial group the glass juror is closely associated with, because the court tells the group that their race alone makes them unfit to serve as jurors. Moreover, the court and the public are harmed by the "undermine[d] public confidence in the fairness" of the justice system.[238] Because the glass juror, the public, and the court suffer the same harm when the glass juror is struck as a proxy for race, *Batson* must protect the glass juror in this situation as well.

234. Batson v. Kentucky, 476 U.S. 79, 87 (1986).

235. *Id.*

236. Melilli, *supra* note 72, at 454.

237. Nancy S. Marder, Beyond Gender: Peremptory Challenges and the Roles of the Jury, 73 TEX. L. REV. 1041, 1044 (1995).

238. *Batson*, 476 U.S. at 87.

2. The Tenth Circuit's Unsatisfying Response to the Glass Juror Argument

The Tenth Circuit's decision in *Morgan v. City of Albuquerque* came close to addressing this question of proxy racial discrimination. In *Morgan*, the court held that associations with disabled persons were not protected by *Batson*.[239] Concluding, the court wrote, "[T]here is no support for the proposition that equal protection analysis should be further extended to cover persons who are not members of the group but merely have some association with them."[240]

At first, *Morgan* may appear inapplicable to the glass juror argument because *Batson* does not expand to prohibit peremptory strikes on the basis of physical disability.[241] The *Morgan* court does, however, conclude that they do not need to decide whether *Batson* expands to physical disability because there is no caselaw supporting *Batson*'s protection of individuals who are merely associated with someone in a cognizable group.[242] But just as the court failed to explain its refusal to expand *Batson* to intimate association discussed above, the court also failed to explain its refusal to treat a person's association as a proxy for prohibited discrimination.[243] For this reason, the Tenth Circuit does not stand in the way of the glass juror argument.

3. Limited Applications

The idea of proxy racial discrimination through association has a limited application regarding peremptory challenges for two reasons. First, it only applies to challenge a juror associated with a group that is focused on the advancement of individuals that *Batson* protects. In jurisdictions that have not expanded *Batson*, this includes only groups primarily focused on the advancement of a certain gender or race. Second,

---

239. Morgan v. City of Albuquerque, 25 F.3d 918, 920 (10th Cir. 1994).

240. *Id.* The Texas Court of Appeals addressed a very similar case in *Giddens v. State*. 256 S.W.3d 426, 432 (Tex. Ct. App. 2008). Using an analysis nearly identical to the Tenth Circuit, the court rejected *Batson*'s protection of individuals associated with a member of a cognizable group. *Id.* The *Giddens* court's analysis is thus inapplicable for the same reasons that the Tenth Circuit's opinion is.

241. Jordan Benson, *Stricken: The Need for Positive Statutory Law to Prevent Discriminatory Peremptory Strikes of Disabled Jurors*, 103 CORNELL L. REV. 437, 451–52 (2018) (noting that physical disability is not subject to heightened scrutiny). If a classification is not subject to heightened scrutiny, then *Batson*'s extension test does not warrant *Batson*'s extension. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 (1994).

242. *Morgan*, 25 F.3d at 920.

243. *See supra* Section III.B.2.

this idea has limited application because of the difficulty of showing race or gender discrimination. The mere fact the excluded juror is associated with a group focused primarily on the advancement of a race or gender will often not be enough to show discrimination. However, if there is evidence that the trial attorney has impermissibly discriminated against members of a race or gender, the challenging attorney will have a better foundation to show that the challenge against the potential juror is actually a proxy for prohibited discrimination. When the potential juror is not herself a member of the race or gender being targeted by the trial attorney, or if the jurisdiction has expanded *Batson* to protect groups not historically marginalized, proving this discrimination is much more difficult. Given these additional facts that will be needed to show proxy race or gender discrimination, *Batson* challenges on these grounds will be limited to cases where discrimination is otherwise clear.

IV. CONCLUSION

By allowing peremptory challenges on the basis of a juror's protected association, courts effectively force the juror to choose between her right of association and her right to serve on the jury. An expansion of *Batson* to prohibit such peremptory challenges would solve this forced dichotomy. *Batson*'s own rule for expansion as articulated in *J.E.B.* allows for this expansion, given that the freedom of association is accorded strict scrutiny under the Equal Protection Clause.[244] While peremptory challenges are a valuable tool, they fail to meet strict scrutiny's high bar, and therefore do not stand in the way of *Batson*'s expansion to the freedom of association. Even if courts refuse to expand *Batson*, the freedom of association must still be protected when peremptory strikes on the basis of a protected association are used as a proxy for racial discrimination. In this way, the court can protect the juror who is artificially forced to choose between her rights—ending this forced dichotomy.

244. *See supra* Section III.A.3.