COMMENTS

Thou Shall Not Strike: Religion-Based Peremptory Challenges under the Washington State Constitution

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I. INTRODUCTION

The United States Supreme Court has expressly recognized that state courts have the power to interpret state constitutions to be more protective of civil liberties than the Federal Constitution.[1] Many state courts have exercised this power by independently interpreting state constitutional provisions as a means to afford their own citizens greater individual rights than those guaranteed by the Federal Bill of Rights.[2]

Washington is among the many states whose courts have traditionally examined their own constitutions on issues involving individual rights without assuming that the United States Supreme Court is the final word on such matters.[3] Washington's courts and commentators alike have recognized that independent interpretation and application of the state's constitution is an obligation that all Washington

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1. *See, e.g.*, Oregon v. Haas, 420 U.S. 714, 719 (1975).

2. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Former Supreme Court Justice Brennan argues that states fulfill their essential role in our federal system when they engage in independent state protection of individual liberties. *Id.* at 503. He points out numerous examples where states have undertaken this role and relied on their own constitutions to protect individual liberties. *Id.* at 498–501.

3. *See generally* Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491 (1984). Former Washington State Supreme Court Justice Utter provides a detailed examination of Washington's tradition of independent state constitutional interpretation, citing many instances where Washington's courts followed this tradition. *Id.* at 499–504.

courts owe to all Washington citizens.[4] In fact, the Washington State Supreme Court in *State v. Gunwall*[5] fashioned a framework to guide the state courts in determining whether to engage in independent state constitutional interpretation.[6]

In accordance with the principle that state courts may interpret their own constitutions more liberally than the Federal Constitution and grant broader protections to their citizens, numerous state courts have held that religion-based peremptory challenges are forbidden under their respective state constitutions.[7] These holdings deviate from the current stance of the United States Supreme Court, which has *sub silentio* recognized that religion-based peremptory challenges do not violate the Equal Protection Clause of the Fourteenth Amendment.[8]

Although Washington courts have yet to address the constitutionality of religion-based peremptory challenges, this Comment seeks to establish that such peremptory challenges violate Article I, § 11 of the Washington State Constitution.[9] The pertinent portion of that section provides that no person "shall . . . be incompetent as a witness or juror, in consequence of his opinion on matters of religion . . . ."[10] Thus, notwithstanding the Supreme Court's refusal to directly rule on whether religion-based peremptory challenges violate the Equal Protection Clause, Article I, § 11 of the Washington State Constitution appears to provide independent state constitutional grounds for resolving the issue.

An analysis under *State v. Gunwall*, the Washington framework for independent state constitutional interpretation, demonstrates that it is appropriate for Washington courts not only to determine the constitutionality of religion-based peremptory challenges independently of the Federal Constitution, but also to extend greater protection to Washington citizens in this area of law. The command of Article I, § 11 and the results of a *Gunwall* analysis establish that, as an independ-

4. *Id.* at 499; *see also* Alderwood Assoc. v. Washington Envtl. Council, 96 Wash. 2d 230, 238, 635 P.2d 108, 113 (1981).

5. 106 Wash. 2d 54, 720 P.2d 808 (1986).

6. *Id.* at 61–62, 720 P.2d at 811. This case establishes six non-exclusive factors for courts to analyze in deciding whether it is appropriate to grant independent protection to individuals under the Washington State Constitution. *See* discussion *infra* Part III(C).

7. Susan Hightower, Note, *Sex and the Peremptory Strike: An Empirical Analysis of* J.E.B. v. Alabama's *First Five Years*, 52 STAN. L. REV. 895, 902 (2000) (listing the states that have found religion-based peremptory challenges impermissible: California; Colorado; Connecticut; Florida; Hawaii; Massachusetts; Mississippi; New Jersey; New York; and North Carolina).

8. Davis v. Minnesota, 511 U.S. 1115, 1115 (1994) (denying *certiorari* when asked to decide the issue of whether religion-based peremptory challenges violate the Equal Protection Clause); *see also* discussion *infra* Part II(D).

9. WASH. CONST. art. I, § 11.

10. *Id.*

ent source of individual rights for all Washingtonians, the Washington State Constitution prohibits religion-based peremptory challenges.

This Comment will first define the peremptory challenge and discuss its history and normative values. It will then examine the United States Supreme Court's treatment of the peremptory challenge, focusing on how the peremptory challenge has changed from a litigation device that lawyers could exercise without explanation to one that at times requires an explanation for it to survive constitutional challenge. Next, this Comment will discuss state courts' independent interpretation of fundamental rights, Washington courts' decisions in harmony with this principle, and *State v. Gunwall*, the guide to independent constitutional interpretation in Washington. This Comment will show that under a *Gunwall* analysis, religion-based peremptory challenges violate Article I, § 11 of the Washington State Constitution. Finally, this Comment will provide a new standard for evaluating religion-based peremptory challenges in Washington while ensuring that the peremptory challenge remains a useful instrument in jury selection.

II. THE FEDERAL APPROACH TO PEREMPTORY CHALLENGES

A. Peremptory Challenges: Definition, History, and Normative Values

A peremptory challenge and a challenge for cause are the two methods by which a party may eliminate a prospective juror during voir dire.[11] Prior to the Supreme Court's decision in *Batson v. Kentucky*,[12] one could define a peremptory challenge as "one exercised without a reason stated, without inquiry and without being subject to the court's control."[13] In contrast, a challenge for cause permits a party to dismiss a member of the venire only "on a narrowly specified, provable and legally cognizable basis of partiality."[14]

While a peremptory challenge is designed to permit a party to strike a member of the venire on nothing more than a hunch regarding the juror's partiality,[15] a challenge for cause requires a party to demonstrate the prospective juror's objective bias before a judge will dismiss

11. FED. R. CIV. P. 47; *see also* JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 47.20–.30 (3d ed. 1999).

12. 476 U.S. 79, 89 (1986) (finding that race-based peremptory challenges violate the Equal Protection Clause). *See* discussion *infra* Part II(B).

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

14. *Id.* The challenge for cause is "narrowly confined to instances in which threats to impartiality are admitted or presumed from the relationships, pecuniary interests, or clear biases of a prospective juror." MOORE ET AL., *supra* note 11, ¶ 47.20.

15. *Swain*, 380 U.S. at 220.

the individual.[16] Although a party can exercise an unlimited number of challenges for cause,[17] the requisite objective standard of proof makes them difficult to sustain.[18] Thus, peremptory challenges, though limited in number,[19] are a treasured tool for the party that desires to dismiss a juror but is unable to do so for cause.

The peremptory challenge originated in England approximately 700 years ago, arrived with the colonists in America, and soon found its way into federal and state statutes.[20] Although Congress has authorized the use of peremptory challenges in federal courts[21] and all states have authorized their use in state courts,[22] nothing in the Federal Constitution provides for the existence of peremptory challenges.[23] Therefore, unlike the challenge for cause, which is grounded in the Sixth Amendment right to a fair and impartial jury,[24] the power to employ a peremptory challenge emanates from various statutes, not from the Constitution.[25]

The lack of a constitutional basis notwithstanding, the peremptory challenge is still viewed as a useful instrument for molding a more impartial jury.[26] Justification for the peremptory challenge is based on the presumption that such challenge can help remove bias from the jury when the bias it purports to eliminate is inarticulable.[27] Parties on both sides of a case may exercise peremptory challenges to exclude

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16. *Id.* "The central inquiry in examining a challenge for cause is whether the prospective juror holds a particular position, belief, or opinion that prevents or substantially impairs the impartial performance of the duties of juror." MOORE ET AL., *supra* note 11, ¶ 47.20.

17. Coburn R. Beck, Note, *The Current State of the Peremptory Challenge*, 39 WM. & MARY L. REV. 961, 964 (1998).

18. *See* MOORE ET AL., *supra* note 11, ¶ 47.20. A juror is presumed to be impartial unless he or she falls into one of the narrowly defined categories of legally cognizable bias. *See* discussion *supra* note 14.

19. Beck, *supra* note 17, at 964.

20. *See id.* at 965; *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 147 (1994) (O'Connor, J., concurring) ("The peremptory's importance is confirmed by its persistence: It was well established at the time of Blackstone and continues to endure in all the States.").

21. 28 U.S.C. § 1870 (2001) (providing that "each party shall be entitled to three peremptory challenges" in civil cases). FED. R. CIV. P. 47(b) provides that a civil court "shall allow the number of peremptory challenges provided by 28 U.S.C. § 1870." In criminal trials, the number of peremptory challenges depends on the offense charged: capital trials entitle each side to twenty peremptory challenges; felony trials entitle the government and the defendant to six and ten peremptory challenges respectively; and misdemeanor trials entitle each side to three peremptory challenges. FED. R. CRIM. P. 24(b).

22. *J.E.B.*, 511 U.S. at 147.

23. Swain v. Alabama, 380 U.S. 202, 219 (1965).

24. U.S. CONST. amend. VI; Ross v. Oklahoma, 487 U.S. 81, 88 (1988).

25. *See Swain*, 380 U.S. at 219.

26. *Id.*

27. *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring) ("That a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous.").

those members of the venire who they suspect are either partial towards the other party or prejudiced against them.[28] By eliminating these extremes of partiality common to any venire, the parties' exercise of peremptory strikes results in a jury that is more likely to be impartial.[29]

In addition to creating a more impartial jury, the peremptory challenge contributes to the appearance of impartiality.[30] Although the claim that peremptory challenges actually create a more impartial jury is not universally accepted, there is less doubt that such challenges impress upon parties that the jury will decide the case impartially.[31] The mere process of striking members of the venire based on nothing more than a surmise of bias strengthens the litigants' belief that the selected jury will arrive at a fair result.[32]

Another beneficial feature of the peremptory challenge is the alacrity with which it allows voir dire to proceed.[33] The peremptory challenge expedites voir dire by reducing a litigant's need to extensively probe every juror for bias to justify a challenge for cause.[34] A party may forego a challenge for cause that is unlikely to succeed and remove the prospective juror with a peremptory challenge.[35]

Because a party need not justify every dismissal of a member of the venire, the peremptory challenge also makes extensive and potentially intrusive questioning during voir dire less necessary.[36] A lawyer who suspects that a potential juror is biased and that further questioning will fail to expose such bias may elect to use a peremptory challenge instead of pursuing a challenge for cause.[37] Also, if a party pursues a challenge for cause and fails to establish that a particular member is biased, the party may then strike the potential juror if for

28. *Id.* at 147 (O'Connor, J., concurring).

29. *Id.* ("Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury.") (quoting Holland v. Illinois, 493 U.S. 474, 484 (1990)).

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

31. *J.E.B.*, 511 U.S. at 161 n. 3 (Scalia, J., dissenting) ("Wise observers have long understood that the appearance of justice is as important as its reality. If the system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function. In point of fact, that may well be its greater value.") (citation omitted).

32. *Id.*

33. A.C. Johnstone, *Peremptory Pragmatism: Religion and the Administration of the* Batson *Rule*, 1998 U. CHI. LEGAL F. 441, 444 (1998).

34. *See id.* at 445.

35. *See id.*

36. *See id.* at 444.

37. *See id.*

no other reason than to avoid placing an irritated member of the venire on the jury.[38]

As demonstrated above, the benefits flowing from the availability of the peremptory challenge are made possible by its unrestricted nature. Despite the benefits of an unrestricted peremptory challenge, the Supreme Court has nevertheless limited its exercise in instances where its use would violate the Equal Protection Clause.

B. Race-Based Peremptory Challenges at the Federal Level

The Supreme Court first confronted the issue as to whether the use of peremptory challenges may at times violate the Equal Protection Clause in its 1965 decision, *Swain v. Alabama*.[39] In *Swain*, a criminal defendant alleged that a prosecutor's use of peremptory challenges to prevent African Americans from sitting on a jury violated the Equal Protection Clause.[40] Justice White reasoned for the majority that "[i]n the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."[41] The Court held that elimination of prospective jurors on the basis of race violates the Equal Protection Clause only if the challenging party can establish that the prosecutor used the peremptory challenge in a systematic fashion, in trial after trial, to discriminate against a particular race regardless of the circumstances of each case.[42]

More than twenty years later, in 1986, the Supreme Court overruled *Swain* by limiting a prosecutor's unrestrained use of peremptory challenges in *Batson v. Kentucky*.[43] Finding the *Swain* requirement of extensive proof of systematic discrimination to be untenable, the Court concluded that a minority defendant can establish a prosecutor's impermissible race-discriminatory use of the peremptory challenge by merely adducing evidence from his or her particular trial.[44] The Court held that a prosecutor who strikes of a member of the venire on the basis of race or on the assumption that members of a par-

38. *See id.*

39. 380 U.S. 202 (1965).

40. *Id.* at 209.

41. *Id.* at 221.

42. *Id.* at 223–24. Under *Swain*, a defendant could not prove a race-based peremptory challenge merely by showing discrimination in his or her own case, even if the prosecutor struck every African American from the jury. The Court demanded evidence that the prosecutor in question had an established pattern of using race-based peremptory challenges that were inexplicable as trial strategy.

43. 476 U.S. 79 (1986).

44. *Id.* at 96.

ticular race are unable to remain impartial violates the Equal Protection Clause.[45]

Specifically, under *Batson*, to establish a prosecutor's race-discriminatory use of a peremptory challenge prohibited under the Equal Protection Clause, a criminal defendant must show (1) "that he is a member of a cognizable racial group,"(2) that the prosecutor used a peremptory challenge on a member of the defendant's race, and (3) that such a challenge and "any other relevant circumstances" give rise to an inference that the prosecutor's actions were racially motivated.[46] Once the defendant establishes a prima facie case, the burden of proof shifts to the prosecutor to demonstrate a nondiscriminatory reason for the peremptory challenge.[47] Although the explanation may be less than that required to establish a challenge for cause, the explanation must be "neutral" and "related to the particular case to be tried."[48] After the explanation is offered, the trial court must assess its legitimacy and must rule accordingly.[49]

The Supreme Court did not limit its *Batson* holding to cases where a prosecutor uses a peremptory strike to discriminate against a member of the defendant's race. It first extended *Batson*'s scope in its 1991 decision, *Powers v. Ohio*,[50] where it held that "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race."[51] The Court relied on principles of third-party standing to extend the right of a *Batson* challenge to white defendants.[52] In doing so, it built upon its explicit recognition in *Batson* that racial discrimination in the context of jury selection harms the juror and the community as much as it harms the defendant.[53]

Later in the same year, in *Edmonson v. Leesville Concrete Co.*,[54] the Court held that the use of a race-based peremptory challenge may violate the Equal Protection Clause in civil as well as in criminal

45. *Id.* at 89.
46. *Id.* at 96.
47. *Id.* at 97.
48. *Id.* at 98.
49. *Id.*
50. 499 U.S. 400 (1991).
51. *Id.* at 402.
52. *Id.* at 415.
53. *Id.* at 406 (Kennedy, J.) ("*Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large. The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.") (citation omitted); *see also Batson*, 476 U.S. at 87 (Powell, J.) ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").
54. 500 U.S. 614 (1991).

cases.[55] Although civil cases usually involve only a dispute between private parties, an area normally beyond the bounds of the Constitution, "governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints."[56] Because private litigants in civil trials exercise peremptory challenges under governmental authority, those parties are state actors and are subject to the same constitutional constraints on the use of race-based peremptory challenges as in the criminal context.[57]

The Supreme Court completed its attempt to eradicate racial discrimination in the jury selection process in its 1992 decision, *Georgia v. McCollum*.[58] According to the *McCollum* Court, the Constitution also forbids a criminal defendant from engaging in purposeful discrimination through use of race-based peremptory challenges.[59] The principles espoused in *Batson*, *Powers*, and *Edmonson* formed the foundation for the *McCollum* Court's conclusion that even a criminal defendant is "bound by the constitutional mandate of race neutrality" when "wielding the power to choose a quintessential governmental body."[60]

Batson and its progeny illustrate how the Supreme Court extended its *Batson* holding to areas where the peremptory challenge may serve as a race-discriminatory tool. However, the Court did not address whether the Equal Protection Clause forbids gender-based peremptory challenges until its 1994 decision, *J.E.B. v. Alabama ex rel. T.B.*[61]

C. Gender-Based Peremptory Challenges at the Federal Level

In *J.E.B.*, the putative father in a paternity and child support suit argued that Alabama's use of peremptory challenges against males violated the Equal Protection Clause, alleging that the use was based solely on gender.[62] The Supreme Court concluded that purposeful "discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad

55. *Id.* at 628.
56. *Id.* at 620.
57. *Id.* at 628.
58. 505 U.S. 42 (1992).
59. *Id.* at 59.
60. *Id.* at 54.
61. 511 U.S. 127 (1994).
62. *Id.* at 129.

stereotypes about the relative abilities of men and women."[63] Extending *Batson* to gender-based peremptory challenges worried those who feared the eventual elimination of all peremptory challenges. Thus, the Court insisted that *J.E.B.* neither sounded the death knell of the peremptory challenge nor extended *Batson* to other groups that are usually subject to review under the Equal Protection Clause.[64]

Those who did not join the majority opinion, however, were unpersuaded by the majority's qualification and emphasized that the majority's holding would have ramifications beyond the decision.[65] For example, Justice Scalia in dissent predicted that *J.E.B.* would become the latest rallying point from which to extend the panoply of equal protection rights to other groups, thus further eroding a method of jury selection, which, by definition, is supposed to be unrestricted.[66] Furthermore, because every use of a peremptory challenge may potentially lead to a gender-based challenge, a situation avoided in *Batson* challenges due to the demographic realities of race, trial courts would face an inundation of collateral litigation and a lengthening of the voir dire process.[67]

The parade of horribles predicted by Justice Scalia has yet to arrive, as the consequence of *J.E.B.* has been far less dramatic than predicted. Indeed, the claim that every peremptory strike will involve a potential gender-discrimination challenge is based on misplaced logic.[68] Of course, members of either gender will usually outnumber members of a particular race on the venire. However, this creates more difficulty, not less, in establishing a prima facie case for gender discrimination.[69] The likely presence of equal numbers of men and women on the venire suggests that a gender claim will arise only in more obvious instances where members of a particular sex are struck repeatedly.[70] Conversely, in instances of race-based peremptory challenges, the demographic reality of fewer members of that race makes a prima facie case easier to recognize and establish, thus making race-

63. *Id.* at 130–31.

64. *Id.* at 143 (Blackmun, J.) ("Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges.").

65. *Id.* at 161 (Scalia, J., dissenting) ("[P]erhaps when the Court refers to 'impermissible stereotypes,' it means the adjective to be limiting rather than descriptive—so that we can expect to learn from the Court's peremptory/stereotyping jurisprudence in the future which stereotypes the Constitution frowns upon and which it does not.") (citation omitted).

66. *Id.* at 161–62 (Scalia, J., dissenting).

67. *Id.* at 162 (Scalia, J., dissenting).

68. Hightower, *supra* note 7, at 905.

69. *Id.*

70. *Id.*

discrimination claims more likely to arise.[71] The difficulty in establishing a gender-discrimination claim during voir dire suggests that every dismissal of a prospective juror will not contain a potential gender-based claim. Thus, the real consequence of *J.E.B.* is less, not more, collateral litigation than that created by *Batson*, and the empirical evidence of *J.E.B.*'s impact on collateral litigation suggests the same.[72]

Although the impact on collateral litigation and the voir dire process predicted by the dissent in *J.E.B.* has failed to materialize, the Supreme Court has *sub silentio* chosen not to extend *Batson* beyond the context of gender-based peremptory challenges.[73] In doing so, it has complied with what Justice O'Connor urged in her concurrence in *J.E.B.*: that the Court limit the holding in that case to gender-based peremptory challenges.[74] On the heels of the *J.E.B.* decision, the Court denied *certiorari* in *Davis v. Minnesota*,[75] an appeal based on the Minnesota Supreme Court's refusal to extend *Batson* to religion-based peremptory challenges.[76]

D. Religion-Based Peremptory Challenges at the Federal Level

The Minnesota State Supreme Court's refusal to extend *Batson* to religion-based peremptory challenges arose from a case where a prosecutor used a peremptory challenge to remove an African American Jehovah's Witness from the jury.[77] The defendant issued a *Batson* challenge and established a prima facie case of race discrimination in violation of the Equal Protection Clause.[78] When the burden shifted to the state to justify the challenge with a legitimate reason, the prosecutor explained that Jehovah's Witnesses are reluctant to exercise authority over their fellow man and asserted that she would never fail to strike them given the opportunity.[79] On appeal, the defense argued that *Batson* applied to religion-based peremptory strikes, but the Min-

71. *Id.*

72. *Id.* at 908. In the first five years after *J.E.B.*, only twenty-three cases were reversed and only twenty-five cases were remanded based on that decision. *Id.* (citing cases from both the federal and state court systems). A similar study on the effect of *Batson* on collateral litigation revealed that over a seven-year period there were 1,156 *Batson* complaints in both federal and state courts. Kenneth J. Melili, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 457 (1996). Of these challenges, 191 of them were ultimately successful. *Id.* at 459.

73. *See* Davis v. Minnesota, 511 U.S. 1115 (1994).

74. 511 U.S. at 147 (O'Connor, J., concurring).

75. *Davis*, 511 U.S. at 1115.

76. State v. Davis, 504 N.W.2d 767, 769 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994).

77. *Id.* at 768.

78. *Id.*

79. *Id.*

nesota State Supreme Court refused to extend *Batson* that far.[80] It emphasized that *Batson* was a limited exception to peremptory challenges and that the reasons for that exception were not present when a party dismissed a juror solely on the basis of religion.[81]

In concluding that the compelling justifications for the extension of *Batson* were absent, the court noted that use of peremptory challenges to discriminate against religion is neither frequent nor pervasive.[82] Unlike race-based discrimination, evidence of religion-based discrimination through the use of peremptory strikes is minimal.[83] With no evidence being presented to show widespread religious discrimination in selecting juries, the court concluded that confidence in the jury system is not undermined when a party exercises a religion-based peremptory challenge.[84]

After failing to convince the Minnesota State Supreme Court that religion-based peremptory challenges are unconstitutional, the defendant in *Davis* appealed to the United States Supreme Court. Although the Minnesota State Supreme Court decided *Davis* prior to *J.E.B.*, the appeal arrived shortly after the *J.E.B.* decision. For that reason, Justices Thomas and Scalia voted to grant certiorari and wrote that the case should be remanded and decided in light of the *J.E.B.* opinion, which undermined the Minnesota State Supreme Court's premise that *Batson* limited the Equal Protection Clause challenges to race-based peremptory challenges.[85] In spite of this urging, a majority of justices voted to deny certiorari.[86] By doing so, the Court tacitly adopted the reasoning of the Minnesota State Supreme Court and indirectly adhered to Justice O'Connor's plea in *J.E.B.* that the equal protection constitutional restrictions on the use of peremptory challenges should be limited to race- and gender-based challenges.

The dissent from the denial of *certiorari* was an attempt to call the bluff of those in *J.E.B.* who so vigorously supported extending *Batson* to gender. Justice Thomas noted, "*J.E.B.* would seem to have extended *Batson*'s equal protection analysis to all strikes . . . based on

80. *Id.* at 771.

81. *Id.* At the time the Minnesota State Supreme Court made its decision, the United States Supreme Court had yet to rule on the issue presented by *J.E.B.* This explains why the *Davis* court emphasized that *Batson* was a limited exception to the peremptory challenge and why Justice Thomas argued that the case needed to be re-evaluated in the context of *J.E.B.* *See* Davis v. Minnesota, 511 U.S. 1115, 1118 (1994) (Thomas, J., dissenting).

82. State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994).

83. *Id.* at 771.

84. *Id.*

85. *See Davis*, 511 U.S. at 1118.

86. *Id.* at 1116.

religion."[87] If *J.E.B.* was based on the conclusion that gender-based peremptory challenges violate the Equal Protection Clause because they do not withstand heightened scrutiny, then religion-based peremptory challenges must also violate the Clause because religion-based classifications fall within the same sphere of protected categories as gender-based classifications.[88] In other words, the dissent posed the logical question of how religion-based peremptory challenges can be substantially related to an important government objective when gender-based peremptory challenges are not. This explains the dissent's conclusion that the justices who refused to grant certiorari were unwilling to face the intellectual implications of the *J.E.B.* decision.[89]

Although the United States Supreme Court refused to address whether religion-based peremptory challenges violate the Equal Protection Clause, many states have addressed the issue and decided that such peremptory challenges violate their state constitutions.[90] These decisions exemplify the states' power to grant broader protections to their citizens than the Federal Constitution and the states' willingness to exercise this prerogative. Although Washington courts have traditionally interpreted the state's constitution independently of its federal counterpart, they have yet to address the constitutionality of religion-based peremptory challenges. There is ample support for the conclusion that such challenges violate the Washington State Constitution.

III. WASHINGTON'S INDEPENDENT APPROACH AND RELIGION-BASED PEREMPTORY CHALLENGES

A. State Courts' Independent Interpretation of Fundamental Rights

It is unclear what led state courts to begin construing state constitutions as being more protective than the Federal Constitution, but former Justice William Brennan suggests that the trend began after the United States Supreme Court retreated from, or at least temporarily suspended, the extension "of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment" to the states.[91] Far from implying that states should avoid this extension, Brennan concludes that it is fitting and proper for the states to do so.[92]

87. *Id.* at 1117.
88. *Id.*
89. *See id.*
90. Hightower, *supra* note 7, at 902.
91. Brennan, *supra* note 2, at 495.
92. *Id.* at 502.

State courts should not necessarily be content with those protections guaranteed by the Supreme Court's interpretation of the Federal Constitution, because state laws are vital as an independent and protective force for fundamental liberties.[93] When state courts extend fundamental liberties under state constitutions beyond the guarantees of the Federal Constitution, it is not necessarily a repudiation of Supreme Court precedent, but rather an acknowledgement "that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[94]

Brennan exhorts state courts to scrutinize the Supreme Court precedent for sound and trenchant analysis before assigning those decisions conclusive weight as signposts to state constitutional interpretation.[95] By scrutinizing the Court's analysis of issues involving fundamental liberties, state courts fulfill a federalism role as a counterpart of a "double source of protection for the rights of our citizens."[96] When the federal judiciary limits its role as the federal half of this "double source of protection," it becomes imperative for the state courts to "thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms."[97]

Treatment of religion-based peremptory challenges at the state level demonstrates the state courts' willingness to interpret state constitutions more broadly than their federal counterpart. Many states have extended *Batson* and *J.E.B.* to religion-based peremptory challenges. For example, the courts of California,[98] Colorado,[99] Connecticut,[100] Florida,[101] Hawaii,[102] Massachusetts,[103] Mississippi,[104] New Jer-

93. *Id.* at 491.

94. *Id.* at 502.

95. *Id.*

96. *Id.* at 503.

97. *Id.*

98. People v. Wheeler, 583 P.2d 748, 761–62 (Cal. 1978) (holding that the exercise of a peremptory challenge to remove a juror on the basis of race, religion, or ethnicity violates the California Constitution).

99. Fields v. People, 732 P.2d 1145, 1155 (Colo. 1987) (finding that religion-based peremptory challenges violate a criminal defendant's right to a fair trial under the United States Constitution and the Colorado State Constitution).

100. State v. Hodge, 726 A.2d 531, 553 (Conn. 1999) (holding that religion-based peremptory challenges violate the Equal Protection Clause).

101. Nunez v. State, 664 So. 2d 1109, 1111 (Fla. Dist. Ct. App. 1995) (concluding that the Florida State Constitution prohibits religion-based peremptory challenges).

102. State v. Levinson, 795 P.2d 845, 849 (Haw. 1990) (holding that the Hawaii State Constitution prohibits a party from excluding a juror on the basis of religion, race, gender, or ethnicity).

sey,[105] New York,[106] and North Carolina[107] have all found that, at least in certain circumstances, religion-based peremptory challenges are forbidden under their respective state constitutions. Although Washington courts have yet to address the constitutionality of religion-based peremptory challenges, there is strong support for concluding that such challenges violate the state constitution.

B. Washington Courts' Independent Interpretation of Fundamental Rights

In his seminal article on Washington courts' tradition of interpreting the state constitution more broadly than its federal counterpart, former Washington State Supreme Court Justice Robert Utter supports independent interpretation of the Washington State Constitution and provides a guide on how and when Washington courts should do so.[108] In *State v. Gunwall*, the Washington State Supreme Court incorporated much of his reasoning in pronouncing the standard for determining when it is appropriate to interpret the state constitution independently of the Federal Constitution.[109]

Among the justifications for independent interpretation of the state constitution is the United States Supreme Court's express recognition that state courts have the power to interpret state constitutions to provide more protection to individuals than the Federal Constitution.[110] This grant of leeway emanates from the presupposition that "a considerable measure of cooperation must exist in a truly effective federalist system."[111] In addition to allowing state courts to fulfill a role as part of a dual protectorate of fundamental rights, the grant furthers the principle "that the states be left free to try a broad range of social, political, and legal experiments."[112]

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103. Commonwealth v. Soares, 387 N.E. 2d 499, 516 (Mass. 1979) (concluding that a peremptory challenge based on gender, race, religion, or national origin violates the Massachusetts State Constitution).

104. Thorson v. State, 721 So. 2d 590, 594 (Miss. 1998) (holding that religion-based peremptory challenges violate the Mississippi State Constitution).

105. State v. Gilmore, 511 A.2d 1150, 1154 (N.J. 1986) (holding that a prosecutor may not use peremptory challenges to strike a prospective juror on the basis of religion, race, ancestry, national origin, or gender under the New Jersey State Constitution).

106. People v. Langston, 641 N.Y.S. 2d 513, 514 (N.Y. Sup. Ct. 1996) (holding that religion-based peremptory challenges violate the New York State Constitution).

107. State v. Eason, 445 S.E.2d 917, 921-23 (N.C. 1994) (holding that the North Carolina State Constitution forbids religion-based peremptory challenges).

108. *See* Utter, *supra* note 3.

109. State v. Gunwall, 106 Wash. 2d 54, 61–62, 720 P.2d 808, 811 (1986).

110. Utter, *supra* note 3, at 493.

111. *Gunwall*, 106 Wash. 2d at 60, 720 P.2d at 812.

112. Utter, *supra* note 3, at 496.

The structural difference between the Washington State Constitution and its federal counterpart also favors independent interpretation of the state constitution.[113] While the Federal Constitution grants strictly described enumerated powers to the federal government, the Washington State Constitution is a set of "limitations on the otherwise plenary power of state governments to do anything not expressly forbidden by the state constitutions or federal law."[114] Thus, state constitutional provisions regarding fundamental rights tend to be more detailed and specific because they are all that stand between the people and the plenary police power of the state.[115] Because of the differences in constitutional structures, state constitutions often vouchsafe fundamental rights that are not provided for by the Federal Constitution.[116]

Additionally, the Washington State Constitution and the judiciary responsible for interpreting it tend to be more sensitive to areas of local concern.[117] In contrast to the Federal Constitution, the state constitution is easier to amend, was authored more recently, and is interpreted by elected, rather than appointed, judges. As such, the state constitution is more indicative of, and amenable to, local concerns than the Federal Constitution.[118] Moreover, the United States Supreme Court must not only be cognizant of its more limited role as an unelected and unrepresentative judiciary, but it must also address concerns of the nation and formulate holdings reflective of the "lowest common denominator of individual rights."[119]

Furthermore, Washington borrowed much of its Declaration of Rights from other state constitutions, not from the Federal Bill of Rights.[120] When the Washington State Constitution was ratified, the Bill of Rights did not apply to the states.[121] It makes little sense, then, for Washington courts to interpret the state constitution, one based on other state constitutions rather than the federal charter, entirely consistent with the Federal Bill of Rights, which did not apply to the states when the state constitution was framed.[122]

Finally, at the time the Washington State Constitution was developed, federal law was not nearly as ubiquitous as it is today, so "[i]t

113. *Id.* at 494–95.
114. *Id.*
115. *Id.* at 495.
116. *Id.*
117. *See id.*
118. *Id.* at 495–96.
119. *Id.* at 496.
120. *Id.* at 497.
121. *Id.*
122. *Id.*

is extremely unlikely that the Washington framers . . . intended that the federal constitution and courts should have any significant role in interpreting or setting limits on the interpretation of Washington's constitution."[123] After all, one hundred years and an entire continent separated the framers of the respective documents.[124] It is only natural, then, to assume that the intent behind the documents differed just as much as the conditions that gave rise to them and the men who wrote them.[125]

The justifications for independent analysis of the Washington State Constitution compel the Washington courts to look there first when the issue is one of fundamental rights.[126] However, determining when to approach a constitutional issue differently than the federal courts and establishing a framework for doing so is as important, if not more so, as the broad normative values behind independent interpretation.[127] It is easier to find instances of independent interpretation of state constitutions than it is to structure a guide that indicates when state courts should use their power to chart their own course.[128]

The presence of a consistent framework for independent state constitutional interpretation reduces the likelihood of the courts' result-oriented application of the state constitution. Also, adherence to an articulable and viable framework for appropriate state constitutional analysis establishes state precedent that discourages attorneys from making "naked castings into the constitutional sea."[129] Washington law has developed such a framework for deciding when to follow federal jurisprudence and when to follow its own constitution.[130] This framework can be utilized to decide whether religion-based peremptory challenges are unconstitutional under the Washington State Constitution.

123. *Id.* at 498.
124. *Id.*
125. *Id.*
126. *Id.* at 524.
127. *Id.* at 492.
128. State v. Gunwall, 106 Wash. 2d 54, 60, 720 P.2d 808, 812 (1986).
129. *Id.* at 62, 720 P.2d at 813 (quoting *In re* Rosier, 105 Wash. 2d 606, 616, 717 P.2d 1353, 1359 (1986)).
130. *Id.* at 61, 720 P.2d at 812.

C. State v. Gunwall: A Guide to Independent Constitutional Interpretation in Washington

In *State v. Gunwall*, the Washington State Supreme Court formulated what is now the standard by which Washington courts determine whether the state constitution should be interpreted as more protective of individual rights than the Federal Constitution.[131] The following nonexclusive factors are relevant to that determination: (1) the text of the state constitution; (2) textual differences between the federal and state constitutions; (3) constitutional and common law history; (4) pre-existing state law; (5) structural differences between the federal and state constitutions; and (6) whether the issue is a matter of local or national concern.[132]

The first and the second factors, the text of the Washington State Constitution and the textual differences between the federal and state constitutions, are intertwined. A reading of the text of the state constitution leads to questions about how its text differs from the text of its federal counterpart. For example, a state provision may be more detailed or differently worded than its federal cognate.[133] It may also govern a matter not explicitly found in the Federal Constitution.[134] Thus, a state constitutional provision more explicit than, or different from, its federal counterpart or a provision covering a matter not addressed by the Federal Constitution may justify a deviation from federal precedent.[135]

The third factor requires an inquiry into case law interpreting the provision at issue and, if necessary, into the constitutional history of the provision.[136] The history of the adoption of a particular provision or state case law illuminating that provision may support independent interpretation of that provision, separate from federal interpretation of the parallel federal provision.[137]

The fourth factor, pre-existing state law, recognizes that pre-existing bodies of state law, including statutory law, may show a "long history and tradition of strict legislative protection" of certain fundamental rights before a state court confronts issues concerning those rights.[138] In other words, pre-existing state protection of a matter cur-

131. *Id.* at 61–62, 720 P.2d at 811.
132. *Id.* at 58, 720 P.2d at 811.
133. *Id.* at 61, 720 P.2d at 812.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 66, 720 P.2d at 815.

rently before a court may establish "distinctive state constitutional rights" and "help to define the scope" of those state-based rights.[139]

Under the fifth factor, a court must examine structural differences between the federal and state constitutions.[140] This criterion recognizes that the Federal Constitution is one of enumerated powers, while the state constitution limits the otherwise plenary power of the state government.[141] In issues involving individual liberties, the state constitution may then guarantee broader protections than its federal counterpart.[142] Furthermore, one must read particular provisions of the Washington State Constitution in relation to the entire document and compare that structural relation with that of the Federal Constitution.

The sixth factor recognizes that it may be more appropriate to address areas of local concern under the aegis of the state constitution, rather than looking to the federal interpretation of the Federal Constitution for guidance.[143] The fourth factor, pre-existing state law, may also be pertinent here, as state legislation on the issue may conclusively demonstrate that the issue is of local or state concern.[144] When resolution of the question requires national uniformity, it is usually appropriate to defer to decisions elucidated by the United States Supreme Court.[145] But, in matters where national uniformity is not necessary or where the Supreme Court has not addressed the issue, courts often have a principled basis for interpreting the Washington State Constitution independently.

D. Religion-Based Peremptory Challenges Under a Gunwall Analysis

The six factors announced in *Gunwall* create the backdrop for determining whether religion-based peremptory challenges are impermissible under the Washington State Constitution. Application of the *Gunwall* analysis establishes that such peremptory challenges are unconstitutional in Washington.

1. The Text of Article I, § 11

Under the first *Gunwall* factor, there is strong textual support in Article I, § 11 of the Washington State Constitution for protecting in-

139. *Id.* at 61–62, 720 P.2d at 812.
140. *Id.* at 62, 720 P.2d at 812.
141. *Id.*
142. *Id.*
143. *Id.* at 62, 720 P.2d at 813.
144. *Id.* at 67, 720 P.2d at 815.
145. *Id.* at 62, 720 P.2d at 812.

dividuals from religion-based peremptory challenges.[146] The relevant language of Article I, § 11 provides that no person "shall . . . be incompetent as a witness or juror, in consequence of his opinion on matters of religion . . . ."[147] As a matter of plain language, Article I, § 11 protects a citizen's right to be a juror regardless of religious belief.

The language clearly suggests that no person shall be excluded from the jury for religious reasons, though one might contend that Article I, § 11 applies only to the selection of the venire and leaves religion-based peremptory challenges unaffected. Article I, § 11 is thus subject to two interpretations (1) it forbids removing a potential juror under all circumstances involving matters of religion, or (2) it forbids religion-based discrimination in compiling the venire, while allowing such discrimination in the form of a peremptory challenge in selecting the jury.

However, the plain language of Article I, § 11 and its logic favor the former interpretation. The plain language of the text appears to preclude any method of removing a juror "in consequence of his opinion on matters of religion," while there is no language suggesting that a citizen may not be excluded from the venire because of religious belief, yet he or she may be excluded from the jury for the same reason. Such a reading is logically inconsistent. To interpret the language this way is tantamount to saying that an attempt to exclude a religious group is impermissible in selecting the venire, yet acceptable during voir dire if the discrimination occurs in the form of a peremptory challenge.

2. Textual Differences Between Article I, § 11 and the Free Exercise Clause of the First Amendment

Examining the second *Gunwall* factor reveals that Article I, § 11 of the Washington State Constitution has no exact federal counterpart. No provision in the Federal Constitution provides that religious matters may not serve as a justification for a juror's incompetence.[148] Thus, the principle that language in the state constitution not included in the Federal Constitution may justify independent interpretation supports independent analysis of Article I, § 11.[149]

Comparison of the First Amendment and Article I, § 11 also bolsters the argument that, in this instance, the Washington State Consti-

146. WASH. CONST. art. I, § 11.

147. *Id.*

148. *See* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

149. *Gunwall*, 106 Wash. 2d at 61, 720 P.2d at 812.

tution should be interpreted more broadly. The Washington State Supreme Court has recognized in a number of cases that material differences in the language of the two documents justify a broader interpretation of the state constitution.[150] In this instance, Article I, § 11 protects individuals from being considered "incompetent" as jurors for religious reasons, while the First Amendment only protects an individual's right to free exercise of religion from governmental infringement.

The text of Article I, § 11 also provides, "[a]bsolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be *guaranteed* to every individual."[151] It further provides that "no one shall be molested or disturbed in person or property on account of religion."[152] Use of a peremptory challenge to remove a prospective juror violates the guarantee of "freedom of conscience in all matters of religious sentiment."[153] Similarly, excluding one from the jury on the basis of religion molests or disturbs that individual "on account of religion."[154] Because the text of the Washington document is specifically phrased to extend broader protection in religious matters than its federal counterpart, finding religion-based peremptory challenges unconstitutional harmonizes with the independent and broader protection granted under Article I, § 11.

3. Constitutional and Common Law History

The third *Gunwall* factor, inquiry into state common law, reveals that there is a dearth of state common law interpreting Article I, § 11 in the context of jury trials. In *State v. Leuch*,[155] the only case discussing the provision, the Washington State Supreme Court found that conscientious objection to the death penalty was severable from one's religious beliefs and could, therefore, serve as a reasonable and legally cognizable basis for dismissing a juror for cause.[156] No violation of Article I, § 11 occurred because the challenge for cause removed a juror with a bias that was completely distinguishable from the religious basis for the belief.[157] Accordingly, the court held that the individual's social belief in abolishing the death penalty, not the religious belief

150. *Id.* at 66, 720 P.2d at 815.
151. WASH. CONST. art. I, § 11 (emphasis added).
152. *Id.*
153. *Id.*
154. *Id.*
155. 198 Wash. 331, 88 P.2d 440 (1939).
156. *Id.* at 337, 88 P.2d at 443.
157. *Id.*

from which it sprung, impeded his ability to remain impartial and rendered him incompetent as a juror.[158]

The *Leuch* court implied, in dicta, that the challenge for cause would have been unconstitutional under Article I, § 11 had it been based on the individual's religious belief and not on a severable social belief.[159] Specifically, by addressing the issue of Article I, § 11 in the context of a challenge for cause, the court suggested that the provision's ban on religion-based discrimination in jury service applies beyond compilation of the venire to selection of the jury.[160] If Article I, § 11 applied only to selection of individuals for the venire, as the alternative reading of that provision suggests, then the provision would not have been applicable in deciding whether dismissal of a juror for cause on the basis of religion was permissible. As a matter of logic, if Article I, § 11 forbids religion-based discrimination in the form of a challenge for cause, it must also forbid such discrimination in the form of a peremptory challenge.

4. Pre-existing State Law

The fourth *Gunwall* factor, pre-existing state law, requires an examination of state law to discover if there is a "long history and tradition of strict legislative protection" of religious liberties in Washington. Washington has a strong tradition of granting broad statutory protections in matters of religion. For instance, a Washington statute makes it a crime to maliciously harass another for religious reasons.[161] Another statute precludes religious questions on applications for employment or licenses in Washington.[162] Many provisions of the state's statutes protect religious beliefs in the field of education.[163] In judicial matters, prosecutorial decisions on whether to prosecute or plea bargain are not to be based on religious bias.[164] Furthermore, persons swearing an oath to testify may elect to be sworn according to religious customs other than Christianity.[165]

These extensive statutory protections of religious belief establish distinctive state rights in matters of religion and support finding religion-based peremptory challenges impermissible on independent state constitutional grounds. However, there is a state statutory provision

158. *Id.*
159. *Id.*
160. *Id.*
161. WASH. REV. CODE. § 9A.36.080 (2001).
162. WASH. REV. CODE § 43.01.100 (2001).
163. WASH. REV. CODE §§ 28A.320.140, 28A.600.025, 28B.04.120 (2001).
164. WASH. REV. CODE § 13.40.077 (2001).
165. WASH. REV. CODE § 5.28.040 (2001).

that suggests a contrary view. Revised Code of Washington (RCW) § 2.36.080 provides that "[a] citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status."[166] But the next portion of the statute explains that "[t]his section does not affect the right to peremptory challenges" in Washington.[167] In forbidding discrimination in selecting the venire, while preserving the peremptory challenge, the statute balances the compulsion to eradicate discrimination in jury service against the desire to maintain peremptory challenges without rendering them nugatory. As such, this statute lends credence to the argument that Article I, § 11 does not limit the exercise of religion-based peremptory challenges but only precludes religion-based discrimination when selecting the venire.

However, given the plain language of Article I, § 11, it is more likely that the statute is, in fact, unconstitutional in preserving peremptory challenges on the basis of religion. When a constitutional provision and a statutory provision conflict, the former trumps the latter and the latter must be struck down. Here, there are portions of the statute, namely, those preserving peremptory challenges based on "race" and "sex," which the Washington State Supreme Court has found to be unconstitutional.

To the extent that the statute preserves peremptory challenges based on "race" and "sex," it is already unconstitutional under both the federal and state constitutions. As noted above, *Batson* and *J.E.B.* limited the once universal coverage of peremptory challenges by finding them impermissible when based on race or gender.[168] Many Washington cases have discussed *Batson*'s application in the state.[169] Although *J.E.B.*, like *Batson*, applies in Washington, the Washington State Court of Appeals in *State v. Burch*[170] had already found gender-based peremptory challenges impermissible under the Washington equal rights amendment before the *J.E.B.* decision.[171] These federal and state decisions therefore invalidate RCW § 2.36.080 to the extent

166. WASH. REV. CODE § 2.36.080(3) (2001).

167. WASH. REV. CODE § 2.36.080(4) (2001).

168. Batson v. Kentucky, 476 U.S. 79, 98–99 (race); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (gender).

169. *See* State v. Vreen, 99 Wash. App. 662, 994 P.2d 905 (2000); State v. Evans, 100 Wash. App. 757, 998 P.2d 373 (2000); State v. Sanchez, 72 Wash. App. 821, 867 P.2d 638 (1994); State v. Ashcraft, 71 Wash. App. 444, 859 P.2d 60 (1993).

170. 65 Wash. App. 828, 830 P.2d 357 (1992).

171. *Id.* at 836, 830 P.2d at 362. The Washington State Court of Appeals followed the lead of the Ninth Circuit Court of Appeals, which had already extended equal protection to gender-based peremptory challenges—an issue that the United States Supreme Court did not address for another two years.

that the statute authorizes race and gender-based peremptory challenges. Also, in light of the compelling reasons for finding religion-based strikes unconstitutional under Article I, § 11, the statute is unconstitutional to the extent that it authorizes religion-based discrimination in selecting the jury.

By finding gender-based peremptory challenges impermissible under the Washington State Constitution before the United States Supreme Court addressed the issue in *J.E.B.*, Washington courts demonstrated their willingness to grant broader protections to individuals in the context of peremptory challenges. The *Burch* opinion also confirms that in a face-off between constitutional and statutory guarantees, the former must prevail over the latter. Thus, if a situation arises concerning the constitutionality of religion-based peremptory challenges under the Washington State Constitution, there is no reason to assume that RCW § 2.36.080 would necessarily govern the outcome of an analysis under Article I, § 11 of the state constitution.

5. Structural Differences

Analysis of the fifth *Gunwall* factor demands examination of the structural differences between the state constitution and its federal counterpart. As previously noted, the structure of the Washington State Constitution differs greatly from that of its federal counterpart, and this difference can sometimes justify independent interpretation of a legal issue on state constitutional grounds.[172] In addition to the aforementioned detailed textual differences between Article I, § 11 and the First Amendment, the Washington State Constitution is a safeguard for individuals against the state, whose power is limited only by the restrictions imposed by federal law and the state constitution. On the other hand, the Federal Constitution "is a grant of limited power authorizing the federal government to exercise only those constitutionally enumerated powers expressly delegated to it by the states."[173] Because the state constitution is a source of guaranteed protection to individuals from government intrusion, Article I, § 11 may be viewed as providing explicit and expansive protection not provided by the Federal Constitution. This enables Washington courts to forbid religion-based peremptory challenges, though they are currently permissible under the Federal Constitution.

The Washington State Supreme Court has repeatedly invoked structural differences between the federal and state constitutions as a justification for interpreting other provisions of the state document

172. State v. Gunwall, 106 Wash. 2d 54, 66, 720 P.2d 808, 814 (1986).

173. Utter, *supra* note 3, at 494.

more broadly than its federal counterpart. For example, in *Manufacturing Housing Communities of Washington v. State*,[174] the court held that Article I, § 16, the state's eminent domain clause, provided greater protection to individual property owners than the Fifth Amendment Takings Clause.[175] Likewise, as mentioned earlier, Washington's court of appeals in *State v. Burch* relied on the Washington equal rights amendment to ban gender-based peremptory challenges before the United States Supreme Court extended that same protection in *J.E.B.*.[176] Finally, in *State v. Boland*,[177] the Washington State Supreme Court held that more detailed language in the state's search and seizure clause provides broader protection to individuals than the Fourth Amendment of the Bill of Rights.[178]

All of these cases relied on the structural and textual differences between the federal and state constitutions in extending greater protection of fundamental liberties.[179] Similar textual and structural differences are present when examining whether or not religion-based peremptory challenges are impermissible under the state constitution. When the structural and textual differences between the two constitutions point to Washington framers' intent to more securely guarantee individual liberties, it follows that state courts should closely scrutinize explicit textual provisions like Article I, § 11 that illuminate the issue at hand.

6. Matters of Local Concern

Gunwall's sixth factor requires an inquiry into whether religion-based peremptory challenges are of sufficient local interest to justify finding them impermissible under the state constitution. The enumeration of Washington's statutes forbidding intrusion into religious beliefs in a multitude of contexts illustrates that the protection of religious beliefs is a local priority.[180] Furthermore, the decisions of other states forbidding religion-based peremptory challenges on state constitutional grounds suggest that there is a local flavor to peremptory

174. 142 Wash. 2d 347, 13 P.3d 183 (2000).

175. *Id.* at 374, 13 P.3d at 196.

176. *Burch*, 65 Wash. App. at 836, 830 P.2d at 362 (1992).

177. 115 Wash. 2d 571, 800 P.2d 1112 (1990).

178. *Id.* at 580, 800 P.2d at 1117.

179. As Justice Utter explained, "[o]rdinary rules of textual and constitutional interpretation, as well as the logic of federalism, require that meaning be given to the differences in language between the Washington and United States Constitutions. . . ." Utter, *supra* note 3, at 515.

180. *See supra* notes 161–167.

challenges that supports independent state determination of the issue.[181]

To the extent that peremptory challenges are authorized in all state and federal courts in both civil and criminal trials, they are a matter of national concern. However, the widespread presence of peremptory challenges does not necessarily establish a need for national uniformity. A state that forbids religion-based peremptory challenges does not impair the use of such challenges in other state or federal courts. If there were a need for national uniformity, the United States Supreme Court would have already addressed the issue, rather than leaving it to the state courts to decide the issue on their own. As already noted, a multitude of states have banned religion-based peremptory challenges under their own state constitutions. Thus, numerous Washington statutes protecting religious liberties, numerous state court decisions banning religion-based peremptory challenges, as well as the willingness of the United States Supreme Court to leave the issue in the hands of individual states point to the conclusion that the issue of religion-based peremptory challenges is of sufficient local interest to support independent interpretation of Article I, § 11 on the issue.

Application of the six nonexclusive *Gunwall* factors establishes that there are compelling reasons for banning religion-based peremptory strikes under the Washington State Constitution. However, the *Gunwall* analysis does not formulate a new standard for evaluating religion-based peremptory strikes and does not indicate whether embarking on such a path will nullify the benefits of peremptory challenges to the point that their continued existence will become endangered. By establishing a standard similar to that used in evaluating race- and gender-based peremptory challenges, Washington courts can eradicate religion-based discrimination in the jury selection process as dictated by Article I, § 11 while, at the same time, ensuring that the peremptory challenge remains a useful instrument in molding the jury.

IV. A NEW STANDARD FOR EVALUATING RELIGION-BASED PEREMPTORY CHALLENGES

Washington's standard for evaluating race- and gender-based peremptory challenges is based on the federal standard. There is no reason to deviate from the current standard, but there are some peculi-

181. *See supra* notes 98–107.

arities involved in religion-based peremptory strikes that courts should account for when assessing challenges to such strikes.

In assessing claims of race and gender-based peremptory challenges, Washington courts follow the federal standard. First, a party establishes a prima facie case of discrimination by demonstrating that the peremptory challenge was used against a member of a constitutionally protected group and that the surrounding circumstances create an inference that the challenge was based on the individual's membership in that group.[182] If a prima facie case of purposeful discrimination is established, the other party must then proffer a neutral justification related to the case.[183] At that point, the trial court must determine the legitimacy of the proffered reason for the strike and rule accordingly.[184]

This standard is appropriate for evaluating religion-based peremptory challenges, but the close relationship between a religious belief and a societal belief emanating from that faith requires courts to be wary when assessing such claims. The relationship becomes important when evaluating whether a party's proffered reason for dismissing a potential juror is neutral or a mere pretext for discriminating against the member of the venire on the basis of religion. Judge Richard Posner discussed this matter in *United States v. Stafford*:[185]

> It is necessary to distinguish among religious affiliation, a religion's general tenets, and a specific religious belief. It would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc. It would be proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing; suppose for example that his religion taught that crimes should be left entirely to the justice of God. In between and most difficult to evaluate from the standpoint of *Batson* is a religious outlook that might make the prospective juror unusually reluctant, or unusually eager, to convict a criminal defendant.[186]

Borrowing this analysis aids in the determination of whether a party exercised an impermissible religion-based peremptory challenge or instead removed a potential juror for a neutral reason related to the particular trial. Any strike based solely on religious affiliation is im-

182. State v. Burch, 65 Wash. App. 828, 840, 830 P.2d 357, 364 (1992); State v. Evans, 100 Wash. App. 757, 769, 998 P.2d 373, 380 (2000).

183. *Evans*, 100 Wash. App. at 764, 998 P.2d at 378.

184. *Id.*

185. 136 F.3d 1109, 1114 (7th Cir. 1998).

186. *Id.*

permissible. For example, a party may not use a peremptory strike to remove a Catholic solely because he is Catholic. Courts should not accept as a defense to a religion-based peremptory challenge "the very stereotype the law condemns."[187] Assumptions about an individual's ability as a juror based solely on the individual's religion represents the very stereotype that a ban on religion-based peremptory challenges would seek to prevent. Thus, a party may not strike a prospective juror only for affiliation with a particular religion.

On the other hand, it would be permissible to strike a member of the venire when a particular personal belief derived from religion would completely interfere with the juror's ability to remain impartial. In Judge Posner's example, a party could dismiss a member of a religion that believes all punishment for crimes should be left to God because such a peremptory challenge would not discriminate on the basis of religion but would merely discharge a juror unable to impartially weigh the evidence. Of course, the dismissal would only be appropriate if the individual actually possessed the belief espoused by his religion, affecting his ability to remain impartial.

The most difficult evaluations will involve beliefs that may render the juror either overly reticent or zealous in convicting a criminal defendant. For example, if a defendant strikes a member of the Nation of Islam and seeks to justify the strike by proffering that members of that group tend to be teetotalers, such explanation may or may not justify the strike when the striker's defense in the case is intoxication. The difficulty lies in assessing whether a peremptory strike on "these societal views should be attributed to a pernicious religious bias,"[188] and the answer will depend on the case's circumstances and the trial judge's discretion. In our example, the justification may be neutral because the juror's belief in abstinence may make him skeptical to a defense based on intemperance. On the other hand, the justification may merely cloak a categorical bias that members of the juror's religion are unable to remain impartial regardless of the individual's ability to remain impartial.

From the above points and examples, one can carve out a guideline for assessing whether a proffered reason for exercising a religion-based peremptory challenge is truly neutral. When a party strikes a juror for nothing more than religious affiliation, a court should forbid the peremptory strike. However, when a party strikes a juror whose religious belief completely precludes objective evaluation of the case, the court should uphold the peremptory strike. When religious beliefs

187. Powers v. Ohio, 499 U.S. 400, 410 (1991).

188. State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994).

may make a juror more or less inclined to one side, the trial judge must balance the proffered reason for the strike against the circumstances of the case and determine whether the reason is significantly related to the juror's ability to evaluate the case or is instead pretext for a peremptory challenge based on pernicious religious bias.

Washington courts may be reluctant to ban religion-based peremptory challenges out of a concern that such an extension is only one more step down a slippery slope that will eventually lead to the demise of the peremptory challenge. Nothing in this Comment suggests that further limits should be placed on peremptory challenges beyond religious bias. In fact, the impetus behind forbidding religion-based peremptory challenges in Washington is Article I, § 11, which indicates that such challenges are incongruous with the Washington State Constitution.

Opponents of forbidding religion-based peremptory strikes point to the infrequency with which such strikes arise. Infrequent occurrence, however, is not an argument against a constitutional mandate. When religion-based discrimination occurs in jury selection, it undermines confidence in the jury system and stigmatizes the venire member for having particular religious beliefs. The infrequency of religion-based peremptory challenges serves as better evidence against the claim that forbidding them will lead to the inevitable demise of the peremptory challenge.

The rare occurrence of such strikes also counters the claim that banning them will result in collateral litigation to the point that voir dire will become a sideshow, eventually overshadowing the trial. The predicted increase in distracting litigation has not materialized in the context of gender-based peremptory challenges, and nothing indicates that the result will be any different if religion-based peremptory challenges are banned. Commentators warned that attacks on gender-based peremptory challenges would arise upon every strike, since those strikes always involve a male or a female and are thus loaded with a potential claim of gender discrimination. If such a prediction has not materialized in those instances, there is no reason to suspect that collateral litigation would increase in instances involving religion given that the juror's religion is often unknown to the party striking the juror.

Because a viable framework exists for evaluating whether a party has exercised a religion-based peremptory challenge that will not eradicate the continued viability of peremptory challenges as a treasured tool of jury selection, the Washington State Supreme Court should establish this framework for the state's lower courts to apply in

future cases involving religion-based peremptory challenges. Implementing this framework will ensure that Washington courts comply with the Washington State Constitution's mandate under Article I, § 11 that no person "shall . . . be incompetent as a witness or juror, inconsequence of his opinion on matters of religion."[189]

V. CONCLUSION

Although the Supreme Court has not directly addressed the issue of the continued viability of religion-based peremptory challenges under the Equal Protection Clause, there is ample evidence that the Washington judiciary has strong grounds to proceed with its own independent and broader interpretation of its State Constitution on the issue, as many other state courts have already done.

Extending protection to those discriminated against on religious grounds through the exercise of a peremptory challenge harmonizes with the Washington tradition of independent state constitutional interpretation. Independent interpretation, when tempered and proper, fulfills a grant that the United States Supreme Court has expressly recognized that the Federal Constitution gives to the States. Washington courts have faithfully and consistently exercised this grant, and eliminating religion-based peremptory challenges is within the purview of this grant.

The propriety of eliminating religion-based peremptory challenges is confirmed by a *Gunwall* analysis, which is the Washington framework for determining when it is appropriate to interpret the state constitution independently of the Federal Constitution. The six nonexclusive *Gunwall* factors establish that religion-based discrimination in the form of a peremptory challenge is impermissible under Article I, § 11 of the Washington State Constitution. The text of Article I, § 11, textual differences between Article I, § 11 and the First Amendment, case law interpreting Article I, § 11, widespread statutory protection of religion in Washington, structural differences between the federal and state constitutions, and the lack of need for national uniformity on the issue all point to this conclusion.

Finding religion-based peremptory challenges unconstitutional in Washington requires no deviation from the current standard used to evaluate race and gender-based peremptory challenges. The only difference in using the standard to evaluate religion-based peremptory challenges is the small caveat that a trial judge may, on rare occasions, have to distinguish between the impermissible use of a peremptory

189. WASH. CONST. art. I, § 11.

strike to remove a juror based on religious bias and the permissible use of a peremptory strike to remove a juror unable to remain impartial because of a societal belief emanating from a religious belief.

Moreover, extending constitutional protection in this area does not necessitate extension of the same principle to other areas, the eventual demise of the peremptory challenge, or excessive collateral hearings within the main trial. Because the basis for finding religion-based peremptory challenges impermissible in Washington is Article I, §11, the holding would be limited to matters of religion since the provision speaks only to protection of religious liberties. Furthermore, religion-based peremptory strikes are infrequent, so the concerns about excessive mini-hearings, prolonging voir dire, and eviscerating the peremptory challenge are misplaced. In fact, the similar conclusions of other states on this issue and the continued viability of peremptory challenges in those states assure that the peremptory challenge will remain intact. Consequently, the peremptory challenge will only be tailored to prevent religion-based discrimination in selecting the jury for trial, and it will thus retain its status as a treasured tool for shaping a more impartial jury.