NOTE

STRICKEN: THE NEED FOR POSITIVE STATUTORY LAW TO PREVENT DISCRIMINATORY PEREMPTORY STRIKES OF DISABLED JURORS

Jordan Benson†

† Cornell Law School, J.D. Candidate, 2018; University of Massachusetts Dartmouth, B.A., Political Science, 2014; Publishing Editor, *Cornell Law Review*, Volume 103. I would like to thank Professor Valerie Hans for her guidance during the writing process and for inspiring my interest in the topic, and I am also grateful to the staff at the *Cornell Law Review* for their diligent editing.

INTRODUCTION

Imagine you are a physically handicapped person who has been called for jury service. The local courthouse has just undergone significant renovations. To improve access for the disabled, they have added, among other things, a wheelchair ramp to the main entrance, elevators to the courtrooms, and wheelchair seating in the courtroom and jury box. Interpreters can now be requested for deaf participants in court proceedings. These accommodations will make jury service much more convenient and comfortable for you than it would have been in the past. You tell the judge that you are more than able to serve on a jury, in spite of your disability, and have no biases that would render you unable to make a fair decision, and make it through the voir dire phase. It seems as though you are about to be seated on the petit jury and begin observing the trial, but then the prosecuting attorney uses peremptory strikes to remove you, along with the only two other jurors with a visible disability, from the jury with no explanation. Under existing equal protection law, neither you nor the defense attorney has any legal grounds to contest these strikes, or even to demand an explanation from the prosecutor as to why he used half of his peremptory strikes to remove all three disabled jurors from the venire.[1]

Buoyed by legislation such as the Americans With Disabilities Act, America has developed some of the most accessible infrastructure in the world for the disabled.[2] The ADA provides the disabled with statutory protection from discrimination in employment[3] and requires employers and public accommodations, regardless of whether they receive federal funding, to provide reasonable accommodations for the disabled.[4] But de-

---

1 *See* Matthew J. Crehan, *The Disability-Based Peremptory Challenge: Does It Validate Discrimination Against Blind Prospective Jurors?*, 25 N. KY. L. REV. 531, 551–52 (1998).

2 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2012)).

3 *Id.* § 12112.

4 *Id.* §§ 12112(b)(5)(A), 12182(b)(2)(A)(ii).

spite these legislative successes, the disabled still face many obstacles to their full participation in many facets of life, and participation on juries remains an especially difficult task. While federal and some state lawmakers have passed laws protecting the right of disabled individuals to serve on juries unless they are physically or mentally incapable of serving,[5] many other procedural obstacles exist, and, because each state creates their own eligibility laws, the disabled face variable protections across states.[6] States draw jurors from jury lists that underrepresent the disabled,[7] and some allow for the dismissal of certain disabled jurors with for-cause strikes.[8]

Peremptory strikes of disabled jurors remain constitutional nationwide today, in spite of the growing body of law prohibiting these strikes on the basis of qualities such as race, gender, and sexual orientation, and the Supreme Court has yet to take up the issue directly. Peremptory strikes of disabled jurors serve as an additional, discretionary way in which the disabled are discouraged from serving on juries, even when a particular juror's disability does not actually preclude him or her from carrying out the duties of jury service, and they have not been eliminated at the for-cause removal stage.[9]

Undoubtedly, the disabled provide a valuable perspective and a unique voice in deliberations, contributing to the ideal of a representative jury.[10] In recognition of this, many commentators have begun calling for improved access to jury service for individuals with disabilities,[11] and the ABA has even recommended that "[c]ourts should provide an adequate and suitable environment for jurors, including those who require reasonable

---

5 *See, e.g.*, The Jury Selection and Service Act of 1968, 28 U.S.C. § 1865(b)(4) (2012) (providing that all persons over the age of eighteen will not be disqualified to serve on a jury unless they are "incapable, by reason of mental or physical infirmity, to render satisfactory jury service").

6 *See* Kristi Bleyer et. al., *Access to Jury Service for Persons with Disabilities*, 19 MENTAL & PHYSICAL DISABILITY L. REP. 249, 250 (1995) (noting that few states prohibit juror discrimination on the basis of disability).

7 *See* Hon. Donovan W. Frank & Brian N. Aleinikoff, *Juries and the Disabled*, 59 FED. LAW., Dec. 2012, at 34, 36.

8 *See* Crehan, *supra* note 1, at 536.

9 *Id.* at 551–52.

10 The Supreme Court acknowledged the American ideal of a representative jury in *Thiel v. Southern Pacific Co.*, in which the Court notes that "[t]he American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community." *See* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 74 (2007) (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 220, 223–24 (1946)).

11 *See, e.g.*, Frank & Aleinikoff, *supra* note 7, at 36 (arguing that presence of a disabled person on a jury helps a party receive a fair trial).

accommodation due to disability,"[12] and that "[e]ligibility for jury service should not be denied or limited on the basis of . . . disability."[13] But even if the disabled face no statutory or physical barriers to jury service, they can be struck at the peremptory-strike phase because of their disability. While no empirical studies have been conducted on the use of peremptory strikes against disabled jurors,[14] their discretionary nature and the lack of protections given to disabled jurors suggest that they threaten to at least partially undermine recent advances in the accessibility of jury service.[15]

This Note will explore the Supreme Court's decision in *Batson v. Kentucky*[16] and the gradual expansion of its protections to other categories such as gender, ethnicity, and (at the circuit level) sexual orientation. I will show that, despite recent expansions of the *Batson* challenge to sexual orientation in the *SmithKline v. Abbott Laboratories*[17] decision, achieving *Batson* protections for disabled jurors is unlikely given the Court's use of equal protection analysis when examining allegedly discriminatory peremptory strikes. I will then look at several recent lower court decisions examining peremptory strikes of disabled jurors to demonstrate how little protection the current equal protection jurisprudence affords disabled jurors in practice. While there is some possibility that rational basis-level review could afford protections against discriminatory peremptory strikes of disabled jurors, it is almost certainly inadequate to combat them.

After synthesizing these decisions, I will show that constitutional law does not, and will not, provide protection for disabled jurors against peremptory strikes. Nevertheless, disabled jurors should be protected from discriminatory strikes so that their viewpoints are represented and to ensure that they have this opportunity for valuable civic participation. Dis-

---

12 AM. BAR ASSOC., PRINCIPLES FOR JURIES AND JURY TRIALS 5 (2005).

13 *Id.* at 4.

14 However, some anecdotal evidence exists. *E.g.*, David G. Hart & Russell D. Cawyer, Batson *and Its Progeny Prohibit the Use of Peremptory Challenges Based upon Disability and Religion: A Practitioner's Guide for Requesting a Civil* Batson *Hearing*, 26 TEX. TECH L. REV. 109, 110 (1994) ("Attorneys defending personal injury cases often use peremptory challenges to strike members of the venire who have sustained disabling injuries.").

15 *See* Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 WILLAMETTE L. REV. 1, 5 (1997) ("[P]eople with disabilities confront one final, but imposing, hurdle [to jury service]—the peremptory challenge.").

16 476 U.S. 79 (1986).

17 740 F.3d 471 (9th Cir. 2014).

crimination against jurors on the basis of their disability poses similar risks of dignitary harm and reinforcement of negative stereotypes as does discrimination on the basis of race or gender. But statutory law, rather than constitutional equal protection principles, is the most viable means to protect disabled jurors from peremptory strikes. I will conclude with a look at some current and recent laws that have been enacted or proposed to modify procedural codes to prevent peremptory strikes on the basis of disability and the limits of such legislation. The recent passage of one of these laws demonstrates the political viability of these statutory protections, and they represent a promising avenue forward for advocates of eliminating discriminatory strikes of disabled jurors.

I
JURY SELECTION AND THE *BATSON* RIGHT

While jury selection is a complex process that varies significantly across jurisdictions, the peremptory strike phase is almost always the final step in assembling a petit jury from a larger jury pool.[18] Following the voir dire phase, in which the attorneys or the trial judge conduct a preliminary questioning of potential jurors, the attorneys may ask the court, at its discretion, to strike jurors that they believe have demonstrated bias or are otherwise unqualified to sit on the petit jury "for cause."[19] After the court has ruled on these "for cause" challenges, each party receives a limited number of peremptory strikes, or challenges without cause, which they can use to strike jurors that they perceive would be unfavorable to their client without articulating any reason for the court.[20]

Although statutory exclusions from jury service on the basis of race have long been held unconstitutional,[21] the Court had dismissed the potential constitutional violations posed by

---

18 *See, e.g.*, David Hittner & Eric J.R. Nichols, *Jury Selection in Federal Civil Litigation: General Procedures, New Rules, and the Arrival of* Batson, 23 TEX. TECH L. REV. 407, 448–56 (1992) (describing the peremptory challenge process in federal civil litigation following the challenge for cause phase).

19 *See id.* at 444–46.

20 *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1085 (2011).

21 *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (invalidating a statute limiting jury service to white persons); *see also* Thiel v. S. Pac. Co., 328 U.S. 217, 222 (1946) (holding that the jury pool must be selected by nondiscriminatory criteria).

the discriminatory use of peremptory strikes.[22] In *Swain v. Alabama*, the Court found that a prosecutor's use of peremptory strikes to remove all black jurors in a rape case did not present a constitutional violation.[23] Although the *Swain* court acknowledged that repeated discriminatory use of peremptory strikes *could* pose an equal protection violation, it required an insurmountable prima facie showing of repeated use of peremptory strikes against jurors of one race over many trials.[24] In practice, discriminatory peremptory strikes continued. *Batson* was thus decided against a backdrop of court-sanctioned *de facto* racial discrimination in jury selection in which blacks were excluded from juries at alarming rates. In some districts, prosecutors were using peremptory strikes against black jurors at rates several times more frequently than against whites.[25]

II
CREATION AND EXPANSION OF THE *BATSON* CHALLENGE

In order to understand how the *Batson* challenge could protect disabled jurors from discriminatory peremptory strikes, it is important to understand its mechanics. An analysis of the *Batson* challenge's legal framework in equal protection jurisprudence will also reveal the difficulty of expanding its protections to disabled jurors.

A. Mechanics of the *Batson* Challenge

A departure from earlier cases disallowing discrimination in jury service, which focused on defendants' Sixth Amendment rights to have a jury composed of a "fair cross section" of society,[26] *Batson* reframed this interest in non-discriminatory jury selection as an equal protection right of the defendant, and established a procedure by which litigants could challenge discriminatory peremptory strikes.[27] Recognizing that *Swain*'s requirement that a defendant show "proof of repeated striking of blacks over a number of cases" to establish a prima facie equal

22 *See* Swain v. Alabama, 380 U.S. 202, 221–22 (1965) (finding no constitutional violation in spite of the fact that no black person had served on a jury in the county in over thirty years).

23 *Id.*

24 *See id.* at 223–24, 227.

25 *See* Batson v. Kentucky, 476 U.S. 79, 103–04 (1986) (Marshall, J., concurring); *see also* JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 6 (2010) (noting that all-white juries continued in many courts after *Swain*).

26 *See* U.S. CONST. amend. VI; *see* Taylor v. Louisiana, 419 U.S. 522, 537 (1975).

27 *See Batson*, 476 U.S. at 89, 96–97.

protection violation was a practical impossibility, the *Batson* Court aimed to create a procedure for challenging peremptory strikes that was not purely theoretical,[28] now known as a "*Batson* challenge."[29] Under the Court's new formulation, "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial," which could consist of, for example, a "'pattern' of strikes against black jurors included in the particular venire."[30]

The *Batson* challenge can be thus be synthesized into a three-step test.[31] First, the challenging party must make a prima facie showing of discriminatory use of peremptory strikes.[32] Second, the burden shifts to the striking party, which must put forward a race-neutral explanation for striking the juror.[33] This is a relatively low standard to meet, and "need not rise to the level justifying exercise of a challenge for cause."[34] Finally, the trial court will decide if the challenging party has proven purposive discrimination.[35] Subsequent Supreme Court cases have expanded the scope of the *Batson* challenge to include peremptory strikes made on the basis of gender and ethnicity,[36] and have allowed it to be invoked by either party in both civil and criminal cases.[37] Additionally, jurors may also suffer an equal protection violation if they are excluded from a jury by a discriminatory peremptory strike.[38] Due to the impracticality of a struck juror bringing legal action against the state on his own behalf, defendants have third-

---

28 *Id.* at 92–93.

29 *See, e.g.*, Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 303 (2007) ("[T]he Supreme Court considered a *Batson* challenge to the prosecutor's strikes against bilingual Hispanic jurors . . . .").

30 *Batson*, 476 U.S. at 96–97.

31 *See* A.C. Johnstone, *Peremptory Pragmatism: Religion and the Administration of the* Batson *Rule*, 1998 U. CHI. LEGAL F. 441, 445–46.

32 *Id.* at 446.

33 *Batson*, 476 U.S. at 97.

34 *Id.*

35 Johnstone, *supra* note 31, at 446.

36 J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (gender); Hernandez v. New York, 500 U.S. 352, 355 (1991) (ethnicity). The Supreme Court has declined to rule on any additional cases that would expand *Batson* challenges to additional groups.

37 Georgia v. McCollum, 505 U.S. 42, 54–55 (1992) (allowing either party to use *Batson* challenges); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (allowing *Batson* challenges in civil cases).

38 Powers v. Ohio, 499 U.S. 400, 409 (1991).

party standing to raise these jurors' rights during the peremptory strike phase.[39]

Although "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose,"[40] the efficacy of the procedures set out in *Batson* in actually preventing the discriminatory use of peremptory strikes has been the subject of much debate,[41] particularly due to the ease with which a striking party can meet the burden of showing a non-pretextual, race-neutral reason for striking a juror.[42] In *Purkett v. Elem*, the Supreme Court affirmed that the proffered race-neutral justification need not be "persuasive, or even plausible" and held that a prosecutor had met this burden when he explained that he struck a black juror because he thought his long hair and mustache made him look "suspicious."[43]

Additionally, a trial court's highly discretionary decision to accept or reject a proffered justification will be given great deference on appeal,[44] making it difficult for appellants to successfully raise this issue unless there is clear evidence in the record that the justification is pretextual.[45] Obviously, explicit evidence of a discriminatory motivation will often be hard to find. Litigants are thus often forced to instead prove implicit discrimination by showing that "a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black [panelist] who is permitted to serve."[46] In spite of these shortcomings, it is undoubted that litigants now frequently employ *Batson* challenges during the peremptory strike phase and on appeal, and that there has been at

---

39 *Id.* at 414–15.

40 Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (quoting United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994)).

41 *E.g.*, BLACK STRIKES, http://blackstrikes.com [https://perma.cc/6VP7-XLBF] (noting the significant disparity in prosecutors' use of peremptory strike usage against black and white jurors in Caddo Parish, Louisiana).

42 *See generally* Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 213–14 (2003) (arguing that *Batson* "has . . . been decidedly ineffective in achieving its original goals").

43 514 U.S. 765, 767–68 (1995) (per curiam).

44 *See Snyder*, 552 U.S. at 477.

45 *E.g.*, Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016) (overturning a trial court's acceptance of the prosecution's non-racial explanation for striking the only four black jurors during the peremptory strike phase based on an extensive written record from the prosecutor's office indicating racially motivated reasons for striking each juror).

46 *Id.* at 1754 (alteration in original) (quoting Miller-El v. Dretke, 545 U.S. 231, 241 (2005)).

least some reduction in the use of discriminatory peremptory strikes since the advent of the *Batson* challenge.[47]

B. *Batson*'s Equal Protection Analysis Framework

Although *Batson* clearly described the procedure that could be employed by defendants to challenge racially discriminatory peremptory strikes and the harms posed by the exclusion of jurors on the basis of race,[48] it gave little indication of what, if any, principle the Court would use in the future when deciding what juror qualities would or would not receive the protections of the *Batson* challenge. It was not until eight years later when the Court finally enunciated such a principle in *J.E.B. v. Alabama*.[49] In expanding the Batson challenge to gender-based peremptory strikes, the Court was careful to limit its holding. It affirmed the continued role of the peremptory strike as a litigants' tool, noting that the holding "does not imply the elimination of all peremptory challenges," and should not "conflict with a State's legitimate interest in using such challenges in its effort to secure a fair and impartial jury."[50] Most importantly, the Court specified that "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."[51] *Batson* could therefore only apply to classifications that receive heightened scrutiny, though the *J.E.B.* court was silent as to whether or not this was sufficient.[52]

The Supreme Court's adoption of the tiered scrutiny framework for establishing *Batson* protections has the advantage of being responsive to changes in equal protection jurisprudence. A recent Ninth Circuit decision, *SmithKline Beecham Corp. v. Abbot Laboratories*, illustrates that this framework provides the real potential for expansion of *Batson* challenges.[53] In the preceding litigation, an attorney had used a peremptory strike to remove a juror who had revealed that he was married to a man

---

47 *See* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PENN. J. CONST. L. 3, 75 fig.4 (2001) (showing a slight decline in the use of peremptory strikes against black jurors by prosecutors in Philadelphia since *Batson* was decided); Covey, *supra* note 29, at 284–85 n.19 (noting that a database search of "Batson" and "jury" in federal and state court cases for the year 2005 yielded 573 results, indicating that parties are raising and litigating these challenges).

48 *See* Batson v. Kentucky, 476 U.S. 79, 87, 96–98 (1986).

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

50 *Id.* at 143.

51 *Id.*

52 *Id.*

53 740 F.3d 471, 479 (9th Cir. 2014).

during voir dire.[54] The attorney provided no reasons for his strike of that juror when challenged, though the trial judge eventually declined to sustain the challenge on the belief that *Batson* did not extend to sexual orientation.[55] Noting that the "fundamental legal question before us [is] whether *Batson* prohibits strikes based on sexual orientation," the Ninth Circuit proceeded to analyze what level of scrutiny sexual orientation classifications should receive.[56] While earlier Supreme Court and Ninth Circuit precedents were ambiguous about the correct level of scrutiny to apply, the court found that the Supreme Court's decision in *United States v. Windsor*[57] established that gays and lesbians are no longer a group or class of individuals normally subject to rational basis review.[58] This heightened scrutiny classification, combined with the history of systematic exclusion faced by gays and lesbians, confirmed for the court that *Batson* prohibited peremptory strikes on the basis of sexual orientation.[59]

While not all commentators agree that the Ninth Circuit was correct to apply heightened scrutiny to sexual identity,[60] it reveals the flexibility of equal protection doctrine. Changes in societal values in America and the world are often reflected in the Supreme Court's equal protection jurisprudence, as "the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[61] The rapidly increasing awareness and acceptance of minority sexual orientations and gender identities, which have never explicitly received heightened scrutiny, could thus lead to the Court applying a higher level of scrutiny to these classifications than it has in the past.[62] Once heightened

---

54 *Id.* at 475.

55 *Id.*

56 *Id.* at 479.

57 United States v. Windsor, 133 S. Ct. 2675 (2013).

58 *SmithKline*, 740 F.3d at 483–84 (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. at 143).

59 *Id.* at 485.

60 *See* Ari Ezra Waldman, *Gay Jurors and Marriage Equality: The Common Legal Thread*, TOWLEROAD (Jan. 22, 2014, 2:40 PM) http://www.towleroad.com/2014/01/jurormarriage [https://perma.cc/2QGN-J4QR] ("Just because *Windsor* used something more than rational basis does not necessarily mean it used heightened scrutiny.").

61 Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015).

62 For example, the Court began treating gender classification with heightened scrutiny in *Craig v. Boren* after initially only affording them rational basis review. *Compare* Reed v. Reed, 404 U.S. 71, 76 (1971) (applying rational basis

scrutiny is applied to a classification, *Batson* could then be found to prohibit peremptory strikes on that basis.[63]

While the expansion of *Batson* protections at the lower court level to classifications beginning to be deemed suspect, like sexual orientation or gender identity, or classifications traditionally afforded heightened scrutiny,[64] has a sound theoretical basis and is even beginning to appear likely,[65] the same cannot be said for disability.[66] *J.E.B.* draws a clear line in the sand between groups subject to rational basis review and those subject to heightened scrutiny, clarifying that courts should not question the motives of peremptory strikes against groups subject only to rational basis review.[67] One commentator lamented, in 1997, that "the status of disability-based peremptory challenges will remain shrouded in doubt" due to "the Court's ambiguous and still evolving approach to disability equal protection."[68] While there was once doubt about how courts would handle *Batson* challenges to strikes of disabled jurors, recent judicial developments have rendered the possibility increasingly unlikely.[69]

III

EXISTING CONSTITUTIONAL LAW IS UNLIKELY TO LEAD TO THE EXTENSION OF *BATSON* PROTECTIONS TO THE DISABLED

Because disability is subject only to rational basis review,[70] courts are unlikely to entertain *Batson* challenges to peremptory strikes of disabled jurors due to the clear language of the *J.E.B.* holding that parties may use "peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."[71] Lower courts have additionally not invalidated the use of a peremptory strike against a disabled juror since *J.E.B.* was decided.

---

review to gender classifications) *with* Craig v. Boren, 429 U.S. 190, 197–202 (1976) (applying intermediate scrutiny to gender classifications).

63 *See SmithKline*, 740 F.3d at 484 (finding that *J.E.B.* prohibits the use of peremptory strikes against members of any group that receives heightened scrutiny).

64 *E.g.*, State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001) (holding that *Batson* prohibits peremptory strikes on the basis of religious affiliation).

65 *See* Kristal Petrovich, *Extending* Batson *to Sexual Orientation: A Look at* SmithKline Beecham Corp. v. Abbott Labs, 2015 U. ILL. L. REV. 1681, 1709 (2015).

66 *See* Weis, *supra* note 15, at 3.

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

68 Weis, *supra* note 15, at 64.

69 *See, e.g.*, *J.E.B.*, 511 U.S. at 145–46 (omitting disability as a basis for protection for jury participation).

70 *See* City of Cleburne. v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985).

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

A. Disability Is Subject Only to Rational Basis Review

The tiered scrutiny framework is the cornerstone of the Supreme Court's equal protection law. The Court has long acknowledged that the Equal Protection Clause of the Fourteenth Amendment[72] is "essentially a direction that all persons similarly situated should be treated alike."[73] Laws that disadvantage members of "suspect class[es]," marginalized groups of "discrete and insular minorities" that have been "subjected to . . . a history of purposeful unequal treatment,"[74] are therefore subject to thorough equal protection review. Because classifications of citizens according to factors such as race or national origin are highly unlikely to have any real relation to legitimate state goals, any laws classifying citizens on this basis are inherently suspect and presumably violate the Equal Protection Clause unless they can survive "strict scrutiny."[75] Strict scrutiny is the highest standard of review applied by courts in equal protection analysis.[76] Such laws will survive strict scrutiny "only if they are narrowly tailored to further compelling governmental interests."[77] *Batson* implicitly incorporates this standard into the *Batson* challenge procedure: since race is "unrelated to [a person's] fitness as a juror,"[78] a decision to strike a juror based solely on his race or the belief that his race is a proxy for bias[79] cannot possibly survive strict scrutiny. Therefore, a party can only sustain their strike against a *Batson* challenge by offering a non-pretextual race neutral justification for the strike,[80] showing that the strike was not actually made on the basis of a racial classification.

The Supreme Court has applied the next level of review, heightened scrutiny, primarily to classifications based on gender,[81] as they "frequently bear[ ] no relation to [the] ability to perform or contribute to society."[82] But differential treatment

---

72 U.S. CONST. amend. XIV.

73 *Cleburne*, 473 U.S. at 439.

74 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

75 *Cleburne*, 473 U.S. at 440.

76 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

77 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) (quoting Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).

78 Batson v. Kentucky, 476 U.S. 79, 87 (1986) (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946)).

79 *Id.* at 97.

80 *See id.*

81 Craig v. Boren, 429 U.S. 190, 197 (1976); *but see* Lalli v. Lalli, 439 U.S. 259, 275 (1978) (applying heightened scrutiny to illegitimacy); Graham v. Richardson, 403 U.S. 365, 372 (1971) (applying heightened scrutiny to alienage).

82 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985) (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).

of individuals based on these "quasi-suspect" classifications may sometimes be justified due to the existence of distinguishing characteristics such as "[p]hysical differences" between men and women.[83] States may utilize quasi-suspect classifications if they are "substantially related to a sufficiently important governmental interest" and not based on "outmoded notions of the relative capabilities of men and women."[84]

Rational basis review is the lowest level of equal protection review.[85] Any group that possesses "distinguishing characteristics relevant to interests the State has the authority to implement" is subject to this level of review.[86] As these classifications are not inherently suspect, they enjoy a presumption of validity.[87] While both strict and heightened scrutiny review require the state to prove that the challenged classifications are serving an important state interest, rational basis is a highly deferential standard of review that merely requires a showing that the classification is "rationally related to a legitimate government purpose."[88] The standard of review is quite low: so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification," it will be upheld.[89]

The Supreme Court has never held that disability is a suspect or quasi-suspect class. It first considered what level of scrutiny was appropriate for disability classifications in *City of Cleburne v. Cleburne Living Center*, finding that rational basis review was appropriate for the "mentally retarded."[90] As the mentally retarded have significantly different needs than the rest of the population, "the States' interest in dealing with and providing for them is plainly a legitimate one," and classifications based on mental retardation are necessary for the state to legislate to meet these needs effectively.[91] The *Cleburne* court notably gave little consideration to the history of discrimination

---

83 *Cleburne*, 473 U.S. at 442; United States v. Virginia, 518 U.S. 515, 533 (1996).

84 *Cleburne*, 473 U.S. at 441.

85 *See* Katie R. Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975, 977 (2017).

86 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366 (2001) (quoting *Clerburne*, 473 U.S. at 441).

87 Heller v. Doe, 509 U.S. 312, 320 (1993) ("A statute is presumed constitutional.").

88 *Cleburne*, 473 U.S. at 446–47.

89 *Heller*, 509 U.S. at 320 (quoting FCC v. Beach Commc'n, Inc., 508 U.S. 307, 313 (1993)).

90 473 U.S. at 442.

91 *Id.* at 442–44.

faced by the mentally retarded, and saw statutes that prevented discrimination on the basis of disability in certain areas as evidence that the mentally retarded were not politically marginalized.[92]

Still, a law must be based on more than "negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" to survive a rational basis inquiry.[93] Thus, mere animosity towards a specific group cannot possibly be considered a legitimate state interest. Ultimately, the Court found the regulation at issue in *Cleburne*, which required that a special use permit be obtained for the construction of hospitals for the mentally retarded, to fail to satisfy even this lenient standard.[94] Since the city had no "rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests," it violated the Equal Protection Clause as it "appear[ed] . . . to rest on an irrational prejudice against the mentally retarded."[95]

The Court again applied, without ruling on, this level of scrutiny to the mentally ill in 1993 in *Heller v. Doe*[96] and to the entirety of "the disabled" in *Board of Trustees of University of Alabama v. Garrett* in 2001, noting that this level of scrutiny means that "[s]tates are not required by the Fourteenth Amendment to make special accommodations for the disabled."[97] With this ruling in *Garrett*, the Court appears to have definitively ruled that disability is subject only to rational basis review, and that this classification does not only apply to the mentally retarded.[98]

B. The ADA Does Not Entitle the Disabled to Heightened Scrutiny Protection

Many felt that the Court's relegation of disability to rational basis review in *Cleburne* was unwise and did not reflect an adequate consideration of the history of discrimination faced by the disabled.[99] Commentators were thus initially optimistic

---

92 *Id.* at 445.
93 *Id.* at 448.
94 *Id.*
95 *Id.* at 450.
96 509 U.S. 312, 320 (1993).
97 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001).
98 *Id.* at 366–67.
99 *See, e.g.*, Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 404–07, 436 (1991) (detailing history of government-sponsored discrimination against the disabled and arguing that *Cleburne* ignored this historical legacy).

that the passage of the ADA would cause or require courts to begin utilizing *Batson*-like hearings for challenges against parties' use of peremptory strikes against jurors on the basis of disability.[100] Of particular import were Congressional findings that "[the disabled] are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."[101] Courts would be informed, the argument goes, by contemporary legislation, like the ADA, describing discrimination issues faced by society, and develop an equal protection jurisprudence to accommodate these legislative findings.[102] In the case of the ADA, this would lead to courts applying higher levels of scrutiny to the disabled in an equal protection analysis than the low level of rational basis review previously used in *Cleburne* and *Garrett*.[103]

The Supreme Court has implicitly rejected such reasoning in subsequent decisions. As a matter of constitutional law, Congress may not require that state or local government actions be held to a more stringent standard of equal protection review than that prescribed by the Supreme Court.[104] In *City of Boerne v. Flores*, the Court rejected such an attempt by Congress to subject state and local government action that would burden the exercise of religion to strict scrutiny when the Court had already decided on a lower level of scrutiny, noting that "[w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued . . . the Court will treat its precedents with the respect due them under settled principles, including *stare decisis* . . . ."[105] Despite the merits of arguments that the ADA may nevertheless *inform*, but not dictate, the

---

100 *See* James B. Miller, *The Disabled, the ADA, and Strict Scrutiny*, 6 ST. THOMAS L. REV. 393, 417–19 (1994).

101 Mary A. Lynch, *The Application of Equal Protection to Prospective Jurors with Disabilities: Will* Batson *Cover Disability-Based Strikes?*, 57 ALB. L. REV. 289, 342–43 (1993) (quoting 42 U.S.C. § 12101(a)(7) (2008)).

102 *Id.* at 333–34.

103 Miller, *supra* note 100, at 417–19.

104 *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (finding that such action is not a valid exercise of Congress's power to "enforce" Fourteenth Amendment protections against the states). Although, like much civil rights legislation, the ADA is also constitutionally based in Congress's commerce powers and may not technically be subject to this constraint, some lower courts have applied the same logic to the ADA. *E.g.*, United States v. Harris, 197 F.3d 870, 875–76 (7th Cir. 1999) ("Congress does not have the power to create constitutional rights or declare a class of persons 'suspect' under the Fourteenth Amendment.").

105 521 U.S. at 536.

Court's equal protection classifications,[106] it does not appear to have had this effect. The Court has not backed away from its application of rational basis review to disability in cases decided after the passage of the ADA,[107] nor has it given any consideration to the ADA at all when deciding the appropriate level of scrutiny.[108]

C. Statutory Protections of the ADA Do Not Independently Entitle the Disabled to *Batson*-Like Hearings

The contention that the ADA provision that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"[109] provides independent statutory protection for the disabled against peremptory strikes has yet to be considered by the courts. However, it has been contended that this argument is on weak standing because such a categorical exclusion on disability-based peremptory strikes could fall into the ADA's exemption from its mandate for reasonable accommodations when creating these accommodations would "fundamentally alter the nature of . . . goods, services, facilities, privileges, advantages, or accommodations."[110] These provisions of the ADA have to date been applied only to invalidate categorical statutory exclusions of the disabled from jury service.[111]

D. Recent Appellate Court Decisions Have Upheld the Use of Peremptory Strikes Against Disabled Jurors

Two recent (relatively speaking) appellate court decisions considering this issue—*United States v. Harris*[112] and *United States v. Watson*[113]—further illustrate that the equal protection framework will not allow *Batson* challenges to peremptory strikes of the disabled. These cases also show that whatever

---

106 See Lynch, supra note 101, at 342–43.

107 *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366–67 (2001) (again applying rational basis review to classifications based on disability).

108 Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L. REV. 527, 541–42 (2014) ("Despite the ADA's attempt to alter the legal construction of disability, constitutionally, the distinctions *Cleburne* created have remained.").

109 42 U.S.C. § 12132 (2012).

110 *See* Crehan, *supra* note 1, at 550–51 (quoting 42 U.S.C. § 12182(b)(2)(A)(ii) (1997)).

111 *See, e.g.*, Galloway v. Super. Ct., 816 F. Supp. 12, 18–19 (D.D.C. 1993) (finding that a state law excluding the blind from jury duty violated the ADA).

112 United States v. Harris, 197 F.3d 870, 872 (7th Cir. 1999).

113 United States v. Watson, 483 F.3d 828, 829 (D.C. Cir. 2007).

protections rational basis review may provide to stricken disabled jurors in theory, its extremely low standards are unlikely to prohibit any peremptory strikes in practice.

In *United States v. Harris*, the Seventh Circuit considered a criminal defendant's contention that the trial court erred when it allowed the prosecution to peremptorily strike a juror with multiple sclerosis.[114] Applying the rational basis standard of review, the court accepted the government's explanation that it had struck the juror because she was on medication that the government suspected might make her drowsy as "rationally related to the state's legitimate purpose of selecting an impartial jury."[115] Further, the court interpreted the holding of *J.E.B.* to mean that characteristics not subject to heightened scrutiny, including disability, "may be used to excuse jurors because of concerns about their potential bias, even if that bias flows from stereotypes related to group membership" as they do not "reinforce . . . stereotypes about the group's competence or predispositions."[116] But an irrational justification, such as "animosity toward or fear of disabled people" would not be a legitimate reason to strike a juror.[117] In *United States v. Watson*, the D.C. Circuit considered a similar challenge on appeal by the defendant of the peremptory strikes of two blind jurors.[118] The court again found that heightened scrutiny did not apply to peremptory strikes of the disabled, then considered if the strikes of the blind jurors had a "rational relationship to a legitimate governmental purpose."[119] The court concluded that these strikes were rationally related to the purpose of securing a fair trial because the government noted that they intended to introduce visual evidence at the trial that the jurors would not be able to evaluate.[120] Notably, neither party's counsel nor the court suggested the possibility of providing accommodations for the blind jurors.[121]

---

114 197 F.3d at 872.
115 *Id.* at 876.
116 *Id.* at 874 (internal citations omitted).
117 *Id.* at 876.
118 483 F.3d at 829.
119 *Id.* at 833 (internal citations omitted).
120 *Id.* at 834–35.
121 *Id.*

IV
COULD THE RATIONAL BASIS TEST PROVIDE PROTECTIONS FOR DISABLED JURORS?

One possible solution that has yet to receive much serious consideration is the possibility that rational basis review could provide disabled jurors protection independent of the *Batson* regime. Such an option is attractive in some ways as it would not require the unlikely extension of *Batson* to disability or an increase in the level of scrutiny afforded to disability classifications, nor would it require any legislative action or a significant change in the law. If a rational basis test is applied to strikes of disabled jurors, then litigants could challenge a peremptory strike of a disabled juror by showing that it was irrational or unrelated to the legitimate state goal of assembling an impartial jury. Although this approach would not prevent litigants from striking jurors on the basis of their disability altogether, it would prevent them from doing so when there is no rational connection between their disability and their ability to serve in a particular case. However, it remains to be seen if this approach possesses any real legal force and it is unclear how it would be applied at trial during the jury selection procedure.

There is some theoretical basis for such an argument. Even though disability receives only a rational basis level review, the Court has invalidated many laws that classify on the basis of disability when it has been unable to find any rational basis for this classification.[122] One could literally read the language in *Batson* noting that "the State's privilege to strike individual jurors through peremptory challenges . . . is subject to the commands of the Equal Protection Clause,"[123] to mean that whatever protections the Equal Protection Clause affords to rational basis groups can be vindicated by these groups against discriminatory peremptory strikes. *Cleburne* itself invalidated a local law requiring a special zoning permit for construction of homes for the mentally retarded as there was no rational basis for the law in the record.[124] In *Tennessee v. Lane*, the Court found that provisions of Title II of the ADA mandating equal access to courts for the disabled were a valid use of Congress's ability to enforce the guarantees of the Equal

---

122 *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (invalidating a local law requiring a special zoning permit for construction of homes for the mentally retarded as there was no rational basis for the law in the record).

123 Batson v. Kentucky, 476 U.S. 79, 89 (1986).

124 *Cleburne*, 473 U.S. at 448.

Protection Clause against the states.[125] Categorical bans of all persons with a certain disability from jury service also likely violate the Equal Protection Clause as they lack a rational relation to a legitimate government purpose.[126]

This issue, however, has seldom been litigated at either the state or federal level, and when it has, the results have generally not been promising. In cases in which the issue has been litigated, courts have almost always found that the strike meets the low standard of "any reason rationally related to the selection of an impartial jury," even when the justification may fall far short of what would warrant a for-cause dismissal.[127] This calls to mind a frequent criticism of the *Batson* test—the ease with which a striking attorney can create a justification that masks the racial nature of the strike,[128] a problem which is only magnified at the rational basis level. Moreover, the courts in these cases do not explicitly rule on whether or not the rational basis standard should be applied to peremptory strikes; they merely assume that it is applicable, which likely ends further litigation of the issue on subsequent appeals.[129]

Although the courts in *Watson* and *Harris* both upheld the challenged peremptory strike, these cases do not exactly rule out the possibility that the rational basis test may have some efficacy. They can be distinguished by the fact that there was a rational basis for the exclusion of the jurors at issue in each of these cases. In *Watson*, the court accepted the argument that the blind jurors were struck because the state intended to pre-

---

125 Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

126 *See Watson*, 483 F.3d at 833 (citing *Lane*, 541 U.S. at 524, n.9) ("As examples of such violations [of rational basis], the Court referenced absolute bars to jury service by disabled individuals and discretionary bars invoked by trial judges.").

127 *E.g.*, *id.* at 829 (permitting the strike of two blind jurors on the basis of their inability to evaluate visual evidence); United States v. Harris, 197 F.3d 870, 872 (7th Cir. 1999) (permitting strike of a juror with multiple sclerosis who "might have trouble climbing stairs and staying awake"); Jones v. State, 548 S.E.2d 75, 77 (Ga. Ct. App. 2001) (permitting a strike because the prosecutor worried he may not be able to speak loudly enough for hearing-impaired juror to hear him); People v. Falkenstein, 732 N.Y.S.2d 817, 817–18 (4th Dep't 2001) (permitting a strike due to concern about hearing-impaired juror's ability to hear inflections in the defendant's voice on an audiotape being presented as evidence).

128 *E.g.*, Bellin & Semitsu, *supra* note 20, at 1077 ("While the [Supreme] Court has consistently reaffirmed its 1986 holding in *Batson v. Kentucky* that race-based peremptory strikes are unconstitutional, virtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials." (footnotes omitted)).

129 *E.g.*, *Harris*, 197 F.3d at 874 ("[B]ecause [defendant] contests even the rationality of [stricken juror]'s exclusion, we will briefly discuss the peremptory exercised here.").

sent visual evidence, and it was rational for them to believe that they may have difficulty presenting this evidence to blind jurors.[130] Likewise, the peremptory strike in *Harris* was rational because the stricken juror was on multiple sclerosis medication that made her drowsy and could potentially compromise her ability to pay attention at the trial.[131] Thus, although courts seem at least open to the idea of invalidating a strike of a disabled juror that was made for an irrational reason,[132] the right situation has apparently yet to be presented.

While these cases do leave open the possibility that rational basis review may prohibit strikes of the disabled in some circumstances, the scope of such protection would necessarily be very narrow and not sufficient to truly combat discriminatory peremptory strikes of disabled jurors. If a strike will be considered rational unless based on "an irrational animosity toward or fear of disabled people,"[133] or a "vague, undifferentiated fear that [disabled] persons are incapable of serving as jurors,"[134] virtually any proffered justification would suffice. A party would be extremely unlikely to offer such a justification to the court when challenged, even if this was really their reason for striking the juror. Furthermore, this limitation overlooks what is likely one of the most common reasons for striking jurors: a belief that they are incapable of evaluating the evidence or participating in the trial, even when the court is able to provide accommodations to allow this. That such beliefs may well be based in paternalistic attitudes or outmoded beliefs about the ability of disabled persons to participate in society,[135] rather than animosity or fear, casts further doubt on the ability of rational basis review to address discriminatory

130 *Watson*, 483 F.3d at 835.

131 *See Harris*, 197 F.3d at 876.

132 *Watson*, 483 F.3d at 833 (citing Purkett v. Elem, 514 U.S. 765, 768–69 (1995) (per curiam)) ("[T]he Court['s] . . . analysis focused on whether an irrational justification was race-neutral for *Batson* purposes; it did not consider whether an irrational justification itself would violate equal protection." (footnotes omitted)).

133 *Id.* at 834.

134 *Id.*

135 Individuals with physical or intellectual disabilities are often stigmatized due to their deviation from societal expectations of normalcy. *See* Annette J. Towler & David J. Schneider, *Distinctions Among Stigmatized Groups*, 35 J. APPLIED SOC. PSYCHOL. 1, 1 (2005) (identifying the physically and mentally disabled as stigmatized groups); *id.* tbl.3 (showing that the physically disabled received high "pity" scores compared to other groups in study of undergraduate students); *see also* Robert Funk, *Disability Rights: From Caste to Class in the Context of Civil Rights*, *in* IMAGES OF THE DISABLED, DISABLING IMAGES 7, 23–24 (Alan Gartner & Tom Joe eds., 1987) (describing the social construction of the disabled as persons "who are perpetually dependent upon the welfare and charity of others").

peremptory strikes. Moreover, this approach seems to allow striking a juror on the basis that their disability is a proxy for bias, as that rationale would likely be a rational basis for such a strike. Though the question of how these courts would apply the rational basis test to less compelling justifications for peremptory strikes, such as striking a blind juror in a case with no significant visual evidence, is unanswered, there is not much reason to think it would afford much protection.

It is also unclear what form a rational basis challenge to a peremptory strike would take. It seems unlikely that the full *Batson* challenge procedure would be used. Indeed, even though the court in *Harris* considered the possibility that a peremptory strike of a disabled juror may need to have a rational basis, it qualified this by noting, in a footnote, that:

> By stating that a party must have a 'rational basis' for peremptory challenges, we do not imply that a party may be required to provide a reason for the challenges he or she chooses to exercise against members of non-suspect classes. . . . They are presumed legitimate and may not be questioned absent a showing that the strike is not rationally related to a legitimate state end.[136]

This accords with the Supreme Court's assertion of the continued vitality of the peremptory strike in *J.E.B.*: "Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."[137] If these statements are taken at face value, then one is left with serious questions as to how litigants could challenge a peremptory strike for lacking a rational basis at all. If parties will not be required to "provide a reason for the challenges,"[138] how could the court have any grounds on which to judge whether or not the strike had a rational basis, as opposed to an irrational basis? Alternatively, one could read this language as simply requiring a much more significant prima facie showing of a lack of a rational basis before a court will look into the reasons for a particular peremptory strike, which may prove equally difficult for the challenging party to provide. When all of the potential shortcomings of this approach are considered alongside its shaky judicial foundation, it seems very unlikely that challenging peremptory strikes for lacking a rational basis will be able to afford much protection to disabled jurors.

---

136 *Harris*, 197 F.3d at 874 n.3.
137 J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 (1994).
138 *Harris*, 197 F.3d at 874 n.3.

V

POSITIVE STATUTORY LAW IS NEEDED TO PREVENT DISCRIMINATION ON THE BASIS OF DISABILITY IN JURY SELECTION

Despite initial optimism, constitutional law has not proven to be a fertile ground for the protection of the civil rights of the disabled.[139] Indeed, following the Supreme Court's decisions in *Cleburne* and *Garrett*, disability advocates have noted that there is currently no "short-term or long-term constitutional strategy" for promoting disability civil rights.[140] Instead, these advocates have turned their attention to statutory strategies that have proven to be much more successful.[141] As it seems unlikely that constitutional equal protection jurisprudence will protect the disabled from discriminatory peremptory strikes, statutory law may be the only way to vindicate their rights. Through legislation, the state can require courts to afford protections to disabled jurors from peremptory strikes beyond what is constitutionally required by the *Batson* line of cases.

While disability appears to have been relegated to rational basis level review, there is still a clear need to protect the disabled from discriminatory peremptory strikes. Indeed, many of the reasons given by the Supreme Court to justify the creation of the *Batson* challenge and its expansion to gender-based peremptories apply with equal force to the disabled. Like members of minority races, the disabled have faced a long history of discrimination and de facto disenfranchisement on juries.[142] As recently as 1994, many states had statutes that categorically excluded persons with certain disabilities from serving on juries.[143] Even today, many states draw jury pools from driver's license lists or voter lists, systematically underrepresenting the disabled, who are often unable to drive and have difficulty registering to vote.[144] Further, peremptory strikes of disabled jurors impede legislative efforts to improve access to jury service for the disabled. Although state laws and the ADA now mandate that states make reasonable accommo-

---

139 *See, e.g.*, Waterstone, *supra* note 108, at 531 (arguing that "despite a nominal victory in *Cleburne*," constitutional law for the disabled "has not lived up to its promise and potential").

140 *Id.* at 527.

141 *Id.* at 555–56.

142 *See* Nancy Lawler Dickhute, *Jury Duty for the Blind in the Time of Reasonable Accommodations: The ADA's Interface with a Litigant's Right to a Fair Trial*, 32 CREIGHTON L. REV. 849, 849–50 (1999).

143 *See* Frank & Aleinikoff, *supra* note 7, at 36 n.2 (citing Ark. Code § 16-31-102 (2016), which disqualified all blind or deaf persons from jury service prior to a 1994 amendment).

144 *See* Weis, *supra* note 15, at 25.

dations to allow the disabled to access courts,[145] prohibit categorical exclusions of disabled jurors,[146] and sometimes even provide for additional protections against their exclusion from juries,[147] these laws do little to combat the use of peremptory strikes against disabled jurors once they have made it to the venire.

Perhaps the logic of *J.E.B.* is simply incorrect as it pertains to disabled jurors. In *Powers v. Ohio*, the Court powerfully articulated the dignitary harm caused to jurors, defendants, and society by the exclusion of jurors on the basis of race: "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard."[148] It is puzzling, then, that only three years later the Court noted in *J.E.B.* that exclusion on the basis of any non-suspect classification, as opposed to race and gender, does not cause a comparable dignitary harm because it does not "reinforce . . . stereotypes about the group's competence or predispositions . . . ."[149] To be sure, the exclusion of jurors on the basis of *most* non-suspect classifications, such as, for example, a juror's occupation, causes no such harm and plays a legitimate role in the selection of a fair jury. But it is hard to accept the argument that peremptory strikes of disabled jurors do not reinforce negative stereotypes about the competence of the disabled. Instead, they reinforce commonly held beliefs that the disabled are unable to participate meaningfully in public life and are incompetent to perform the important deliberative function of jury service.

A. Federal Legislation Is Unlikely to be Successful in Reducing Discriminatory Peremptory Strikes

Congress has the power to regulate the procedure of the federal courts,[150] and so could pass legislation prohibiting peremptory strikes of jurors on the basis of disability in these courts, but has yet to do so. Legislation has been introduced at the federal level as well, albeit aimed at sexual orientation: the

145 42 U.S.C. §§ 12131–12165 (2012).

146 *E.g.*, Galloway v. Super. Ct., 816 F. Supp. 12, 18–19 (D.D.C. 1993).

147 *E.g.*, Tex. Crim. P. Code Ann. § 35.16 (2005) (providing that sensory-impaired jurors will not be removed at the for-cause challenge stage unless the court concludes that they are not fit to serve in that particular case).

148 Powers v. Ohio, 499 U.S. 400, 413–14 (1991).

149 J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 n.14 (1994).

150 U.S. CONST. art. III, cl. 2; *e.g.*, Rules Enabling Act, 28 U.S.C. § 2072 (1988).

Jury Access for Capable Citizens and Equality in Service Selection Act of 2015[151] would prevent the exclusion of jurors from petit juries on the basis of sexual orientation or gender identity in federal courts, following in the steps of the *SmithKline* decision, but the law has never been enacted.

However, federalism principles articulated by the Court in *City of Boerne* render it unlikely that federal legislation would be able to address the problem of discriminatory peremptory strikes in state courts with federal legislation.[152] Although in *Tennessee v. Lane*, the Court upheld portions of Section II of the ADA that required states to make courts accessible to the disabled as a valid exercise of Congress's power to enforce the guarantees of the Fourteenth Amendment,[153] a federal law aimed at prohibiting peremptory strikes of disabled jurors in state courts would likely exceed this power. Congress's power to enforce the Fourteenth Amendment against states is limited by a principle of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end";[154] to enact 'prophylactic' legislation against discriminatory practices that would otherwise not be within Congress's power to regulate, Congress must identify an equal protection injury and remedy it with legislation that is proportional to the extent of the injury being caused. In contrast to the significant amount of findings Congress made regarding the accessibility of courthouses in *Lane*,[155] there is scant empirical evidence regarding the effects of peremptory strikes against disabled jurors. In addition, the Court has placed a high value on the practice of peremptory strikes against any group not subject to heightened scrutiny,[156] so it is likely that such a regulation would exceed Congress's ability to enforce the Fourteenth Amendment for not being proportional to the harm of peremptory strikes of disabled jurors. However, the Court has not fully clarified the scope of its holding in *Lane*, so it remains possible

---

151 Jury ACCESS Act, S. 447, 114th Cong. (2015).

152 *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

153 *See* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

154 *Flores*, 521 U.S. at 519–20.

155 *See Lane*, 541 U.S. at 528 ("Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the dissent's contention that the record is insufficient to justify Congress'[s] exercise of its prophylactic power is puzzling, to say the least.").

156 *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 (1994) (internal citations omitted) ("Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review.").

that such a regulation might be able to survive a constitutional attack if *Lane*'s "access to the courts" language could be read to encompass peremptory strikes of disabled jurors as well as physical impediments to court access. Due to the predominance of state-level litigation, federal legislation must be able to reach state courts if it is to provide any meaningful change to peremptory strike protections, and this appears unlikely under current law.

B. States Can Pass Laws or Amend Rules of Trial Procedure to Prevent Peremptory Strikes of the Disabled

Some states have had success passing statutory measures to prevent discrimination on the basis of disability in peremptory strikes. States can codify peremptory strike protections for certain classes of jurors in codes of civil and criminal procedure in the sections where jury selection and peremptory strike procedure are prescribed.[157] For example, California passed Assembly Bill 87 in 2015,[158] modifying its code of civil procedure to prohibit peremptory challenges "on the basis of an assumption that the prospective juror is biased" due to certain characteristics, including disability.[159] Sponsors of the bill noted that it was a "modest but necessary step to ensure that defendants are allowed a trial by an impartial jury that reflects a cross section of the population in a community" and to make sure that prospective jurors are not denied the opportunity to participate in the "civic duty" of jury service.[160]

The protections for disabled jurors codified in A.B. 87 are quite similar to those afforded to racial minorities by *Batson*. Like *Batson*, the law protects jurors from peremptory strikes on the basis of their disability, even if the striking attorney legitimately believes the juror may be biased due to their disability. It thus remedies the lack of protections disabled jurors receive due to disability receiving only rational basis level protections in equal protection jurisprudence, putting disability on an equal level with racial or gender-based classifications, and pre-

157 *See* Frank & Aleinikoff, *supra* note 7, at 35 ("[M]any states have enacted legislation that does not allow litigants to discriminate against people with disabilities when selecting a jury.").

158 Assem. B. 87, 2015–16, Reg. Sess. (Ca. 2015).

159 Ca. Code Civ. Proc., § 231.5 (2016).

160 Jason Howe, *Governor Signs EQCA-Sponsored Bill Protecting Jury Service Equality*, EQCA (July 17, 2015), http://www.eqca.org/governor-signs-eqca-sponsored-bill-protecting-jury-service-equality [https://perma.cc/ZLF3-7JN3].

vents damaging stereotypes about the disabled from making their way into the peremptory strike process.

1. *Practical Challenges to Implementing Prohibitions on Peremptory Strikes of the Disabled*

While states may be successful in implementing statutory prohibitions on peremptory strikes on the basis of disability, challenges will remain in the actual implementation of these prohibitions. Most significantly, the issues that plague the *Batson* challenge procedure will continue to impede the effectiveness of peremptory strike protections for disabled jurors, and some aspects of the *Batson* challenge may actually be more difficult to satisfy when a party is trying to prove that a peremptory strike was made on the basis of a juror's disability than on the basis of their race. While issues with the *Batson* procedure's effectiveness more generally are beyond the scope of this Note, this section will look at some issues that would be of particular concern in enforcing prohibitions on strikes against disabled jurors if protections similar to California A.B. 87[161] are enacted by the courts.

As the disabled undoubtedly make up a far smaller percentage of the jury pool than racial minorities, demonstrating purposive discrimination may be more difficult than in cases in which racial discrimination is alleged. This could make the prima facie showing element of the *Batson* challenge[162] a more difficult barrier for litigants to surpass, as 'targeting' of disabled jurors may be difficult to demonstrate from a purely statistical perspective. *Batson* itself notes that a prima facie case of an inference of discrimination can often be made by a showing of "a 'pattern' of strikes against black jurors included in the particular venire."[163] Such a showing may simply be impossible to make if there is, for example, only a single disabled juror on the venire. While "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support . . . an inference of discriminatory purpose,"[164] such a showing may be much more difficult to make as an attorney is unlikely to reveal their discriminatory intent during this phase of the selection process if they are aware that striking jurors on this basis is illegal. However, this step is highly discretionary, representing "a common sense

161 *See supra* subpart V.B.
162 *See* Batson v. Kentucky, 476 U.S. 79, 94 (1986).
163 *Id.*
164 *Id.* at 97.

judgment that race or gender appears to motivate a party's strike,"[165] so trial judges will need to be sensitive to parties' peremptory strikes of disabled jurors and whether or not there are grounds for further investigation into the motives of the striking attorney.

Striking parties will still have the ability to offer up a non-discriminatory explanation for their strike of a disabled juror in the second portion of the *Batson* challenge procedure. This has long been a weak point of the *Batson* challenge procedure, as it is often fairly easy for an attorney to come up with a non-discriminatory justification for striking a juror, even if they were really striking the juror on the basis of a protected classification. Unlike with race, attorneys may wish to strike disabled jurors not because of a belief that they are biased because of their disability, but also because of a belief that the disabled juror will not be able to interpret the evidence properly because of their disability. Such beliefs are often incorrect and reflective of old attitudes about the ability of the disabled to participate meaningfully in society. Ideally, states should strive to limit these types of challenges to the for-cause striking portion of jury selection, so that jurors who would actually have difficulty interpreting the evidence (i.e., a blind juror in a case relying on film evidence of the defendant) are removed before the peremptory strike phase. In this phase of jury selection, the judge will have a better opportunity to weigh the impact of the juror's disability on their ability to participate on the jury, and can receive input from the juror themselves. But cases such as *Harris* and *Watson*[166] demonstrate that this is not always the case, and attorneys may try to remove jurors at the peremptory strike phase for this reason. There is therefore some uncertainty regarding how courts will respond to this sort of justification when a peremptory strike of a disabled juror is challenged.

---

165 Bellin & Semitsu, *supra* note 20, at 1121. The *Batson* court also recognized the discretion that trial judges will have in determining whether a prima facie case of discriminatory intent has been made and should "consider all relevant circumstances." Batson, 476 U.S. at 79 ("We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.").

166 *See supra* subpart IV.C.

CONCLUSION

Trial by jury has been recognized as a fundamental right since before the founding of America,[167] and the institution of the jury suffers a blow to its legitimacy when it fails to be representative of the diversity of viewpoints in American society.[168] A representative jury ensures a truly impartial trial and that all groups are able to share in this valuable opportunity for civic engagement.[169] Though the disabled constitute a minority of the population, their viewpoint is no less necessary to securing the benefits of a representative jury than that of groups already afforded protection from discriminatory strikes. As the disabled become more represented in many areas of society, their continued underrepresentation on juries will become even more difficult to justify. Discriminatory peremptory strikes are a significant, discretionary means by which the disabled can continue to be excluded from juries even when other reforms aimed at increasing jury accessibility are put into place. Current equal protection jurisprudence provides scant protection for disabled jurors, but states can protect these jurors by statutory means, and will need to do so in order to secure the benefits of a truly representational jury.

Unfortunately, much work remains to be done on many fronts before we will begin to see a significant increase in the representation of the disabled on juries. The ADA and other legislation designed to increase the accessibility of courts has removed many of the obstacles faced by disabled persons to serving on a jury, but do little to address many other sources of underrepresentation, including juror lists that systematically exclude the disabled. Peremptory strike reform will therefore need to be only a piece of a broader legislative strategy to increase the representation of the disabled on juries, but it will be an essential piece nonetheless.

---

167 *See* NANCY GERTNER & JUDITH H. MIZNER, THE LAW OF JURIES 2 (5th ed. 2011).

168 *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 134 (1994) (noting that maintaining a diverse jury assures impartiality).

169 *See id.*