

## EXTENDING BATSON TO SEXUAL ORIENTATION: A LOOK AT SMITHKLINE BEECHAM CORP. V. ABBOTT LABS

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*In Batson v. Kentucky, the Supreme Court held that discriminatory use of peremptory challenges by a prosecutor to strike a black juror based solely on race violated the Equal Protection Clause. This Note argues that Batson should be extended to prohibit discriminatory use of peremptory challenges based on sexual orientation. The Ninth Circuit has adopted this approach, recently holding both that Batson extends to sexual orientation and that heightened scrutiny applies to such challenges. The Supreme Court should uphold the Ninth Circuit's decision as an important step on the road to securing gay rights both in the courtroom and elsewhere.*

### TABLE OF CONTENTS

I. INTRODUCTION .....	1682
II. BACKGROUND .....	1684
A. <i>Historical Background of Peremptory Challenges</i> .....	1684
1. <i>Pre-Batson</i> .....	1685
2. <i>Batson v. Kentucky</i> .....	1686
3. <i>Progression of Peremptory Challenges post-Batson</i> .....	1688
4. <i>SmithKline Beecham Corp. v. Abbott Laboratories</i> .....	1689
a. <i>Batson Violation</i> .....	1692
b. <i>Level of Scrutiny as Applied to Classifications Based on Sexual Orientation</i> .....	1692
c. <i>Batson as Applied to Classifications Based on Sexual Orientation</i> .....	1695
III. ANALYSIS .....	1696
A. <i>Analyzing the SmithKline Decision</i> .....	1696
B. <i>Right to Impartial Jury vs. Right to Juror Privacy</i> .....	1703
C. <i>Practical Considerations for Extending Batson to Sexual Orientation</i> .....	1705

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IV. RECOMMENDATION .....	1709
V. CONCLUSION .....	1709

## I. INTRODUCTION

[H]ere I was, standing in a court of law, where my relationship with my partner meant absolutely nothing. When the questions came around to me, I was legally bound to say I was single – because according to the law, I was.

I thought about it hard as the judge went around the room asking for everyone's personal information. . . . Finally, when the judge came around to me, I said out loud what I had been practicing in my head. I didn't care if I got in trouble, I just had to say it—I felt morally obligated.

I gave my full name, my address, my length of residence, my employment and my education. Then, I said: "I am gay and partnered, but not legally allowed to marry my partner under the laws of the state . . . So I guess that means, under the legal definition, I would erroneously be labeled 'single'."

And then I promptly sat down. The judge gave me a very nasty look, perhaps she was considering if I could be held in contempt of court. And, in a way, I did have contempt for the court – and the legal system – and the government. . . .

The judge paused. The prosecutor (a police officer), the defense attorney, the defendant and virtually every juror stared at me for a long moment. Then, the judge moved on to the next person.

Looking back, I am very glad that I was chosen for jury duty. It may have meant nothing in the larger scheme of things, but I was proud to stand up in that court room and declare in front of all of those people that I was gay and that I was a victim of legal discrimination.<sup>1</sup>

The above account illustrates just a single example of the jury selection process as experienced by a gay or lesbian individual. 2013 was undoubtedly a victorious year for gay rights. The recent Supreme Court opinions of *United States v. Windsor*,<sup>2</sup> ruling that same-sex couples are entitled to federal benefits, and *Hollingsworth v. Perry*,<sup>3</sup> effectively allowing same sex marriage in California by declining to decide the case, have been hailed as major strides in the right direction for the gay community. Empirical research, however, shows that discriminatory attitudes

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1. L.A. Vess, *Gay Jury Duty? I Just Read an Interesting Lesbian Nation “Jury Duty” Article*, MY GAY ONLINE (Jan. 25, 2006), <http://www.mygayonline.com/i-just-read-an-interesting-jury-duty-article-in-lesbian-nation.html> (detailing the experiences of a lesbian attending jury duty).

2. 133 S. Ct. 2675 (2013).

3. 133 S. Ct. 2652 (2013).

toward homosexuals continue to persist, and play a significant role, in the courtroom.<sup>4</sup>

Numerous questions regarding the legal rights of gays and lesbians remain unanswered. Among these, in the trial context, is whether attorneys may exercise peremptory strikes on the basis of sexual orientation, thereby excluding gay men and lesbians from juries.<sup>5</sup> The Supreme Court has yet to address the issue of peremptory strikes based on sexual orientation, but on January 21, 2014, the U.S. Court of Appeals for the Ninth Circuit became the first federal appeals court to prohibit such strikes.<sup>6</sup>

In *SmithKline Beecham Corp. v. Abbott Laboratories*, the three-judge panel unanimously held that in light of the history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes about the group, the protection of *Batson v. Kentucky* applies and equal protection forbids striking a juror on the basis of his sexual orientation.<sup>7</sup> The court interpreted *Windsor* to conclude that the Supreme Court applied a standard of heightened scrutiny to its analysis of the Defense of Marriage Act (“DOMA”).<sup>8</sup> The appropriate analysis to use in *SmithKline*, therefore, is heightened scrutiny as well.<sup>9</sup> The potential implications of extending heightened scrutiny to any lawsuit involving discrimination on the basis of sexual orientation could be extremely significant and affect the gay rights movement as a whole.<sup>10</sup>

This Note explores the recent *SmithKline* decision and the extension of *Batson* to protect gays and lesbians. Part II of this Note reviews the history of the cases leading up to *Batson v. Kentucky* and those that follow it, including an in-depth examination of the Ninth Circuit’s *SmithKline* opinion. Part III first discusses the various responses to the ruling and addresses its potential implications. Part III then examines some of the more general considerations involved in extending *Batson* to protect homosexuals. Part III.B looks at the sometimes-conflicting interests of a defendant’s right to an impartial jury and a juror’s right to privacy. Part III.C then discusses some practical considerations and obstacles to extending *Batson*. Part IV provides some recommendations on how this issue should ultimately be decided at the Supreme Court level.

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4. See generally Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard*, 39 J. HOMOSEXUALITY 93 (2000) (providing empirical research regarding the effects of sexual orientation discrimination and the roles it plays within the courtroom).

5. Adam Liptak, *Sexual Orientation Is No Basis for Jury Exclusion, a Federal Appeals Court Rules*, N.Y. TIMES, Jan. 21, 2014, <http://www.nytimes.com/2014/01/22/us/sexual-orientation-is-no-basis-for-jury-exclusion-a-federal-appeals-court-rules.html> [hereinafter Liptak, *Sexual Orientation*].

6. *Id.*

7. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014).

8. Editorial Board, *The Expanding Power of U.S. v. Windsor*, N.Y. TIMES, Jan. 26 2014, <http://www.nytimes.com/2014/01/27/opinion/the-expanding-power-of-us-v-windsor.html>.

9. *SmithKline*, 740 F.3d at 489.

10. Emma Margolin, *Federal Ruling on Jury Exclusion Carries Big Implications for Gay Rights*, MSNBC (Jan. 22, 2014, 8:00 PM), <http://www.msnbc.com/msnbc/jury-service-ruling-boost-gay-rights>.

## II. BACKGROUND

The Sixth Amendment of the U.S. Constitution requires states to provide defendants with a trial by an impartial jury.<sup>11</sup> This requires states to exclude potential individuals with a particular bias that may impair their ability to be impartial.<sup>12</sup> Peremptory challenges allow an attorney to exclude a potential juror who might be biased without showing cause,<sup>13</sup> unless the opposing party can show that the challenge was used to discriminate on the basis of race, ethnicity, or sex.<sup>14</sup> Peremptory challenges are distinguishable from “strikes for cause,” which allow a lawyer to remove any prospective juror who is shown to be actually incapable of making an impartial decision.<sup>15</sup> Although peremptory challenges appear to be facially neutral, when based on race or gender they are motivated by a discriminatory intent and have a discriminatory purpose.<sup>16</sup> The Supreme Court, therefore, has held that a race or gender based challenge denies equal protection when exercised by a prosecutor,<sup>17</sup> a criminal defendant,<sup>18</sup> or a civil litigant.<sup>19</sup> While the Supreme Court has recognized the value of peremptory challenges, it has also made clear that peremptories are not a constitutionally protected right.<sup>20</sup>

### A. Historical Background of Peremptory Challenges

The use of peremptory challenges dates back to sixteenth century England, and has changed dramatically throughout its history.<sup>21</sup> During the time of King Edward, the Crown allowed thirty-five peremptory challenges to defendants with felony charges.<sup>22</sup> Technically, the Crown, or

11. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].”).

12. Kathryn Ann Barry, *Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 BERKELEY WOMEN'S L.J. 157, 160 (2001).

13. John J. Neal, *Striking Batson Gold at the End of the Rainbow?: Revisiting Batson v. Kentucky and Its Progeny in Light of Romer v. Evans and Lawrence v. Texas*, 91 IOWA L. REV. 1091, 1093 (2006).

14. BLACK'S LAW DICTIONARY, 261–62 (9th ed. 2009).

15. Vikram David Amar, *Another Front in the Same-Sex Equality Campaign: Jury Service, Peremptory Challenges, and the SmithKline Beecham Corp. v. Abbott Laboratories Case Pending in the Ninth Circuit*, JUSTIA (Aug. 16, 2013), <http://verdict.justia.com/2013/08/16/another-front-in-the-same-sex-equality-campaign> [hereinafter Amar, *Another Front*].

16. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 718 (3d ed. 2006).

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

18. Georgia v. McCollum, 505 U.S. 42 (1992).

19. Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991).

20. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 137 n.7 (1994) (“Although peremptory challenges are valuable tools in jury trials, they ‘are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial.’” (citation omitted)).

21. Neal, *supra* note 13, at 1095.

22. *Id.*

Prosecutor, was required to show cause when removing a potential juror, but English common law shows that the Crown's challenges were essentially unlimited.<sup>23</sup> This practice, known as "to stand aside," allowed the King to challenge any juror; the juror would then "stand aside" until the panel had been established.<sup>24</sup> The King was only required to show cause for the jurors who had been struck or "standing by" in the event that the court failed to impanel a full jury.<sup>25</sup> The U.S. legal system has retained some of these traditional features while developing its own peremptory challenge system, but has evolved significantly over the course of history.

### 1. *Pre-Batson*

The first landmark case to address the issue of discriminatory jury practices was *Strauder v. West Virginia*, in which the Supreme Court declared unconstitutional a West Virginia law that limited jury service to "white male persons who are twenty-one years of age and who are citizens of this State."<sup>26</sup> The Court concluded that putting a black individual on trial before a jury from which members of his race have been purposely excluded and singled out disadvantaged blacks, therefore denying equal protection.<sup>27</sup> Although this case did not address the issue of peremptory challenges, it did lay the "foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn."<sup>28</sup>

The Supreme Court first dealt with peremptory challenges in *Swain v. Alabama*, holding that racial discrimination by a prosecutor could be proved only by showing a systematic pattern of discriminatory peremptory challenges over a period of time.<sup>29</sup> The Court refused to find an Equal Protection violation when the state used peremptory challenges to strike every black member from the potential jury pool. It reasoned that there was a lack of requisite state action because defense counsel had participated in the peremptory challenge system to a higher degree than the state.<sup>30</sup>

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23. *Id.*

24. *Id.* at 1095–96.

25. *Id.* at 1096.

26. 100 U.S. 303, 305 (1879), abrogated by *Taylor v. Louisiana*, 419 U.S. 522 (1975).

27. CHEMERINSKY, *supra* note 16, at 718.

28. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986).

29. 380 U.S. 202 (1965).

30. *Id.* at 227 ("Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State."); Neal, *supra* note 13, at 1098–99.

## 2. Batson v. Kentucky

The landmark case of *Batson v. Kentucky* overruled *Swain v. Alabama*, holding that the discriminatory use of peremptory challenges by a prosecutor to strike a black juror based solely on the juror's race denies equal protection.<sup>31</sup> In overruling *Swain*, the Court explained, “[a] single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions.”<sup>32</sup> The Court further noted that “[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.”<sup>33</sup>

In reaching this decision, the Court announced a three-step process for determining whether there is impermissible discrimination in jury selection.<sup>34</sup> First, the defendant must make a *prima facie* case showing discrimination by the prosecutor.<sup>35</sup> “To establish such a case, the defendant must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race.”<sup>36</sup> Second, once the defendant has presented the *prima facie* case, the burden shifts to the prosecutor to provide a neutral explanation for his peremptory challenge.<sup>37</sup> The Court clarified further that the prosecutor “must give a ‘clear and reasonably specific’ explanation of his ‘legitimate reasons’ for exercising the challenges.”<sup>38</sup> Finally, in the third step, the trial court must decide whether the prosecutor’s race-neutral explanation is sufficiently persuasive or whether the “defendant has established purposeful discrimination.”<sup>39</sup>

The test outlined in *Batson* has been applied and clarified in numerous subsequent decisions and continues to be applicable law today. The Supreme Court clarified the first prong of the test in *Johnson v. California*.<sup>40</sup> The U.S. Supreme Court reversed a California Supreme Court decision concluding that showing a *prima facie* case required strong evidence that it was more likely than not that race was used as the basis for peremptory challenges.<sup>41</sup> Instead, the U.S. Supreme Court ruled that a

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31. 476 U.S. at 100.

32. *Id.* at 95 (internal quotation marks omitted).

33. *Id.* at 99.

34. *Id.* at 96.

35. *Id.*

36. *Id.* (citation omitted).

37. *Id.* at 97.

38. *Id.* at 98 n.20 (citations omitted).

39. *Id.* at 98.

40. 543 U.S. 499 (2005).

41. *Id.* at 505–06 (“Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, ‘[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’ We therefore apply strict scrutiny to *all* racial classifications to ‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.” (citations omitted)).

defendant need only produce evidence that is sufficient enough to allow the trial judge to infer that discrimination has occurred.<sup>42</sup> The Court thereby set a lower threshold, making it easier for parties to object to discriminatory peremptory challenges.<sup>43</sup>

The Court further clarified the second prong of the *Batson* test in *Purkett v. Elem*, explaining that, “[t]he second step of this process does not demand an explanation that is persuasive, or even plausible . . . . It is not until the *third* step that the persuasiveness of the justification becomes relevant . . . .”<sup>44</sup>

Finally, the Court elaborated on the third step of the *Batson* test in both *Hernandez v. New York* and *Purkett v. Elem*.<sup>45</sup> In *Hernandez*, the Court found a sufficient race-neutral explanation when the prosecutor explained that he struck two Latino jurors because they spoke Spanish, and therefore might understand a different version of the witness’ testimony than what the translator would have provided to the other non-Spanish speaking jurors.<sup>46</sup> In *Purkett*, the Court held that there was no discriminatory purpose when a prosecutor struck a prospective juror because of “long, unkempt hair, a mustache, and a beard.”<sup>47</sup> It explained, “a ‘legitimate reason’ is not a reason that makes sense, but a reason that does not deny equal protection.”<sup>48</sup> These cases appear to make it easier for courts to find non-discriminatory reasons for the strikes of prospective jurors. In *Miller-El v. Dretke*, however, the Court emphasized the need for courts to examine the record carefully to see if there was an impermissible use of race or gender in exercising a peremptory strike.<sup>49</sup> The defendant sufficiently proved an impermissible use of race in the prosecutor’s peremptory challenges by showing that the prosecutor’s office had a policy of striking black prospective jurors when there was a black defendant.<sup>50</sup> This decision reinforced the strength of *Batson*, and sent a clear message to both trial and appellate courts to examine the record closely.

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42. See *id.* at 506.

43. CHEMERINSKY, *supra* note 16, at 719.

44. 514 U.S. 765, 767-68 (1995).

45. CHEMERINSKY, *supra* note 16, at 720.

46. 500 U.S. 352, 361 (1991) (“The prosecutor’s articulated basis for these challenges divided potential jurors into two classes: those whose conduct during *voir dire* would persuade him they might have difficulty in accepting the translator’s rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos. While the prosecutor’s criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor’s actions into a *per se* violation of the Equal Protection Clause.”).

47. See *Purkett*, 514 U.S. at 769.

48. *Id.*

49. See 545 U.S. 231 (2005).

50. *Id.* at 253 (“The case for discrimination goes beyond these comparisons to include broader patterns of practice during the jury selection. The prosecution’s shuffling of the venire panel, its enquiry into views on the death penalty, its questioning about minimum acceptable sentences: all indicate decisions probably based on race. Finally, the appearance of discrimination is confirmed by widely known evidence of the general policy of the Dallas County District Attorney’s Office to exclude black venire members from juries at the time Miller-El’s jury was selected.”).

### 3. *Progression of Peremptory Challenges post-Batson*

Because *Batson* was limited only to peremptory strikes by prosecutors, the Court was subsequently faced with a wider range of issues and necessary applications.<sup>51</sup> In *Edmonson v. Leesville Concrete Co., Inc.*, the Supreme Court extended *Batson* to apply to private civil litigants.<sup>52</sup> The Court explained that there was sufficient state action because the court system, as a government entity, facilitated the voir dire and other actions in the proceeding, and without the assistance of the courts the private party would not be able to use peremptory challenges.<sup>53</sup>

Up until this point peremptory challenges only applied to the State's discriminatory use of peremptory challenges.<sup>54</sup> In *Georgia v. McCullum*, the Supreme Court extended *Batson* further, holding that criminal defendants may not exercise peremptory challenges in a discriminatory manner.<sup>55</sup> The Court followed its reasoning in earlier rulings<sup>56</sup> to explain that “[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination.”<sup>57</sup> The Court further concluded that there was sufficient state action for the Fourteenth Amendment to apply when a private party exercises peremptory challenges.<sup>58</sup>

Finally, the Supreme Court extended *Batson* protections to include not only racial discrimination, but gender discrimination as well.<sup>59</sup> In *J.E.B. v. Alabama ex rel. T.B.*, the Court addressed whether a state may use its peremptory strikes to exclude male members from a jury.<sup>60</sup> The Court stressed the “long and unfortunate history of sex discrimination” against women in the legal system and concluded that gender, like race, was an impermissible basis for peremptory challenges.<sup>61</sup> The Court explained that, “[d]iscrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial

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51. Neal, *supra* note 13, at 1102.

52. 500 U.S. 614, 614 (1991).

53. *Id.* at 624.

54. Neal, *supra* note 13, at 1103.

55. 505 U.S. 42, 44 (1992).

56. *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (“*Batson* ‘was designed ‘to serve multiple ends,’” only one of which was to protect individual defendants from discrimination in the selection of jurors.” (citation omitted)); *see also Campbell v. Louisiana*, 523 U.S. 392 (1998) (extending *Batson* protections to grand jurors).

57. *McCullum*, 505 U.S. at 53.

58. *Id.* at 54–55 (“Whenever a private actor’s conduct is deemed ‘fairly attributable’ to the government, it is likely that private motives will have animated the actor’s decision. Indeed, in *Edmonson*, the Court recognized that the private party’s exercise of peremptory challenges constituted state action, even though the motive underlying the exercise of the peremptory challenge may be to protect a private interest.” (citation omitted)).

59. *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 146 (1994).

60. *Id.* at 129.

61. *Id.* at 136.

process.”<sup>62</sup> The Court did, however, make sure to impose some limitations on the use of peremptory challenges.

Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. Neither does it conflict with a State’s legitimate interest in using such challenges in its effort to secure a fair and impartial jury. Parties still may remove jurors who they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias. Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to “rational basis” review.<sup>63</sup>

This indicated the important point that *Batson* would only apply to types of discrimination that would receive heightened scrutiny under the Equal Protection analysis, extending *Batson* to cover not only race and gender, but non-marital children, and aliens as well.<sup>64</sup>

#### 4. SmithKline Beecham Corp. v. Abbott Laboratories

The Supreme Court has yet to address sexual orientation with regard to peremptory challenges. The Ninth Circuit recently decided the issue of whether homosexuals may be excluded from juries on account of their sexual orientation in *SmithKline Beecham Corp. v. Abbott Laboratories*.<sup>65</sup> The case addresses an antitrust dispute involving HIV medications.<sup>66</sup> The attorney for pharmaceutical company GlaxoSmithKline (“GSK”) raised a *Batson* challenge when Abbott used a peremptory strike against a male juror who had previously identified himself as gay.<sup>67</sup> This is significant, according to counsel for GSK, because “the litigation involves AIDS medications” and “the incidence of AIDS in the homosexual community is well known, particularly [to] gay men.”<sup>68</sup>

At this point, the trial judge dismissed GSK’s objection on erroneous grounds and uncertain reasoning.<sup>69</sup> Judge Claudia Wilken of the Federal District Court in Oakland, California contemplated, “I don’t

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62. *Id.* at 140.

63. *Id.* at 143.

64. *Id.*

65. Adam Liptak, *Court to Decide if Lawyers Can Block Gays From Juries*, N.Y. TIMES, July 29, 2013, <http://www.nytimes.com/2013/07/30/us/court-weighs-exclusion-of-jurors-because-theyre-gay.html> [hereinafter Liptak, *Court to Decide*].

66. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474 (9th Cir. 2014) (“The dispute relates to a licensing agreement and the pricing of HIV medications, the latter being a subject of considerable controversy in the gay community. GSK’s claims center on the contention that Abbott violated the implied covenant of good faith and fair dealing, the antitrust laws, and North Carolina’s Unfair Trade Practices Act by first licensing to GSK the authority to market an Abbott HIV drug in conjunction with one of its own and then increasing the price of the Abbott drug fourfold, so as to drive business to Abbott’s own, combination drug.”); Amar, *Another Front*, *supra* note 15.

67. Brief of Plaintiff-Appellee and Cross-Appellant at 18, SmithKline Beecham Corp. v. Abbott Lab., 740 F.3d 471 (9th Cir. 2014) (No. 2011-17357, 2011-17373), 2012 WL 1133815 [hereinafter Brief].

68. Liptak, *Court to Decide*, *supra* note 65.

69. Brief, *supra* note 67, at 18–19.

know that, number one, *Batson* applies in civil [cases].<sup>70</sup> This is clearly erroneous as stated *supra* in the discussion of *Edmonson v. Leesville Concrete Co., Inc.*, that *Batson* does, in fact, apply to civil cases.<sup>71</sup> Judge Wilken continued with more certainty, “[n]umber two, whether *Batson* ever applies to sexual orientation.”<sup>72</sup> “Number three,” she continued, “there is no way for us to know who is gay and who isn’t here, unless someone happens to say something.”<sup>73</sup> Judge Wilken then offered Abbott’s counsel an opportunity to offer a neutral reason for his peremptory strike.<sup>74</sup> “Or if you don’t want to,” she said, “you can stand on my first three reasons.”<sup>75</sup> Counsel, making an arguably significant tactical error, accepted the Judge’s first suggestion, responding: “I will stand on the first three at this point,” adding of the juror: “I have no idea whether he is gay or not.”<sup>76</sup> The attempt to justify the strike based on the contention that counsel did not know the potential juror was gay appears to be demonstrably false and deceptive.<sup>77</sup> The juror had previously identified himself as gay by making references to his male partner, stating, “my partner . . . he’s retired, he doesn’t have to work” and that “he just has studied economics and does investments.”<sup>78</sup>

On appeal, GSK argued that the trial court erred by not rejecting Abbott’s peremptory strike of a gay man, and therefore should complete the three-step *Batson* analysis.<sup>79</sup> GSK made four arguments. First, “*Batson* prohibits peremptory strikes based on a juror’s sexual orientation because heightened scrutiny under the Equal Protection Clause applies to any classification that impinges on the liberty rights of homosexuals.”<sup>80</sup> Second, “*Batson* prohibits peremptory strikes based on a juror’s sexual orientation because sexual orientation is a suspect or quasi-suspect classification subject to heightened scrutiny under the Equal Protection Clause.”<sup>81</sup> Third, “*Batson* applies because Abbott’s strike of a gay man constitutes gender based discrimination.”<sup>82</sup> Finally, “[n]o binding authority forecloses applying *Batson* to Abbott’s strike of a gay man.”<sup>83</sup>

Abbott responded to GSK’s arguments, arguing on appeal that “neither the Supreme Court nor [the Ninth Circuit] has extended *Batson* beyond intentional discrimination against a member of a suspect or qua-

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70. Liptak, *Court to Decide*, *supra* note 65.

71. 500 U.S. 614 (1991).

72. Liptak, *Court to Decide*, *supra* note 65.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Brief, *supra* note 67, at 18.

78. Liptak, *Court to Decide*, *supra* note 65.

79. Brief, *supra* note 67, at 18, 35.

80. *Id.* at 19.

81. *Id.* at 25.

82. *Id.* at 29.

83. *Id.* at 31.

si-suspect class under the Equal Protection Clause.”<sup>84</sup> Further, they argued, “extending *Batson* to sexual orientation would present significant implementation problems.”<sup>85</sup>

Finally, the Ninth Circuit required and requested supplemental briefs “addressing the effect, if any, of *United States v. Windsor*, on whether *Batson v. Kentucky*, applies to the sexual orientation of jurors and, if so, what level of scrutiny shall be applied in this case.”<sup>86</sup> GSK argued that “*Windsor* confirms that heightened scrutiny applies to sexual orientation”<sup>87</sup> and therefore “*Windsor* confirms that sexual orientation discrimination during jury selection violates the Equal Protection Clause.”<sup>88</sup> Abbott, conversely, argued “*Windsor* did not hold that classifications based on sexual orientation are subject to heightened scrutiny under Equal Protection,”<sup>89</sup> and “*Windsor* is not ‘clearly irreconcilable’ with existing circuit precedent applying rational basis review under the Equal Protection Clause to sexual orientation classifications.”<sup>90</sup>

The Ninth Circuit heard the case on September 18, 2013 and released its unanimous decision to reverse and remand on January 21, 2014.<sup>91</sup> The three-judge panel held that although the Ninth Circuit has applied rational basis review in the past, the Supreme Court’s decision in *United States v. Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.<sup>92</sup> The court further held that “in light of the history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes about the group, the protection of *Batson v. Kentucky* applies and equal protection forbids striking a juror on the basis of his sexual orientation.”<sup>93</sup>

The court reached its conclusion through a series of separate considerations. First, the court addressed whether a *Batson* violation occurred at all.<sup>94</sup> Second, it decided whether heightened scrutiny applies to classifications based on sexual orientation.<sup>95</sup> Finally, the court determined whether *Batson* is applicable to classifications based on sexual orienta-

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84. Third Brief on Cross Appeal of Defendant-Appellant and Cross-Appellee at 14, SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014) (No. 11-17357, 11-17373), 2012 WL 1943252.

85. *Id.* at 19.

86. Order Requiring Supplemental Briefs and Setting Oral Argument for September 18, 2013 at 1, SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014) (No. 11-17357) (internal citations omitted).

87. Supplemental Brief on Cross-Appeal of Plaintiff-Appellee and Cross-Appellant at 5, SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014) (No. 11-17357), 2013 WL 4446818.

88. *Id.* at 2.

89. Abbott Laboratories Supplemental Brief Regarding *United States v. Windsor* at 3, SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014) (No. 11-17357), 2013 WL 4540201.

90. *Id.* at 7.

91. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 489 (9th Cir. 2014).

92. *Id.* at 474.

93. *Id.* at 486.

94. *Id.* at 476.

95. *Id.* at 484.

tion.<sup>96</sup> The following three sections will discuss these respective considerations.

#### a. *Batson* Violation

The court applied the *Batson* test to establish whether Abbott impermissibly used its peremptory strike. GSK established a prima facie case of intentional discrimination.<sup>97</sup> The juror at issue was the only juror to have self-identified as gay and the subject matter of the case was a significant issue within the gay community, providing a reason for Abbott to strike him solely for his sexual orientation.<sup>98</sup> The court inferred that Abbott feared the potential juror would be influenced by concern in the gay community about the price increase of an HIV drug, thereby relying on impermissible stereotypes.<sup>99</sup> Further, because Abbott declined to provide justification for the strike when asked by the district court judge, and subsequently falsely denied knowing whether the juror was gay, the court took this as additional evidence of counsel's discriminatory intent.<sup>100</sup> Abbott failed the second prong of the *Batson* test in failing to provide non-discriminatory justification for its strike.<sup>101</sup> Abbott offered multiple neutral reasons for the strike on appeal, all of which were decided by the court to be pretextual.<sup>102</sup> Ultimately, based on the totality of the circumstances, the court decided that a *Batson* violation occurred.<sup>103</sup>

#### b. Level of Scrutiny as Applied to Classifications Based on Sexual Orientation

In section III of the opinion, the Ninth Circuit addressed the most significant legal issue in the case: whether heightened scrutiny should be applied to classifications based on sexual orientation.<sup>104</sup> Because of the Court's statement that "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals nor-

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96. *Id.*

97. *Id.* at 476.

98. *Id.* at 474.

99. *Id.* at 476.

100. *Id.* at 477.

101. *Id.* at 479.

102. *Id.* at 478 n.4 ("One reason advanced by Abbott on appeal is that Juror B was the only juror who had lost friends to AIDS. We reject this reason because it is not supported by the record. . . . A second reason advanced by Abbott on appeal is that Juror B was acquainted with many people in the legal field. Other jurors, however, who were lawyers, and other jurors with close relatives who were lawyers were not stricken but served on the jury. Third, Abbott speculates on appeal that because Juror B was a computer technician at the Court, other jurors "might have given extra weight" to his opinions. We have more respect for jurors than to credit the idea that Juror B would have more influence on his fellow jurors than would the other jurors . . . . Finally, Abbott points out that Juror B was the only potential juror who testified that he had heard of any of the three drugs at issue. When asked what he knew about the drug, however, Juror B replied, 'not much,' and stated that he had no personal experience with it.")

103. *Id.* at 478–79.

104. *Id.* at 479.

mally subject to ‘rational basis’ review,”<sup>105</sup> if classifications based on sexual orientation are subject to rational basis review, then *Batson* would not apply. In *Witt v. Department of the Air Force*, the Ninth Circuit decided that heightened scrutiny applied to substantive due process cases involving classifications based on sexual orientation.<sup>106</sup> The court used *Lawrence v. Texas* to come to this decision, which did not explicitly state what standard of review is appropriate with regard to due process claims involving sexual orientation.<sup>107</sup> When the Supreme Court has failed to identify its method of analysis, the Ninth Circuit has analyzed precedent “by considering what the Court actually did, rather than by dissecting isolated pieces of text.”<sup>108</sup>

The court then used three factors to determine that *Lawrence* applied a heightened level of scrutiny.<sup>109</sup> First, “*Lawrence* did not consider the possible post-hoc realizations for the law” as “required under rational basis review.”<sup>110</sup> Second, in order to justify the harm that the Texas law inflicted, “*Lawrence* required a legitimate state interest,” which is typically necessary of heightened scrutiny and not rational basis review.<sup>111</sup> Finally, the court looked to the precedent “cases on which *Lawrence* relied and found that those cases applied heightened scrutiny;” therefore, *Lawrence* could reasonably be interpreted to have applied heightened scrutiny as well.<sup>112</sup>

The court used this “*Witt test*” to analyze what level of scrutiny the Supreme Court applied in *Windsor*, concluding “[i]n its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. . . . *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.”<sup>113</sup>

In analyzing the first *Witt* factor, analogously to *Lawrence*, *Windsor* “did not consider the possible rational bases for the law in question.”<sup>114</sup> Instead, the Court “looked to DOMA’s design, purpose, and effect,” examining the legislative history.<sup>115</sup> On this factor, the Ninth Circuit concluded that “*Windsor* . . . requires not that we conceive of hypothetical purposes, but that we scrutinize Congress’s actual purposes.”<sup>116</sup> Further, “*Windsor*’s ‘careful consideration’ of DOMA’s actual purpose and its

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

106. *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008) (“[W]e hold that *Lawrence* requires something more than traditional rational basis review and that remand is therefore appropriate.”).

107. *SmithKline*, 740 F.3d at 480 (citation omitted).

108. *Id.* (quoting *Witt*, 527 F.3d at 816) (internal quotation marks omitted).

109. *Id.*

110. *Id.* (citation omitted).

111. *Id.* (citation and internal quotation marks omitted).

112. *Id.* at 480–81 (citations omitted).

113. *Id.* at 481.

114. *Id.*

115. *Id.* (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013)).

116. *Id.* at 482.

failure to consider other unsupported bases is antithetical to the very concept of rational basis review.”<sup>117</sup>

The second *Witt* factor addressed the Court’s identification of a legitimate state interest, concluding that if it were applying rational basis review no justification would be necessary.<sup>118</sup> The Ninth Circuit compared the requirement of a legitimate state interest that justifies the harmful Texas law in *Lawrence* to the requirement of a “legitimate purpose” that overcomes the “disability” on a “class” of individuals in *Windsor*.<sup>119</sup> Additionally, the repeated use of words like “harm” or “injury,” which are rarely used in a case applying rational basis review, suggested that the Supreme Court was not using rational basis in the case of *Windsor*.<sup>120</sup> The court interpreted *Windsor* to “require[] that classifications based on sexual orientation that impose inequality on gays and lesbians and send a message of second-class status be justified by some legitimate purpose.”<sup>121</sup> Finally, the Ninth Circuit concluded that because the Court used balancing to determine whether a legitimate purpose overcame the injury, instead of applying a “strong presumption” in favor of the constitutionality of the law[], rational basis review must not have been used.<sup>122</sup>

The final and least important *Witt* factor, as proclaimed by the Ninth Circuit, determined that the level of scrutiny applied to the cases cited and relied upon by the Court was the same level of scrutiny likely used in the case at issue.<sup>123</sup> Ultimately the Ninth Circuit decided that because *Windsor* relied upon one case that applied rational basis review and two cases that applied heightened scrutiny, this final factor did not provide conclusive support but did lean in favor of applying heightened scrutiny.<sup>124</sup>

As a result of the *Witt* analysis, the Ninth Circuit came to the ultimate conclusion that *Windsor* did in fact require heightened scrutiny, and therefore held that *Windsor*’s heightened scrutiny applies to classifications based on sexual orientation.<sup>125</sup> The Ninth Circuit explained, “*Windsor* requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status.”<sup>126</sup>

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117. *Id.* (citation omitted).

118. *Id.* (citation omitted).

119. *Id.* (citations omitted).

120. *Id.*

121. *Id.* at 482–83.

122. *Id.* at 483 (citation omitted).

123. *Id.* (citation omitted).

124. *Id.*

125. *Id.*

126. *Id.*

c. *Batson* as Applied to Classifications Based on Sexual Orientation

After concluding that classifications based on sexual orientation are subject to heightened scrutiny, the Ninth Circuit next addressed more specifically whether *Batson* prohibits striking a juror based on his sexual orientation.<sup>127</sup> The court referenced *J.E.B.*, in which the Supreme Court extended *Batson* strikes to protect gender as well as race based on the “history of exclusion from jury service and the prevalence of ‘invidious group stereotypes.’”<sup>128</sup> By the same line of reasoning, the Ninth Circuit concluded that *Batson* should be extended to protect gays and lesbians as well.<sup>129</sup> The court provided a number of examples showcasing the history of discrimination against homosexuals and their exclusions from “institutions of self-governance.”<sup>130</sup> The Ninth Circuit provided a strong declaration of its opinion on the matter, stating:

Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation’s most cherished rites and rituals. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve.<sup>131</sup>

The court went on to emphasize the importance of jury service as a civic duty and that taking away the opportunity to participate in such duties is “demeaning the dignity of the individual and threatening the impartiality of the judicial system.”<sup>132</sup>

The Ninth Circuit continued to provide policy support for extending *Batson* to protect classifications based on sexual orientation.<sup>133</sup> First, the court explained that although exclusion from jury service may not have been as open and obvious as it was for women and African Americans, the policies emphasized in precedent cases such as *Batson* and *J.E.B.* require that the same principles be applied to the experiences of gays and lesbians.<sup>134</sup> Further, the court emphasized that “*Batson* must also protect potential jurors, litigants, and the community from the serious dignitary harm of strikes based on sexual orientation because, as in the case of gender, to allow such strikes risks perpetuating the very stereotypes the law forbids.”<sup>135</sup> It cited empirical studies providing additional support for

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127. *Id.* at 484.

128. *Id.* (citation omitted).

129. *Id.* at 486.

130. *Id.* at 484.

131. *Id.* at 485.

132. *Id.*

133. *Id.* at 485–87.

134. *Id.* at 485.

135. *Id.* at 486.

the premise that discriminatory opinions against homosexuals play a significant role in the courtroom.<sup>136</sup> Based on the totality of all the aforementioned factors, the court finally concluded that *Batson* applied to peremptory strikes based on sexual orientation.<sup>137</sup>

In the final pages of the opinion, the Ninth Circuit addressed a number of potential concerns or implications that might occur as a result of the foregoing decision. The court first addressed the idea that extending *Batson* to strikes based on sexual orientation will cause privacy concerns.<sup>138</sup> It responded with appreciation for the “coming out” process and acknowledged that “[n]o one should be ‘outed’ in order to take part in the civic enterprise which is jury duty.”<sup>139</sup> The Ninth Circuit confidently stated, however, that these concerns should not be an issue with the use of careful and proper courtroom procedures.<sup>140</sup> Courts already have measures in place to protect the privacy of potential jurors when sensitive personal information is involved.<sup>141</sup> Furthermore, applying *Batson* to strikes on the basis of sexual orientation does not require that the potential juror reveal his or her sexual orientation.<sup>142</sup> The challenge would apply only once the potential juror’s sexual orientation had voluntarily been established and on record.<sup>143</sup> The court cited to *Wheeler* and *Garcia*, explaining that California has successfully applied similar protections to sexual orientation for thirteen years, and that “problems with administration can be overcome, even in a large judicial system that comes in contact with a diverse population of court users.”<sup>144</sup>

### III. ANALYSIS

This Part of the Note will analyze the *SmithKline* decision and its potential implications for not only peremptory challenges but other gay rights issues as well. First, Section A will address some of the responses to the *SmithKline* opinion. Second, Section B will compare and contrast the sometimes conflicting ideas of a defendant’s right to an impartial jury and a juror’s right to privacy. Finally, Section C will discuss some practical considerations and potential obstacles to the extension of *Batson*.

#### A. Analyzing the SmithKline Decision

The Ninth Circuit made some significant analytical moves in order to reach this ruling. If the reasoning catches on, this decision could have very significant implications for gay rights in a variety of contexts. How-

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136. *Id.* (citing Hill, *supra* note 4, at 93).

137. *Id.*

138. *Id.* at 487.

139. *Id.* at 486 (quoting People v. Garcia, 92 Cal. Rptr. 2d 339, 347 (Cal. Ct. App. 2000)).

140. *Id.* at 487.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

ever, since the decision was released there have been a number of comments made by various writers and legal scholars questioning the validity of the Ninth Circuit's reasoning. This Section will address some of that analysis and discuss potential implications of the *SmithKline* decision.

Arguably, the most significant outcome of this decision is the conclusion that the Supreme Court applied heightened scrutiny to the *Windsor* decision. In equal protection cases, different levels of scrutiny are applied depending on what type of discrimination is alleged.<sup>145</sup> There are three generally accepted levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational review.<sup>146</sup>

In equal protection analysis, strict scrutiny applies to discrimination based on race, national origin, and alien status.<sup>147</sup> For a law to be upheld under strict scrutiny, it must be proven "necessary to achieve a compelling government purpose."<sup>148</sup> The government has the burden of proof, and must show that there is no alternative and less discriminatory way to achieve its goal.<sup>149</sup> A challenged law is almost always declared unconstitutional under strict scrutiny analysis.<sup>150</sup>

Intermediate scrutiny applies to discrimination based on gender and discrimination against non-marital children.<sup>151</sup> A law is upheld under intermediate scrutiny if it is "substantially related to an important government purpose."<sup>152</sup> This is less stringent than strict scrutiny because the government need only prove an "important" purpose, not one that is "compelling."<sup>153</sup>

Finally, all the remaining laws that do not qualify under the previous two levels of scrutiny will fall under the rational review analysis.<sup>154</sup> A law will be upheld under rational basis review if it is "rationally related to a legitimate government purpose."<sup>155</sup> In this case, the government's purpose need not be important or compelling.<sup>156</sup> Even if the government's actual purpose or motivation is not legitimate, the law will be upheld so long as counsel or the court can come up with some conceivable legitimate purpose.<sup>157</sup> Rational review is extremely deferential to the government and will very rarely result in the challenged law being declared unconstitutional.<sup>158</sup>

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145. CHEMERINSKY, *supra* note 16, at 528.

146. *Id.* at 529.

147. *Id.*

148. *Id.*; see, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984) (holding that the effects of racial prejudice cannot justify a racial classification that would remove an infant child from the custody of his or her biological mother).

149. CHEMERINSKY, *supra* note 16, at 529.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 541.

158. *Id.* at 672.

There are some circumstances, however, in which the Court has refused to find a legitimate state interest under rational review.<sup>159</sup> Both *Lawrence v. Texas* and *Department of Agriculture v. Moreno*, two cases that were cited in *Windsor*, failed under rational review because “the goal of degrading or demeaning a group because of bare animus toward its members” was deemed an illegitimate state purpose by the Court.<sup>160</sup> Additionally, there are some cases in which the Supreme Court has applied rational review with a bit more rigor than the “conventional leniency associated with a rational basis analysis.”<sup>161</sup> These “rational basis with teeth” cases include *Romer v. Evans*<sup>162</sup> and *Cleburne v. Cleburne Living Center, Inc.*<sup>163</sup> Again, however, both of the challenged laws in those cases were declared unconstitutional because of the presence of animosity toward the disadvantaged group.<sup>164</sup>

Some scholars suggest that the Ninth Circuit seems to have interpreted the aforementioned “rational basis with teeth” cases as applying heightened scrutiny, which should therefore be applied to “other laws burdening the same groups” and in other settings.<sup>165</sup> In that case, the “heightened scrutiny” of *Romer* would apply to all cases involving gays and lesbians.<sup>166</sup> There is no evidence, however, that these cases have changed the level of scrutiny to anything different than the rational basis review that has been widely accepted.<sup>167</sup> Therefore, as long as the Court still considers these cases to have been decided under rational review, peremptory challenges striking gays and lesbians cannot be invalidated.<sup>168</sup> Critics argue that *Windsor* should be understood to protect state’s rights with regard to marriage laws.<sup>169</sup> Others, however, claim that this reading falls short of identifying *Windsor*’s “essence, which is that DOMA’s cen-

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159. Vikram David Amar & Alan E. Brownstein, *The Ninth Circuit*, in SmithKline v. Abbott Labs, *Bars Lawyers From Removing Gay/Lesbian Jurors*, JUSTIA (Jan. 31, 2014), <http://verdict.justia.com/2014/01/31/lawyers-allowed-remove-jurors-based-sexual-orientation> [hereinafter Amar & Brownstein, *The Ninth Circuit*].

160. *Id.*

161. *Id.*

162. 517 U.S. 620 (1996).

163. 473 U.S. 432 (1985).

164. 517 U.S. at 634–35 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. ‘[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.’ . . . [I]n making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”); 473 U.S. at 446–47 (“Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. . . . [S]ome objectives—such as ‘a bare . . . desire to harm a politically unpopular group’ are not legitimate state interests. . . . [T]he mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.” (citations omitted)).

165. Amar & Brownstein, *The Ninth Circuit*, *supra* note 159.

166. *Id.*

167. *Id.*

168. *Id.*

169. Editorial Board, *supra* note 8.

tral, impermissible purpose was to ‘impose inequality’ on a class of individuals without legitimate justification.”<sup>170</sup>

Others agree that this is too far of a leap.<sup>171</sup> Although it may be conceded that *Windsor* used something more than rational review, it does not necessarily mean that it used any form of recognizable heightened scrutiny.<sup>172</sup> This “new tier of review” is comparable to that used in *Lawrence* and *Romer*, which has been labeled “rational review plus” or “rational basis with bite.”<sup>173</sup> It does not, however, equate to intermediate scrutiny, as some appear to be interpreting it.<sup>174</sup> This may simply be further clarifying, or renaming, a form of scrutiny that has traditionally been used in equal protection doctrine for sexual orientation classifications, and is not substantively changing the level of scrutiny at all.<sup>175</sup> Still others take this critique further, arguing that the *Windsor* majority directed its reasoning toward the specifics of DOMA, therefore making it unnecessary to adopt a level of scrutiny for classifications based on sexual orientation.<sup>176</sup>

Some question whether the Equal Protection Clause is the proper framework through which to analyze the problem of juror exclusion in the first place.<sup>177</sup> They suggest that the constitutional provisions dealing with voting and other political rights may be better suited to helping courts decide how to scrutinize peremptory challenges because jury service has traditionally been tied and analogized to voting.<sup>178</sup> This juror-as-voter analogy is illustrated as follows: “[J]urors, like individuals casting ballots for members of Congress or the President, exercise their power by voting for particular results; jurors implement policy when they decide cases, just as voters help shape policy by electing representatives or adopting initiatives.”<sup>179</sup> Historically, voting and jury service were considered political rights governed, not by the Equal Protection Clause, but by the voting rights amendments.<sup>180</sup> If this analogy were to be followed, then removing anyone from juries becomes much more problematic, just as

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170. *Id.*

171. Ari Ezra Waldman, *Gay Jurors and Marriage Equality: The Common Legal Thread*, TOWEROAD (Jan. 22, 2014, 2:40 PM), <http://www.toweroad.com/2014/01/jurormarriage.html>; see also Amar & Brownstein, *The Ninth Circuit*, *supra* note 159.

172. Waldman, *supra* note 171.

173. *Id.*

174. Ruthann Robson, *Ninth Circuit Extends Batson’s Equal Protection Doctrine Regarding Juror Exclusion to Sexual Orientation and Applies “Heightened” Scrutiny*, CONS. LAW PROF BLOG (Jan. 21, 2014), <http://lawprofessors.typepad.com/conlaw/2014/01/ninth-circuit-extends-batsons-equal-protection-doctrine-regarding-juror-exclusion-to-sexual-orientat.html>.

175. *Id.*

176. Ed Whelan, *More Mischief from Judge Reinhardt*, NAT'L REV. ONLINE (Jan. 24, 2014, 12:23 PM), <http://www.nationalreview.com/bench-memos/369370/more-mischief-judge-reinhardt-ed-whelan>.

177. Vikram David Amar & Alan E. Brownstein, *The Ninth Circuit*, in SmithKline v. Abbott Labs, *Bars Lawyers From Removing Gay/Lesbian Jurors: Part-Two in a Two-Part Series*, JUSTIA (Feb. 14, 2014), <http://verdict.justia.com/2014/02/14/ninth-circuit-SmithKline-v-abbott-labs-bars-lawyers-removing-gaylesbian-jurors> [hereinafter Amar & Brownstein, *Part Two*].

178. *Id.*

179. *Id.*

180. *Id.*

prohibiting people from voting has proven to be.<sup>181</sup> This analysis partly supports the general idea that the Supreme Court should reconsider whether peremptory strikes can be constitutionally exercised at all.<sup>182</sup> Arguing for abolition of peremptories altogether is beyond the scope of this Note; however, the analysis presents an alternative view of peremptory challenges and a further example of some of the thoughts and reactions sparked by the *SmithKline* opinion.

The Ninth Circuit's decision could have some far reaching implications. After *Windsor* and *Perry*, discrimination based on sexual orientation and gender identity continued to be a controversial issue in 2013.<sup>183</sup> In October, the Missouri Supreme Court rejected the claim of a deceased highway patrol trooper's same-sex partner claiming Missouri's benefits statute violated equal protection under the state constitution.<sup>184</sup> In November, a U.S. District Court for the District of New Jersey upheld a New Jersey law banning the use of sexual orientation conversion therapy, and the U.S. Senate approved a bill outlawing workplace discrimination against gay, bisexual, and transgender Americans called the Employment Non-Discrimination Act ("ENDA").<sup>185</sup> The *SmithKline* decision has the potential to extend to and influence issues similar to these and resolve some of the inconsistencies.

In applying heightened judicial scrutiny, the decision may impact far more than peremptory challenges. Commentators predict that *SmithKline* could affect the gay rights movement as a whole, potentially affecting any lawsuit involving the discrimination of gays and lesbians.<sup>186</sup> In the Ninth Circuit at least, this decision may impact cases involving public employment, housing issues, family law, and same-sex marriage.<sup>187</sup> For example, in direct response to the Ninth Circuit's decision in *SmithKline*, Nevada Attorney General Catherine Masto filed a motion withdrawing the state's legal arguments in support of Nevada's gay marriage ban in *Sevcik v. Sandoval*,<sup>188</sup> stating:

*Windsor v. United States*, decided in June 2013, has been interpreted by the Ninth Circuit's decision in *SmithKline* to require heightened scrutiny to classifications based on sexual orientation. The decision in *SmithKline* is controlling and sets a new standard of review for cases in the Ninth Circuit.

After thoughtful review and analysis, the State has determined that its arguments grounded upon equal protection and due process

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181. *Id.*

182. *Id.*

183. Benjamin Minegar, *Federal Appeals Court Rules Juror Exclusion for Sexual Orientation Unconstitutional*, JURIST (Jan. 22, 2014, 11:04 AM), <http://jurist.org/paperchase/2014/01/federal-appeals-court-finds-juror-exclusion-for-sexual-orientation-unconstitutional.php>.

184. *Id.*

185. *Id.*

186. Margolin, *supra* note 10.

187. Editorial Board, *supra* note 8.

188. *Nevada AG Seeks to Withdraw Gay Marriage Brief*, KTVN (Feb. 17, 2014, 3:03 PM), <http://www.ktvn.com/story/24685883/nevada-ag-seeks-to-withdraw-gay-marriage-brief>.

are no longer sustainable. Additionally, the legal evolution referenced by *SmithKline* is undeniably a “doctrinal development” that vitiates the State’s position.<sup>189</sup>

*SmithKline* is predicted to have similar consequences for recently filed marriage equality suits filed in other Ninth Circuit states such as Arizona, Idaho, and Oregon.<sup>190</sup> It is less clear whether other, less left-wing circuits will follow the reasoning of this three judge panel, all of whom were appointed by a Democratic president, even more so, considering the lead author has been hailed the “liberal lion.”<sup>191</sup>

Despite the skepticism, however, optimism abounds from supporters of the Ninth Circuit’s opinion.<sup>192</sup> James Esseks, director of the American Civil Liberties Union Lesbian Gay Bisexual Transgender & AIDS Project, explained that under the newly heightened scrutiny as established by *SmithKline*, “any law that treats gay people differently is presumed unconstitutional; it no longer gets the benefit of the doubt.”<sup>193</sup> “The difference is night and day,” he exclaimed.<sup>194</sup> Jon Davidson from Lambda Legal shared equal excitement saying that they were “jumping with joy” with the release of the opinion.<sup>195</sup> Davidson believes the newly adopted heightened scrutiny will make it much easier to win cases for those who have been discriminated against because of sexual orientation.<sup>196</sup>

Perhaps an even more significant implication depends upon whether the Supreme Court will review the Ninth Circuit’s decision in *SmithKline*. There has been some suggestion of a split between *SmithKline* and a decision from the Eighth Circuit opining that sexual orientation is not an invalid basis for peremptory strikes, and that this split might make Supreme Court review more likely.<sup>197</sup> Others, alternatively, do not think it is likely that the Court will exercise its discretion to review the Ninth Circuit’s decision.<sup>198</sup> First of all, they argue, this alleged split does not really exist because the language arguing that sexual orientation is an acceptable basis for peremptories is merely dicta.<sup>199</sup> Furthermore, the Eighth Circuit decision was decided before *Windsor* and be-

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189. Press Release, Office of the Attorney General of Nevada, Attorney General Masto’s Statement on Same-Sex Marriage Case (Feb. 10, 2014), available at [http://ag.nev.gov/News/PR/2014/Miscellaneous/Attorney-General\\_Masto's\\_Statement\\_On\\_Same-Sex\\_Marriage\\_Case/](http://ag.nev.gov/News/PR/2014/Miscellaneous/Attorney-General_Masto's_Statement_On_Same-Sex_Marriage_Case/).

190. Art Leonard, *9th Circuit Holds Sexual Orientation Requires Heightened Scrutiny in Gay Juror Case*, ART LEONARD OBSERVATIONS (Jan. 21, 2014), <http://www.artleonardobservations.com/tag/SmithKline-beecham-v-abbot-laboratories/>.

191. Nicole Flatow, *Federal Appeals Court Ruling Could Change the Game on Gay Rights*, THINK PROGRESS (Jan. 22, 2014, 11:11 AM), <http://thinkprogress.org/justice/2014/01/22/3188501/federal-appeals-court-ruling-change-game-lgbt-rights/>.

192. See Margolin, *supra* note 10.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. Liptak, *Sexual Orientation*, *supra* note 5.

198. Amar & Brownstein, *Part Two*, *supra* note 177.

199. *Id.*

fore the court had an opportunity to address the *Windsor* opinion; therefore, it is still unknown whether the Eighth and Ninth Circuits actually disagree on the matter.<sup>200</sup> Finally, legal scholars hypothesize that the reason the Court decided *Windsor* somewhat ambiguously and dodged the issue in *Perry* was because the Court was not ready to answer the same-sex marriage question.<sup>201</sup> If that theory is accurate, it is improbable that the Court would be ready now to tackle legal issues canvassing all sexual-orientation discrimination as a whole.<sup>202</sup> It seems unlikely, therefore, that the Court will be willing to take on additional gay-rights issues until some time has passed and the landscape begins to settle down.<sup>203</sup>

*SmithKline* might also have influence on legislative action as well. The Juror Non-Discrimination Act and Jury Access for Capable Citizens and Equality in Service Selection (“ACCESS”) Act would prohibit attorneys from attempting to “strike potential federal jurors based on sexual orientation or gender identity.”<sup>204</sup> The Act was originally introduced into the 112th Congress in May of 2012 and into the Senate in September of 2012.<sup>205</sup> It was reintroduced to the 113th Congress and Senate in January and July of 2013, respectively.<sup>206</sup> Senators Shaheen and Collins who originally introduced the bill, now urge the Senate Judiciary Committee to consider the Act, citing *SmithKline* and the Ninth Circuit’s reasoning in their request.<sup>207</sup>

The Ninth Circuit’s ruling demonstrates the need to pass the Jury ACCESS Act and provide a clear statutory prohibition to prevent such discrimination in jury selection once and for all. Our country is seeing dramatic advancement in protections for the rights of lesbian, gay, bisexual, and transgender citizens, and the federal judicial system should be part of that progress.<sup>208</sup>

This clearly demonstrates the potential scope of consequences *SmithKline* might have on the discrimination of gays and lesbians across the governmental branches.

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200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Juror Non-Discrimination Act/Jury ACCESS Act*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/laws-and-legislation/federal-legislation/juror-non-discrimination-act-jury-access-act> (last updated Mar. 20, 2014).

205. H.R. 5848, 112th Cong. (2012); S. 3618, 112th Cong. (2012).

206. H.R. 312, 113th Cong. (2013); S. 38, 113th Cong. (2013).

207. Press Release, Senator Jeanne Shaheen, Collins Urge Senate Committee to Act on Bill Banning LGBT Discrimination During Jury Selection Process (Jan. 29, 2014), available at <http://www.shaheen.senate.gov/news/press/release/?id=38b56a80-f0f7-4ef1-a568-7407fae7db1f>.

208. *Id.*

*B. Right to Impartial Jury vs. Right to Juror Privacy*

Both criminal defendants<sup>209</sup> and civil litigants<sup>210</sup> have a right to an impartial jury. Criminal defendants are protected under the Due Process Clause of the Constitution as well as the Sixth Amendment.<sup>211</sup> Voir dire exists in order to protect this right by “provid[ing] a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.”<sup>212</sup> If conducted properly, it “can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise.”<sup>213</sup> Judges in both federal and state courts have wide discretion with regard to voir dire proceedings.<sup>214</sup> There are cases in which bringing evidence of sexual orientation before the jury is necessary to prove certain motives.<sup>215</sup> These cases would require probing jurors’ opinions and attitudes regarding sexual orientation during voir dire in order to ensure an impartial jury.<sup>216</sup> Surely these questions would involve some deeply personal and private dimensions that skirt the line of being overly intrusive and violating privacy interests.

The courts have given little attention to juror privacy.<sup>217</sup> It is unclear whether jurors have any constitutional privacy interest in avoiding disclosures during voir dire or what kind of expectations of privacy, if any, jurors should have when summoned for jury duty.<sup>218</sup> The Supreme Court is undecided on the issue, stating, “[w]e need not decide . . . whether a juror, called upon to answer questions posed to him in court during voir

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209. See, e.g., *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (“[D]ue process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment.”); *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976) (“A criminal defendant in a state court is guaranteed an ‘impartial jury’ by the Sixth Amendment as applicable to the States through the Fourteenth Amendment.” (citation omitted)).

210. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 548–49 (1984) (“Respondents are not entitled to a new trial unless juror’s failure to disclose denied respondents their right to an impartial jury.”).

211. U.S. CONST. amend. VI.

212. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143–44 (1994).

213. *Id.* at 143.

214. *Mu’Min v. Virginia*, 500 U.S. 415, 422 (1991) (“[A] suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. This is the rule in civil cases, and the same rule must be applied in criminal cases.” (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895))).

215. See Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231, 256 (1998) (“Cases in which sexual orientation bias allegedly motivated a crime or other action . . . would bring evidence of sexual orientation and that issue before the jury.”).

216. *Id.*

217. *Id.* at 257.

218. *Id.*

dire, has a legitimate expectation, rising to the status of a privacy right, that he will not have to answer those questions.”<sup>219</sup>

Some lower courts have addressed the issue, however. In *United States v. Barnes*, a leading case on the issue of juror privacy, the Second Circuit upheld the district court’s refusal to ask juror’s their racial and ethnic backgrounds or religious affiliations.<sup>220</sup> The court looked at whether the scope of voir dire covered the essentials of the case, but also, whether the requested voir dire would infringe upon jurors’ privacy interests, reasoning:

If Darrowesque questioning of prospective jurors were allowed, namely “religion, politics, social standing, family ties, friends, habits of life and thought”, any semblance of juror privacy would have to be sacrificed. There is neither statutory nor constitutional law that requires disclosure of information about jurors unrelated to any issue as to which prejudices may prevent an impartial verdict.<sup>221</sup>

Recently, courts have begun to address the issue of juror privacy with greater restrictions on the scope of voir dire questioning.<sup>222</sup> This has resulted in an increased “recognition that jurors’ maintain some personal privacy rights when summoned for jury service, and that these interests prohibit posing certain personal questions when the information is not essential to a case or other less intrusive questioning would be sufficient to disclose any disqualifying bias.”<sup>223</sup>

Some argue that the *Lawrence v. Texas* decision implicates a privacy interest that protects homosexual jurors from having to reveal their sexual orientations.<sup>224</sup> In *Lawrence v. Texas*, the Court held that the Texas statute making it unlawful for two persons of the same sex to engage in sexual conduct was unconstitutional.<sup>225</sup> The Court reasoned that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>226</sup> When a juror is asked to disclose his or her sexual orientation in public and then counsel subsequently peremptorily strikes the juror on that basis, it can be argued that it is analogous to the situation in *Lawrence* when an individual was sanctioned for private conduct.<sup>227</sup> Asking jurors these personal

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219. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 514 (1984) (Blackmun, J., concurring).

220. 604 F.2d 121, 140 (2d Cir. 1979) (“It is not, after all, the prospective jurors who are on trial in the cases that come before the courts. It can be imagined that, as counsel seek more and more information to aid in filling the jury box with persons of a particular type whom they believe to be well disposed toward their clients, prospective jurors will be less than willing to serve if they know that inquiry into their essentially private concerns will be pressed.”).

221. *Id.* at 143.

222. Lynd, *supra* note 215, at 231, 257; see *United States v. McDade*, 929 F. Supp. 815, 817–18 (E.D. Pa. 1996); *United States v. Padilla-Valenzuela*, 896 F. Supp. 968, 971–72 (D. Ariz. 1995); *Brandborg v. Lucas*, 891 F. Supp. 352, 358–59 (E.D. Tex. 1995).

223. Lynd, *supra* note 215, at 258.

224. Neal, *supra* note 13, at 1110–11.

225. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

226. *Id.*

227. Neal, *supra* note 13, at 1111.

questions and thereby striking them because of their answers sends a potential message to the juror that he or she is unfit to participate in the judicial process because of his or her sexual orientation.<sup>228</sup>

The Ninth Circuit upheld these principles in its opinion in *SmithKline*.<sup>229</sup> The court acknowledged the significance of coming out and confirmed that the privacy of gay and lesbian jurors should not be compromised.<sup>230</sup> The court assured that any concerns regarding juror privacy should be “allayed by prudent courtroom procedure.”<sup>231</sup> Courts should, and already do, to some extent, use a variety of procedures to ensure privacy protections for prospective jurors.<sup>232</sup> Additionally, the Ninth Circuit stated that extending *Batson* to classifications based on sexual orientation does not create any requirement that prospective jurors reveal their sexual orientations.<sup>233</sup> The *Batson* challenge would apply only when the prospective juror’s sexual orientation has already been established, voluntarily, and on record.<sup>234</sup> The court stated that this method has been operating successfully for over thirteen years in California state courts and such problems have been overcome.<sup>235</sup>

If the purpose of a peremptory challenge is to ensure an impartial jury, then voir dire questioning should consist of direct questions concerning bias, rather than questions regarding the sexual orientation of the individual juror.<sup>236</sup> If an attorney is denied the opportunity to ask a potential juror point-blank whether he or she is homosexual, an attorney cannot peremptorily strike the juror on that basis alone.<sup>237</sup> As discussed below, however, the possibility of inferences based on assumptions and stereotypes could prove just as much of a risk that a potential juror will be discriminated against because of his or her sexual orientation.

### C. Practical Considerations for Extending Batson to Sexual Orientation

Sexual orientation, unlike race and gender, is concealable. Therefore, multiple difficulties arise in determining whether a prospective juror is gay. Asking the juror directly about his or her sexual orientation would be the most obvious method; yet, various other possibilities exist as well.<sup>238</sup> One possibility is looking at the totality of the circumstances to determine whether a juror is gay.<sup>239</sup> This would require a number of inferences—using factors like appearance and demeanor to make an as-

228. *Id.* at 1112.

229. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 486–87 (9th Cir. 2014).

230. *Id.* at 487.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Neal, *supra* note 13, at 1112.

237. *Id.*

238. Kathryne M. Young, *Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243, 256 (2011).

239. *Id.*

sumption that a juror is gay—and would require the judge to make the ultimate, rather awkward, determination of the juror's sexual orientation.<sup>240</sup> This method has numerous downsides such as relying on stereotypes, speculation, and potentially insulting assumptions between the parties.<sup>241</sup>

An alternative approach would be to question the juror specifically about his or her sexual orientation, eliminating the need for guesswork as discussed above. Several practical considerations arise, however, that do not ensure that the court would receive an accurate response from jurors with regard to their sexual orientation.<sup>242</sup> First, is the possibility that jurors could be uncertain about their specific sexual orientations.<sup>243</sup> Sexual preference and orientation is an extremely subjective assessment.<sup>244</sup> There is a wide range of sexual preferences and conduct, and someone engaging in certain behaviors may be considered gay or lesbian by others but would not classify himself or herself as a homosexual.<sup>245</sup> This could result in various, conflicting perceptions of what constitutes homosexuality. Therefore, when counsel poses a direct inquiry into a prospective juror's sexual orientation, he or she may not accurately learn the information sought.<sup>246</sup>

Second, the courtroom setting may not be a comfortable place in which an individual would want to disclose his or her most personal and private details.<sup>247</sup> Even for openly gay or lesbian individuals, the courtroom can be a particularly intimidating place, involving examinations by prying counsel or judges on record.<sup>248</sup> The California Judicial Study found that more than half of gay and lesbians preferred not to out themselves when situations of sexual orientation arose in court.<sup>249</sup> Once the disclosure has been made, the individual cannot take it back and loses control over his or her most personal information.<sup>250</sup> This results in understandable hesitancy for jurors to accurately disclose their sexual orientations.<sup>251</sup>

Third is the possibility that prospective jurors might lie about their sexual orientation in order to avoid jury service. It is a common desire for citizens summoned for jury duty to avoid service. A simple Google search of "how to get out of jury duty" yields over twenty-two million re-

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240. *Id.* at 256–57.

241. *Id.* at 257.

242. Lynd, *supra* note 215, at 267.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 267–68.

247. *Id.* at 268.

248. *Id.*

249. JUDICIAL COUNSEL OF CAL., ACCESS AND FAIRNESS ADVISORY COMM., SEXUAL ORIENTATION FAIRNESS SUBCOMM., SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS 20 (2001), available at <http://www.courts.ca.gov/documents/report.pdf>.

250. Lynd, *supra* note 215, at 268–69.

251. *Id.*

sults including how-to blogs and articles from reputable publications.<sup>252</sup> If jurors believe that identifying as gay or lesbian may relieve them from jury service, some may intentionally misrepresent their sexual orientations.<sup>253</sup> On the contrary, many people do take their civic responsibilities seriously, and jurors do submit to voir dire examination under oath and penalty of perjury.<sup>254</sup> Nevertheless, untruthful prospective jurors are a real concern and yet another risk of inaccurate disclosure with regard to inquiries into sexual orientation.

Finally, asking potential jurors questions regarding their sexual preferences could be construed as overly intrusive and offensive, thereby angering and prejudicing jurors and undercutting their impartiality.<sup>255</sup>

California state courts have prohibited the use of peremptory challenges based on sexual orientation for more than a decade.<sup>256</sup> In *People v. Garcia*, the California appellate court held that sexual orientation is an impermissible basis for a peremptory strike.<sup>257</sup> At some point during the trial, it somehow became known that two members of the jury were lesbians.<sup>258</sup> The prosecution excused both women and defense counsel objected.<sup>259</sup> The appellate court concluded that gays and lesbians are part of a cognizable group and “share a history of persecution comparable to that of blacks and women.”<sup>260</sup> It went on to explain the importance of including cognizable groups in the jury venire in assuring “that as many different life views as possible will be represented in the important decisions of the judicial process.”<sup>261</sup> Furthermore, in explaining the importance of the perspective of the homosexual community, the court stated, “[o]utside of racial and religious minorities, we can think of no group which has suffered such ‘pernicious and sustained hostility’ and such ‘immediate and severe opprobrium’ as homosexuals.”<sup>262</sup>

The *Garcia* court addressed the practical difficulties associated with recognizing gays and lesbians as a cognizable group. While agreeing with the Attorney General that sexual orientation is “not necessarily patent,” it explained that race and ethnicity are not necessarily patent either, without effect on their status as a cognizable group.<sup>263</sup> Further, the court firmly cautioned against inquiring of jurors about their sexual orientation.

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252. See, e.g., Gus Lubin, *Getting Out of Jury Duty Is Easier Than You Think*, BUS. INSIDER (Feb. 9, 2013, 7:59 AM), <http://www.businessinsider.com/how-to-get-out-of-jury-duty-2013-2>.

253. Lynd, *supra* note 215, at 269.

254. *Id.*

255. *Id.* at 270.

256. William Peacock, *Does Batson Apply to Gay Jurors?*, FINDLAW (July 29, 2013, 2:55 PM), [http://blogs.findlaw.com/ninth\\_circuit/2013/07/does-batson-apply-to-gay-jurors.html](http://blogs.findlaw.com/ninth_circuit/2013/07/does-batson-apply-to-gay-jurors.html).

257. 92 Cal. Rptr. 2d 339, 347–48 (Cal. Ct. App. 2000).

258. *Id.* at 340.

259. *Id.*

260. *Id.* at 344.

261. *Id.*

262. *Id.* at 346 (quoting *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) (citations omitted)).

263. *Id.* at 346–47.

No one should be “outed” in order to take part in the civic enterprise which is jury duty. The whole point is that no one can be excluded because of sexual orientation. That being the case, no one should be allowed to inquire about it. If it comes out somehow, as it did here, the parties will doubtless factor it into their jury selection decisions, just as they factor in occupation, education, body language, and whether the juror resembles their stupid Uncle Cletus. But there is no reason to allow inquiry about it.<sup>264</sup>

Although the court prohibits direct inquiry into a prospective juror’s sexual orientation, it does not offer any guidance on what to do when an attorney perceives that an individual is homosexual.<sup>265</sup> This decision leaves many questions unanswered with regard to the practical obstacles involved in prohibiting peremptory challenges based on sexual orientation.

Following the disposition of the case, the California Assembly codified the *Garcia* holding on May 4, 2000: “A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds.”<sup>266</sup> Although *Garcia* leaves some questions unanswered, the codification of its holding was a positive step in California’s treatment of gay and lesbian jurors, and a good indication of how federal circuits—and possibly state courts as well—should proceed.

A glaring concern that remains is not specific to peremptories based on sexual orientation, but applies to the area of peremptory challenges as a whole. Even if a lawyer may not use a peremptory challenge motivated by race, gender, or sexual orientation, the lawyer may still strike the potential juror by offering a neutral explanation.<sup>267</sup> This neutral explanation could be based on age, attire, or occupation, for example.<sup>268</sup> This makes it particularly easy for a lawyer to disguise his or her discriminatory motives. This goes back to the question of whether peremptory challenges should exist at all. This question is beyond the scope of this Note, but there is no lack of scholarly attention on the matter.<sup>269</sup>

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264. *Id.* at 347.

265. Barry, *supra* note 12, at 169.

266. CAL. CIV. PROC. § 231.5 (West 2014); Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 6 (2001).

267. Michael McGough, *A Victory for Gays but a Loss for Lawyers*, L.A. TIMES, Jan. 22, 2014, <http://www.latimes.com/opinion/opinion-la/la-ol-gays-juries-peremptory-challenge-court-20140121,0,1232265.story#axzz2vbfqxER5>.

268. *Id.*

269. See generally Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996); Antony Page, *Batson’s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005); Matt Haven, Comment, *Reaching Batson’s Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the*

#### IV. RECOMMENDATION

Other federal circuits should follow the decision made by the Ninth Circuit and extend *Batson* to apply to discriminatory uses of peremptory challenges based on sexual orientation. More significantly, the Supreme Court should address this issue and clarify what level of scrutiny should be applied to equal protection cases dealing with classifications based on sexual orientation. The Court should acknowledge that sexual orientation is subject to a clear form of heightened scrutiny and therefore should be treated just like race, religion, and ethnicity with regard to voir dire and peremptory challenges.

Arguably, the practical considerations as outlined in Part IV.C *supra* might be too great of an obstacle for the extension of peremptory challenges to include sexual orientation to result in any meaningful change. “A skilled attorney can always offer a non-discriminatory reason for exercising a peremptory strike, and the likelihood of having enough gay, lesbian, or bisexual potential jurors on a given panel to establish a pattern is minimal.”<sup>270</sup> Yet, some protection is better than no protection and is a positive step in the direction of increased rights and protections for the LGBT community. The state of California has prohibited peremptory strikes based on sexual orientation for thirteen years, proving that administrative problems can be overcome, even in a large judicial system with a diverse variety of court users.<sup>271</sup>

Hopefully, the positive implications of the *SmithKline* decision will extend to a number of other areas of law. Prior to the ruling, commentators predicted: “If the Ninth Circuit interprets *Windsor* to require a heightened standard of protection for homosexuals, it could mean more than *Batson* protections against discriminatory voir dire. It could prove persuasive in all other areas where heightened protection pops up, such as discriminatory laws or employment practices.”<sup>272</sup> Those predictions have already begun to materialize as demonstrated by the state of Nevada’s withdrawal from its defense of the ban on gay marriages.<sup>273</sup>

#### V. CONCLUSION

*Batson* should be extended to prohibit the discriminatory use of peremptory challenges based on sexual orientation. Although the Supreme Court has only held peremptory challenges unconstitutional

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*Challenge for Cause Standard*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 97 (2011); Keith A. Ward, Comment, “*The Only Thing in the Middle of the Road Is a Dead Skunk and a Yellow Stripe*: Peremptory Challenges—Take ‘Em or Leave ‘Em”, 26 TEX. TECH L. REV 1361 (1995).

270. Eisemann, *supra* note 266, at 7.

271. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 487 (9th Cir. 2014).

272. William Peacock, *9th Hears Oral Arguments in Gay Juror Batson Challenge Case*, FINDLAW (Sept. 20, 2013, 3:11 PM), [http://blogs.findlaw.com/ninth\\_circuit/2013/09/9th-hears-oral-arguments-in-gay-juror-batson-challenge-case.html](http://blogs.findlaw.com/ninth_circuit/2013/09/9th-hears-oral-arguments-in-gay-juror-batson-challenge-case.html).

273. *Nevada AG Seeks to Withdraw Gay Marriage Brief*, *supra* note 187.

when at least heightened-scrutiny applies, *Windsor* has changed that analysis. *Windsor* confirms that heightened scrutiny applies to sexual orientation, and therefore *Batson* should be extended to prohibit discriminatory peremptory challenges based on sexual orientation. The Ninth Circuit confirmed this interpretation of *Windsor* with its ruling in *SmithKline*.<sup>274</sup> The courts can still secure an impartial jury without excluding homosexuals from performing their civic duties. Juror privacy should be recognized as a major concern and under no circumstance should it be acceptable for a counselor to directly question a juror with regard to his or her sexual orientation during voir dire. Nor should it be permissible for counsel to use stereotypes or assumptions to determine whether or not a prospective juror is gay. Courts should be required to use the same procedures required for jurors with regard to race, ethnicity, and gender.

Certainly it is argued that *Batson* does not provide a practical means of removing bias from the venire. As Justice Breyer argued: “[p]eremptory challenges seem increasingly anomalous in our judicial system. On the one hand, the Court has widened and deepened *Batson*'s basic constitutional rule. . . . On the other hand, the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before.”<sup>275</sup> Although *Batson* may not operate perfectly to remove discrimination in every instance, it is a major leap in the right direction of extending equal rights protections to gays and lesbians. Until the U.S. government is ready to take further steps to either eliminate peremptories entirely, or reformat the way they are used in the justice system today, limiting discrimination in this way is the best method we currently have to address the issue.

If the Ninth Circuit's interpretation of *Windsor* that classifications based on sexual orientation are no longer subject to rational basis review, but heightened scrutiny, is followed by other Circuits or confirmed by the Supreme Court, the battle to win equality for gays and lesbians is well on its way to a victory. This could mean significant advances in equality in areas far broader than just peremptory challenges, or even courtroom procedure generally. Heightened scrutiny in equal protection analysis could potentially expand protections in areas such as employment discrimination disputes, family law, housing, and more, and will certainly play a significant role in the fight for marriage equality. The *SmithKline* ruling has already sparked a series of advances in the Ninth Circuit, and

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274. *SmithKline*, 740 F.3d at 484.

275. *Miller-El v. Dretke*, 545 U.S. 231, 269–70 (2005) (citations omitted). Justice Breyer's concurrence provides a well articulated argument against the continued use of peremptory strikes. *Id.* at 272 (Breyer, J., concurring) (“I recognize that peremptory challenges have a long historical pedigree. They may help to reassure a party of the fairness of the jury. But long ago, Blackstone recognized the peremptory challenge as an ‘arbitrary and capricious species of [a] challenge.’ If used to express stereotypical judgments about race, gender, religion, or national origin, peremptory challenges betray the jury’s democratic origins and undermine its representative function.” (alterations in original) (citations omitted)).

No. 4]

EXTENDING BATSON

1711

hopefully the rest will follow suit. The Supreme Court should address this issue and explicitly confirm the appropriate level of scrutiny to resolve any confusion and continue to advance equality for gays and lesbians.

1712

UNIVERSITY OF ILLINOIS LAW REVIEW

[Vol. 2015