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Peremptory Pragmatism: Religion and the Administration of the Batson Rule

A.C. Johnstone

Over a decade after Batson v Kentucky, the constitutional status of peremptory challenges exists in uneasy equilibrium. In 1986, Batson protected criminal defendants from a prosecutor's race-based challenges to jurors of the defendant's race. Since Batson, the Supreme Court has extended this constitutional prohibition to a defendant's strikes and has removed the requirement that the defendant and the juror be of the same race. The Court applied Batson to sex-based challenges in J.E.B. v Alabama, citing historic discrimination against women in jury selection. In the aftermath of J.E.B., some commentators have urged the overhaul or even the abolition of peremptory challenges.

But just five weeks after the Court extended Batson to sex, it passed on an opportunity to extend Batson to religion by denying certiorari in Davis v Minnesota. The case involved a prosecutor who struck a Jehovah's Witness, admitting that the prospective juror's religion motivated the challenge. The Minnesota Supreme Court ruled that Batson did not apply to the prosecutor's challenge for three reasons. First, irrational religious bias does

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1 B.A. 1995, Yale University; J.D. Candidate 1999, University of Chicago.
7 Georgia v McCollum, 505 US 42, 59 (1992).
not pervade the jury system to the same extent as racial bias does.\textsuperscript{10} Second, religious affiliation best indicates a juror's religious beliefs and, therefore, the potential for juror bias based on these beliefs.\textsuperscript{11} Third, religion is not a self-evident characteristic like race or sex. Thus, it becomes difficult to make any attempt at a religion-based \textit{Batson} challenge without prying into a potential juror's "inviolate" religious beliefs.\textsuperscript{12}

This Comment defends the pragmatic line the Minnesota Supreme Court drew in \textit{Davis}, because that line facilitates the efficient administration of fair trials while protecting important interests of citizens called for jury duty.\textsuperscript{13} Unlike race or sex, religious affiliation can often serve as a proxy for a juror's beliefs and likely biases. Religion-based juror strikes, therefore, threaten neither the anti-discrimination principle of equal protection nor the integrity of the criminal justice system. In fact, if courts subjected religion-based peremptory challenges to standard \textit{Batson} analysis, the difficulty of defining religious belief would raise the already substantial costs of determining the validity of challenges. Furthermore, accurately ascertaining prospective jurors' religious beliefs in voir dire requires intrusive questioning which can alienate jurors and may infringe upon their constitutional rights. Religion-based peremptory challenges avoid these substantial administrative and privacy costs while allowing litigants to strike potentially biased jurors, thus vindicating the Constitution's guarantee of a trial by an impartial jury.\textsuperscript{14}

Part I explains the pragmatic value of the peremptory challenge and how courts accommodate the peremptory challenge under equal protection principles as applied to race, sex, and other personal characteristics. Part II describes the Minnesota Supreme Court's refusal to extend \textit{Batson} to religion in \textit{State v Davis}, and other courts' approaches to the religion question before and after the Supreme Court denied certiorari to \textit{Davis}. Part III argues that the \textit{Batson} regime should not apply to religion.

\textsuperscript{10} Id at 771.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Other commentators defend religion-based peremptory challenges primarily on equal protection grounds. See generally Comment, \textit{Religion: The Cognizable Difference In Peremptory Challenges}, 5 Widener J Pub L 131 (1995) (arguing that the equal protection reasoning of \textit{Batson} and \textit{J.E.B.} does not apply to religion).
\textsuperscript{14} US Const, Amend VI.
I. THE LAW OF THE PEREMPTORY CHALLENGE

The peremptory challenge came about as, and remains, a way for a lawyer to protect his client from prospective jurors' prejudices, "even without being able to assign a reason for . . . his dislike." The first Congress proposed the Sixth Amendment guarantee of an "impartial jury" and enacted a statute allowing peremptory challenges in criminal trials. Today, Congress grants the federal peremptory challenge through 28 USC § 1866(c). In most federal jury trials, judges conduct voir dire questioning and issue for-cause challenges themselves, after which lawyers may exercise peremptory strikes. The Supreme Court protects the use of the peremptory challenge, citing its "very old credentials" and reiterating a commitment not to "undermine the contribution the challenge generally makes to the administration of justice."

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17 "[N]o person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: Provided, That any person summoned for jury service may be . . . (3) excluded upon peremptory challenge as provided by law." 28 USC § 1866(c) (1997). Rule 24 of the Federal Rules of Criminal Procedure sets the number of peremptory challenges for capital cases (twenty), felonies (six for the prosecution, ten for the defense) and misdemeanors (three each). FRCrP 24(b). In federal civil cases, each party is entitled to three peremptory challenges, and additional challenges at the court's discretion. 28 USC § 1870 (1997). States provide defendants with similar numbers of challenges, generally with an equal number or fewer for the prosecution. Yale Kamisar, Wayne R. LaFave, and Jerold H. Israel, eds, Modern Criminal Procedure 1428, n 1-2 (West 8th ed 1994).
18 In a survey of over 450 federal judges, sixty-seven percent reported conducting all of voir dire questioning without lawyer participation. Most judges use some variation of the "strike" method: after questioning and for-cause challenges, lawyers strike jurors alternately or simultaneously, either in or out of open court. J. Stratton Shartel, Federal Judges Employ Wide Variety of Jury Procedures, 8 Inside Lit 1, 15–18 (Sept 1994). Trial judges, who control voir dire in the federal system, generally respect the peremptory challenge in its current form. Over 85 percent of federal judges believe that peremptory challenges contribute to fair trials. Christopher E. Smith and Roxanne Ochoa, The Peremptory Challenge in the Eyes of the Trial Judge, 79 Judicature 185, 186 (1996). The most common complaint about peremptory challenges was that they prolonged voir dire and trials (18.9 percent), followed by concerns about discrimination (15.8 percent). Racial discrimination and discrimination by social class drew the most attention (12.6 and 11.6 percent, respectively); sex discrimination ranked with age discrimination as a secondary concern (each 8.4 percent). Id at 187.
A. The Function of Peremptory Challenges

By allowing a lawyer to strike prospective jurors without explanation, the peremptory challenge assures the selection of a qualified jury, especially when a lawyer cannot articulate his suspicions of bias.\(^{21}\) Furthermore, its simplicity allows jury selection to proceed efficiently by avoiding wasteful mini-trials while also protecting the privacy of both struck and empanelled jurors.

First, peremptory challenges contribute to the selection of an impartial jury. The only major empirical study of the peremptory challenge found that while striking jurors will achieve a jury based in neither side’s favor, it will exclude the jurors most biased toward each side, leaving a relatively impartial panel.\(^{22}\) Jurors inevitably bring their personal prejudices into the courtroom, and in any given case, the distribution of bias among individual jurors resembles a bell curve.\(^{23}\) Peremptory challenges allow lawyers, who possess superior knowledge of the facts and therefore can most accurately predict the likely impact of bias on their case, to remove the jurors most likely to be most biased.

The peremptory challenge also bolsters confidence in the system for parties, those to whom such confidence matters most. The mere appearance of impartiality created by the peremptory challenge process can reassure parties of a trial’s integrity.\(^{24}\) Additionally, the process of weeding out bias in the jury may impress on the remaining jurors their duty to remain impartial.\(^{25}\)

Second, peremptory challenges accomplish their ends by efficient means. In Press Enterprise v Superior Court,\(^{26}\) the Supreme Court observed that prolonged voir dire, “in and of itself, undermines public confidence in the courts.”\(^{27}\) The Court noted that

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\(^{21}\) See J.E.B. v Alabama, 511 US 127, 148 (O’Connor concurring) (“A trial lawyer’s judgments about a juror’s sympathies are sometimes based on experienced hunches and educated guesses . . . That a trial lawyer’s instinctive assessment of a juror’s predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer’s instinct is erroneous.”).

\(^{22}\) Hans Zeisel and Shari S. Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, 30 Stan L Rev 491, 525, 528 (1978) (“The Effect of Peremptory Challenges”) (explaining that extremes in juror bias can be eliminated if courts provide a sufficient number of challenges).

\(^{23}\) J.E.B., 511 US at 161 n 3 (Scalia dissenting) (“If the system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function. In point of fact, that may well be its greater value.”) (citation omitted).

\(^{24}\) Zeisel and Diamond, 30 Stan L Rev at 512 (cited in note 22).


\(^{27}\) Id at 510 n 9.
voir dire in California can last as long as six months, and in the
capital murder case at issue it required six weeks of court time.28
Restraints on peremptory challenges create an incentive to con-
duct meticulous voir dire because lawyers need more information
to justify any challenge they make, and judges need more infor-
mation to determine the legitimacy of lawyers' justifications. As
judges increasingly scrutinize peremptory challenges, lawyers
may seek for-cause challenges more often, requiring even deeper
inquiry into each juror's potential biases. Finally, administering
restraints on peremptory challenges through ancillary mini-trials
consumes courtroom resources that would be better expended in
trying the case.

Third, peremptory challenges protect prospective jurors,
whether struck or empanelled. Not only do jurors benefit by
shorter voir dire, but they also avoid questions that may offend
them or intrude upon their privacy. One commentator suggests
that intrusive questions aggravate jurors, pointing out that two-
thirds of jurors surveyed found voir dire too personal and offen-
sive.29 Prospective jurors ought not be demeaned and idled by
unnecessarily prolonged voir dire, particularly before they have
even assumed their duties.

B. Equal Protection Limitations on Peremptory Challenges: The
Batson Rule

Batson v Kentucky30 held that race-based peremptory chal-
lenges violate the Equal Protection Clause, and that the defend-
ant may prove the violation based solely on juror selection in his
case.31 The current Batson rule, as modified by subsequent cases,

28 Id. One cause of the delay may be California's constitutional restrictions on the
exercise of peremptory challenges.
29 Mark Curriden, The Death of the Peremptory Challenge, 80 ABA J 62, 65 (Jan
1994) (citing a 1992 survey of more than 100 jurors by the Atlanta Constitution).
31 Id at 95. Batson stands in a long line of cases specifically redressing race-based
exclusion from juries. See generally id at 103–05 (Marshall concurring) (citing historical
and statistical evidence of racially discriminatory peremptory challenges). As early as
1879, in Strauder v West Virginia, the Supreme Court drew on the recently ratified Four-
ten Amendment to prohibit statutory exclusion of African Americans from the venire.
100 US 303, 305, 310 (1879). Norris v Alabama prohibited the total exclusion of black
jurors on the pretext that they were biased or unqualified. 294 US 587, 599 (1935).
Swain v Alabama held that a state's "purposeful or deliberate" discrimination against
black prospective jurors in jury selection violates the Equal Protection Clause. 380 US
202, 203–04 (1965). Swain placed a "crippling burden of proof" on parties seeking to prove
discrimination by requiring proof of discriminatory strikes over several cases, and Batson
relaxed this burden. Batson, 476 US at 92.
requires a three-step inquiry. First, the party opposing the peremptory challenge must make a prima facie showing that the struck juror was excluded from the jury because of his race. Under Powers v Ohio, the struck juror and the defendant need not be of the same race, because the defendant has third-party standing to raise the juror's discrimination claim. Still, the opposing party must prove that the juror is "a member of a racial group capable of being singled out for differential treatment." Second, the prosecution may provide a race-neutral reason for the challenge. The reason need not rise to the justification of a challenge for cause, but cannot be a mere denial of discriminatory purpose. According to Purkett v Elem, the prosecution's explanation need not be persuasive, nor even plausible, but need only have a "facial validity." Third, the trial court must decide whether the defendant has proven purposeful discrimination. Throughout the inquiry, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."

Batson and its progeny balance the benefits and costs of categorically prohibiting race-based peremptory challenges. The benefits of preventing discrimination and changing attitudes about race in jury selection are great. Limiting these challenges prevents the use of race-based stereotypes and makes juries more racially representative. The costs of discovering and invalidat-

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33 476 US at 96.
35 Id.
36 476 US at 94.
37 Id at 97.
38 Id.
40 Id at 768, quoting Hernandez 500 US at 360. Since Purkett, courts have accepted apparently pretextual excuses for discriminatory strikes. Purkett itself, for example, upheld a peremptory challenge against a black male because the prosecutor did not like the juror's long, unkempt hair, mustache and beard. Purkett, 514 US at 769. One commentator found that of thirty-eight appellate cases citing Purkett, each involving a possibly pretextual challenge, only one reversed the trial court's determination that the challenge was proper. Note, The Future Viability of Batson v Kentucky and the Practical Implications of Purkett v Elem, 16 Rev Litig 137, 171 (1997).
41 Batson, 476 US at 98.
42 Purkett, 514 US at 768.
43 Batson may work best indirectly as an expression of anti-racist attitudes in the courtroom rather than a cure-all remediying every improper strike. See, for example, Albert W. Alschuler, The Supreme Court and the Jury: Voir dire, Peremptory Challenges,
ing race-based challenges are relatively low. In the first step the prerequisite for a defendant's third-party standing — the juror's membership in "a racial group capable of being singled out for differential treatment" — is almost always self-evident. So, too, is the facial validity of the striking party's racially neutral reason in the second step. Furthermore, because race is never a legitimate proxy for a juror's ability to serve effectively, the cost of seating improperly biased jurors by denying a challenge is minimal. The effective application of equal protection doctrine to peremptory challenges requires just this approach.

C. J.E.B.: The Extension of Batson to Sex

J.E.B. v Alabama marked a shift in the line of cases explaining Batson. For the first time, J.E.B. restricted the use of peremptory challenges justified on grounds other than race. The Court held that peremptory challenges based on a prospective juror's sex violated the equal protection clause. Applying the "heightened scrutiny" standard applicable to sex classifications, the Supreme Court found no "exceedingly persuasive justification" that the sex-based peremptory challenge "substantially furthers the State's legitimate interest in achieving a fair and impartial trial." According to the Court, these challenges violate equal protection because they "ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." Lawyers selecting a jury may not presume, solely based on a prospective juror's sex, that the juror is too biased for jury service.

By extending Batson beyond race, the Court left open the possibility of further extending scrutiny of peremptory challenges to other suspect classifications. Yet while J.E.B. concentrated

and the Review of Jury Verdicts, 56 U Chi L Rev 153, 172 (1989) ("Because most prosecutors will probably comply with the Supreme Court's decision in good faith, Batson may work a significant change in American trial practice. I suspect in fact that it has.").

44 Batson, 476 US at 94.
46 Id at 130–31.
47 The court reopened the question whether strict scrutiny might apply to sex as well as race in United States v Virginia, 116 S Ct 2264, 2274-75 (1996) (holding that an all-male public military college violates equal protection under heightened scrutiny).
49 Id at 131.
50 Id at 141.
51 In his dissent in Batson, Chief Justice Burger predicted that the application of conventional equal protection principles might prohibit peremptory challenges "on the basis of not only race, but also sex, age, religious or political affiliation, mental capacity,
on the evils of sex-based stereotypes, the Court also expressly weighed both the administrability of its new rule and the utility of strikes based on other group characteristics. First, in conducting its analysis, the Court cited the experience of jurisdictions that had previously prohibited sex-based strikes, arguing that trial courts are capable of complying with the rule. Second, the Court noted that other group characteristics, like occupation, that do not reinforce such stereotypes remain a legitimate basis for peremptory challenges. Concurring Justice O'Connor warned that "[i]n further constitutionalizing jury selection procedures, the Court increases the number of cases in which jury selection — once a sideshow — will become part of the main event." In short, extending the benefit of Batson's protections has costs. Consequently, the balance of interests that resulted in race and sex limitations on peremptory strikes might tilt against further restrictions protecting other constitutionally recognized groups.

D. Batson Beyond Race and Sex

In Hernandez v New York, the Supreme Court analyzed peremptory strikes of Spanish-speaking Latino jurors under Batson. Though ethnicity and race are different, some courts have often extended Batson protections to ethnic groups. Because ethnicity is no more legitimately related to bias than race, it is a good candidate for Batson protection. However, courts may have difficulty identifying ethnicity; the Court's analysis of discrimination against jurors in Hernandez stumbled on the fact that only three struck jurors could "with confidence be identified as Latinos." Indeed, the Court declined to resolve the "difficult question of the breadth with which the concept of race should be defined" for Batson analysis. If the trial judge cannot tell the race or ethnicity of a particular member of the venire after voir dire, the costs of determining the validity of a peremptory strike in-

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number of children, living arrangements, and employment in a particular industry, or profession." 476 US 79, 124 (1986) (Burger dissenting) (citations omitted).

32 J.E.B., 511 US at 144.
33 Id at 142 n 14.
34 Id at 147 (O'Connor concurring).
36 Id at 355.
37 See, for example, United States v Biaggi, 853 F2d 89, 96 (2d Cir 1988) (Italian Americans protected under Batson).
38 Hernandez, 500 US at 370.
39 Id at 371.
crease substantially. When such a determination requires a lengthy and intrusive reexamination of the struck juror, a judge's best option may be simply to deny the *Batson* challenge.

Language can serve as a surrogate for race, and when it does, *Batson* should apply. However, a juror's fluency in a foreign language can also undermine his compliance with courtroom procedures, specifically his adherence to the official record translation of testimony in that language. *Hernandez* reveals the Court wrestling with legitimate and illegitimate reasons for striking a prospective juror on language grounds. The prosecutor had struck two Latino jurors because he doubted that they would properly rely on the official court interpreter. A plurality of four Justices held that the trial court did not err in upholding the strikes, but in dicta suggested that a "policy of striking all who speak a given language, without regard to the particular circumstances of the trial," may be considered a pretext for racial discrimination. Justice O'Connor, joined by Justice Scalia, concurred with the judgment but disagreed with the plurality's suggestion that intentional language-based discrimination in jury selection should be considered as a surrogate for prohibited racial discrimination. The Court's reluctance to define a rule for language-based strikes stems from the relevance of language ability to a juror's qualifications. Language can change a juror's perception of a trial, and it is extremely difficult to determine in voir dire if that perception will reach the level of bias. In these situations, the peremptory challenge is particularly useful.

Another example is even more telling. Some parties have challenged strikes based on sexual orientation, apparently reading *J.E.B.*'s prohibition against discrimination "on the basis of gender" broadly. Although sexual orientation is an undesirable proxy for bias, the personal costs to prospective jurors of inquiring into their intimate lives in the courtroom may be too great to justify *Batson* protection. Such inquiries not only demand judicial scrutiny of jurors' sexual habits, but also threaten to "out" gay or lesbian jurors in voir dire or a *Batson* hearing. At least one court has acknowledged these costs and refused to extend

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60 Id.
61 Id at 357 n 1.
63 Id at 371–72.
64 Id at 375.
65 511 US at 130. See also, *United States v Gayden*, 1993 US App LEXIS 30555 (7th Cir) (deciding not to rule on *Batson* challenge because juror who admitted that she was a lesbian and stated that she may be biased was properly struck for cause).
Batson to sexual orientation. 66

Batson challenges can effectively protect against invidious discrimination when identity is self-evident and unrelated to a legitimate source of bias. Race and sex are the most obvious examples, but other self-evident attributes of prospective jurors may also merit Batson protection. As federal courts wrestle with the applicability of Batson to cases of ethnicity, language and sexual orientation, they reveal the importance of balancing equal protection against other important interests. In so doing, they suggest useful approaches to religion. For example, the Hernandez Court’s difficulty in determining whether or not struck jurors were actually Latinos would be compounded in any attempt to establish a struck juror’s religion, because religion is often less apparent than ethnicity. Similarly, the Court avoided ruling on the applicability of Batson to Spanish-speaking jurors because language skills can often affect a juror’s suitability in the same way religion can affect a juror’s impartiality. Finally, the hesitancy of courts to apply Batson to personal attributes such as sexual orientation parallels a similar privacy concern in the case of religion.

II. THE RELIGION DIFFERENCE: DAVIS DRAWS THE LINE

Religious classifications are subject to “strict scrutiny” under the Constitution. 67 Many commentators draw the conclusion that religion, because it is subject to the same heightened level of scrutiny as race and sex, ought to receive the same treatment under Batson in the context of peremptory challenges. 68 However, such formalism is misplaced where, as in the context of religious peremptory challenges, constitutional considerations may justify either extension or restriction of scrutiny. A pragmatic approach expands the circle of relevant interests beyond equal

66 Johnson v Campbell, 92 F3d 951, 953 (9th Cir 1996) (finding that district court did not err when it refused to inquire into a struck juror’s sexual orientation, and denied a Batson hearing on the strike).
67 See Larson v Valente, 456 US 228, 246 (1982) (noting that the Court must use strict scrutiny in evaluating a law under the Establishment Clause and invalidating charity registration law selectively exempting some, but not all, religious organizations).
protection of prospective jurors. This approach includes the jurors' other interests alongside administrative interests as well as the interests of the parties.

A. State v Davis

In State v Davis, a prosecutor challenged a Jehovah's Witness because, she explained, "[I]n my experience Jehovah Witness [sic] are reluctant to exercise authority over their fellow human beings in this Court House." The trial judge ruled that the peremptory challenge could stand, the jury convicted Davis, and the court of appeals affirmed the conviction. The Minnesota Supreme Court analyzed Davis under Powers v Ohio, a case in which the struck juror was of a different race than the defendant. The defendant in Davis, like the defendant in Powers, could not claim that the Jehovah's Witness naturally sympathized with him because of shared identity; instead, he argued that the strike violated the juror's equal protection rights.

The Davis court found that, although "[a] juror's religious beliefs are inviolate . . . they are the basis for a person's moral values," and therefore a peremptory strike based on religion does not manifest a "pernicious religious bias." In other words, concerns about reinforcing impermissible stereotypes do not weigh as heavily with religion as with race, because a juror's religion may determine his views in a way that the law, the other jurors, and the juror himself can recognize as legitimate. This legitimacy mitigates cynicism among jurors, while striking jurors on the basis that religion correlates to moral values promotes impartiality.

On the other hand, extending Batson to religion would impose substantial administrative and privacy costs. First, opposing counsel would demand religion-neutral grounds for every strike, because lawyers may have no other way of detecting impermissible strikes when religion is difficult to ascertain. Such tactics would "unduly complicate voir dire." Second, Powers

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69 504 NW2d 767 (Minn 1993).
70 Id at 768.
71 Id at 767–68.
73 Id at 406.
74 504 NW2d at 769.
75 Id at 771.
76 Id.
77 Id.
78 504 NW2d at 771.
only permits the defendant to challenge the peremptory strikes when the struck juror has standing as a member of a class subject to discrimination, and in this instance, "inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial." Summarizing its pragmatic rationale, the Davis court wrote: "If the life of the law were logic rather than experience, Batson might well be extended to include religious bias and, for that matter, an endless number of other biases." The logic of equal protection does not conclusively describe the balance of constitutional interests involved in religion-based peremptory challenges. The balancing of these interests in the courtroom, according to Davis, counsels against an extension of Batson.

B. Certiorari Denial

In a memorandum concurrence to the denial of certiorari in Davis v Minnesota, Justice Ginsburg cited approvingly to what she considered two essential observations of the Minnesota court. First, religious affiliation "is not as self-evident as race or gender," and second, inquiry into a prospective juror's religious beliefs "is irrelevant and prejudicial, and to ask such questions is improper." Ginsburg's memorandum was short, containing only these two observations. She offered no equal protection analysis, but instead addressed practical aspects related to the administration of challenges and the potential consequences of an extension of Batson to religion. Justice Thomas, joined by Justice Scalia, dissented from the denial of certiorari, arguing that under J.E.B. there was "no principled reason" for declining to extend Batson to all classifications subject to heightened scrutiny, such as religion.

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80 Davis, 504 NW2d at 772.
81 Id at 769. The court is alluding to Oliver Wendell Holmes. See Oliver Wendell Holmes, The Common Law, in Richard A. Posner, ed, The Essential Holmes 237 (Chicago 1992) ("The life of the law has not been logic: it has been experience.").
83 Id (Ginsburg concurring), citing Davis, 504 NW2d at 771.
84 511 US at 1116 (Ginsburg concurring), citing Davis, 504 NW2d at 772.
85 511 US at 1115–16 (Ginsburg concurring).
86 Id at 1117 (Thomas dissenting). Originally opponents of any extension of Batson beyond race, this opinion marks a concession by Justices Thomas and Scalia to stare decisis. Justice Scalia's dissent from J.E.B., joined by Justice Thomas, lamented the damage the Batson doctrine inflicts on the peremptory challenge system, "which loses its whole character when . . . 'reasons' for strikes must be given." J.E.B. v Alabama, 511 US 127, 161–62 (1994) (Scalia dissenting). In the same dissent, Justice Scalia foreshadowed his
Justice Ginsburg's argument reflects a broader, more pragmatic concern for jurors' interests than the usual, abstract arguments that "stereotypes have wreaked injustice in so many other spheres of our country's public life," or that a juror's primary interest is "to participate in the administration of justice." In fact, prospective jurors may value their privacy more than they value their civic responsibilities. Many prospective jurors do not want to serve jury duty at all. While it remains unclear whether the Court supports Davis, Justice Ginsburg's comments suggest concern about the costs of extending Batson to religion.

C. Courts in Conflict

No consensus exists on extending Batson to religion, adding considerable uncertainty to the already difficult enterprise of scrutinizing peremptory challenges. Both before and after Batson, several states have imposed broad restrictions on peremptory challenges based on a juror's membership in certain cognizable groups. California led this movement in 1978 with People v Wheeler, which held that the state constitution prohibited peremptory strikes based on "group bias," or membership in "an identifiable group distinguished on racial, religious, ethnic or similar grounds." Several other states followed suit, usually basing their decisions on broader equal protection provisions in state constitutions, some explicitly protecting religion as a cognizable class. However, these cases have only persuasive value for federal courts and few of these provisions have been tested by

claim in Davis that religion must also fall within the Batson regime after J.E.B. Id at 161-62.

67 J.E.B., 511 US at 140.
69 In one survey of 562 judges, 73 percent of them reported veniremen lying in voir dire in at least one case they had tried during the last three years. Nancy J. King, Juror Delinquency in Criminal Trials in America, 1796-1996, 94 Mich L Rev 2673, 2732 (1996).
70 According to the judges who elaborated on reasons they thought veniremembers had lied, the most common reason for dishonesty was to avoid jury service. Id at 2736.
71 583 P2d 748 (Cal 1978).
72 Id at 761.
73 See, for example, Commonwealth v Soares, 387 NE2d 499, 516 (Mass 1979) (citing protection of "creed" in state constitution); State v Gilmore, 511 A2d 1150, 1158 (NJ 1986) (including "religion principles" in prohibited group biases); Fields v People, 732 P2d 1145, 1153 n 15 (Colo 1987) (extending Batson to religion, among other categories); State v Levinson, 795 P2d 845, 849 (Hawaii 1990) (citing state constitution and statute prohibiting jury exclusion on basis of religion); State v Eason, 445 SE2d 917, 922-23 (NC 1994), cert denied, 115 SCt 764 (1995) (prohibiting peremptory challenges based on religion, unless based on specific tenet likely to bias juror); People v Langston, 641 NYS2d 513, 514 (NY Sup Ct 1996) (citing protection of "creed or religion" in state constitution).
cases involving religion-based challenges.

Like Minnesota, Texas declined to extend Batson protection to religion in a case actually involving a religion-based challenge. In Cazarez v State, the Texas Court of Criminal Appeals held that Batson did not apply to religion-based peremptory challenges. In Cazarez, the State struck two black prospective jurors and then answered a Batson challenge to the strikes by explaining that Pentecostal jurors have difficulty assessing punishment. According to the decision, religion-based peremptory challenges did not "denigrat[e] the dignity of any individual veniremembers," unlike challenges based on race or sex. The court concluded that J.E.B. "does not imply the elimination of all peremptory challenges," and does not extend Batson to all heightened scrutiny classifications.

The court argued that members of a religion share beliefs, and that discrimination based on a juror’s religion only results from these shared beliefs. Religion-based peremptory challenges, the court reasoned, solely concern the juror’s personal beliefs, which "has always been considered appropriate in the jury selection context." Because members of the same religion "share the same faith by definition, it is not unjust to attribute beliefs characteristic of the faith to all of them." Thus, Cazarez focused primarily on the legitimacy of religious stereotyping in the jury selection process, rather than on administrative problems.

Lower federal courts do not agree on whether Batson should extend to religion. Before the denial of certiorari in Davis, the Fifth Circuit, in United States v Greer, upheld the District Court’s refusal to allow the defendant to exclude minority jurors, including Jews, from sitting on a jury at trial of white supremacists accused of violating the civil rights of black, Hispanic and

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94 Virginia has suggested a similar conclusion. See James v Commonwealth, 442 SE2d 396, 398 (Va 1994) (permitting religion-based explanations to rebut prima facie case of racial discrimination in jury selection).
95 913 SW2d 468 (Tex Crim App 1995).
96 Id at 496.
97 Id at 496–97 (Mansfield concurring).
98 Id at 495.
100 913 SW2d at 496
101 Id at 495.
102 Id.
103 Id at 496.
104 939 F2d 1076 (5th Cir 1991) aff’d en banc, 968 F2d 433, 434 (5th Cir 1992).
The panel found that Batson applies to Jewish jurors regardless of whether they are a "race" or a religion, but cited no authority to support applying Batson to religion. However, in response to the defendants' request to determine which jurors were Jewish, the Greer panel suggested that "having the judge determine which jurors are Jewish requires questions disturbingly reminiscent of those asked by the very people the [white supremacist defendants] sought to celebrate." Paradoxically, these are exactly the questions required to determine the validity of a religious peremptory strike. However, the Fifth Circuit reheard Greer en banc, affirming the convictions but dividing equally over whether the trial court erred in refusing to inquire into the religious affiliation of the jurors.

D. United States v Somerstein

More recently, in United States v Somerstein, a District Court held that Batson protects Jews as a religious group and alternatively as a racial group. Furthermore, in applying its rule, Somerstein demonstrated in detail the administrative problems that Casarez bypassed. The defendants in Somerstein, officers and employees of a kosher caterer, were charged with conspiring to defraud the restaurant union. The prosecution struck six "ostensibly" Jewish prospective jurors.

In ruling on the strikes, the court specifically adopted the equal protection reasoning of Justice Thomas's dissent in Davis v Minnesota. But the Somerstein court also noted Justice Ginsburg's observation that religion is not as self-evident as race or gender, and that this fact "will inevitably lead to factual disputes as to whether the particular juror is of the Jewish faith." Indeed, the case examines six challenges to peremptory strikes, providing a useful example of Batson's application to religion.

In refining the Batson challenge for religion the court first
found that because “the religious element is intertwined in the criminal charges,” religion was factually relevant to the case. The court next tried to determine whether each struck juror was Jewish, allowing the defendant to assert third party standing on their behalf.

Of the six jurors, the court found none had been struck improperly. Only one of the struck jurors indicated that she was Jewish by answering a questionnaire as “Jewish American,” and the prosecutor struck her for the facially valid reason that she was uncomfortable crossing picket lines. As for the other prospective jurors, one gave “insufficient evidence” of being Jewish. Another had what the defendants termed a “quintessential Jewish name” and was assumed to be Jewish but was struck for a “facially valid reason.” The defendants considered another prospective juror Jewish because he attended a club catered by a kosher caterer, but the court considered the fact that he claimed to attend union meetings “only if they served breakfast” sufficient reason for a peremptory challenge. The court found that the defendants failed to state a prima facie case of discrimination with regard to the fifth prospective juror, and that the sixth prospective juror likely was not of the Jewish faith, and could not be struck solely because of her relationship to a Jewish person.

Such determinations, pitting stereotype against gross stereotype in motions, hearings and finally in a legal opinion, colorfully illustrate the problem of extending equal protection to jurors whose religious identity is known only to themselves. Somerstein’s review of the challenges posed additional difficulties because of the absence of the struck jurors. The record provides the only basis for determining each juror’s religion. The court could have answered the first question of standing by asking during voir dire whether the prospective jurors were Jewish. But such questions raise uncomfortable issues. Is it appropriate for judges to make a practice of probing the religious beliefs of each member

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116 Id at 596.
117 Id.
118 See also Ohio v Powers, 499 US 400, 415 (1991) (holding that a criminal defendant has standing to raise third-party equal protection claims of jurors excluded by the prosecution because of their race).
119 959 F Supp at 596-97.
120 Id at 597.
121 Id at 598.
122 Id at 598-97.
123 959 F Supp at 597.
124 Id.
125 Id.
of the venire? Once the court answers the threshold question of a juror’s religion, however, more problems arise. When, if ever, does a juror’s religion threaten his impartiality? For example, in the trial of a Roman Catholic priest for blocking access to an abortion clinic, should Catholic jurors be protected against challenges? These questions highlight the potential pitfalls of denying peremptory challenges when the basis for striking a juror, such as religion, may reasonably relate to the facts of the particular case.

III. ENTRENCING THE PEREMPTORY CHALLENGE, PRAGMATICALLY

Religion is different from sex and race. Race and sex are practically immutable characteristics and they are irrelevant to a juror’s ability to find facts. Religion represents an individual’s moral outlook and does not easily fit into categories reflecting relevant biases. Given these differences, the practical question is how to treat religion-based peremptory challenges.

Recall the peremptory challenge’s functions. First and foremost, it helps to create impartial juries, and to bolster parties’ confidence in that impartiality. Second, their simplicity enables courts and lawyers efficiently to empanel a jury without extensive voir dire. Third, jurors need not endure the prolonged and intrusive voir dire required if all challenges were for-cause. Because the combined interests of the parties, the jury and the efficiency of the justice system overcome equal protection objections, courts should refuse to extend Batson to religion.

A. An Impartial Jury: Religion as a Proxy for Bias

A juror’s particular religious beliefs can directly affect his ability to deliberate impartially. As the Minnesota Supreme Court recognized, religion shapes a juror’s views on exactly the kinds of issues that arise in many trials, such as “the use of intoxicating liquor, cohabitation, necessity of medical treatment, civil disobedience, and the like.” Given the reasonable correla-

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125 See Part IV C.
127 See Part I A.
tion of these societal views to jurors' religious beliefs, religion-based peremptory strikes cannot be simply attributed to "a pernicious religious bias."\footnote{504 NW2d at 771.}

Because religion is not a perfect proxy for bias, courts might distinguish between religious beliefs and religious affiliation in determining the validity of suspicious peremptory strikes.\footnote{See Comment, The Equal Protection Clause, The Free Exercise Clause and Religion-Based Peremptory Challenges, 63 U Chi L Rev 1639, 1641 (1996) ([A]lthough courts should bar challenges based solely on a venireman's religious affiliation, they should continue to permit challenges based on his actual beliefs, even when those beliefs spring from the venireman's religion.).} However, the law should refuse to recognize such a distinction because, aside from the constitutional difficulties of deciding which beliefs correlate to a certain religious affiliation, the courts would have to account for the infinite variation of jurors' religious experiences. In response to this problem, another commentator advocates extending Batson to religion precisely because it is impossible to define religion.\footnote{Lori Krafe-Jacobs, What Is "Religion" in Religion-Based Peremptory Challenges?, 65 U Cin L Rev 1291, 1320 (1991).} "Once we acknowledge the sweep of religious experience, the assumption that religious affiliation can tell us anything of consequence to jury selection is dubious at best."\footnote{Id at 1322.} Indeed, a lawyer's religion-based peremptory challenge probably rests on little more than the prospective juror's apparent religious affiliation, because it is practically impossible to determine a juror's specific religious beliefs during voir dire. However, neither the lawyer nor the judge can or should have to "acknowledge the sweep of religious experience"\footnote{Id.} in weeding out potentially biased jurors. They should select as impartial a jury as is practically possible, and get on with the trial; such abstractions unduly complicate this task.

Even if a lawyer or judge asked a prospective juror about his religious beliefs, "[p]otential jurors may hide their prejudices from the examiner, either consciously or unconsciously. In the end, it is difficult to define and describe the borderline between prejudice and value differences with any precision."\footnote{Zeisel and Diamond, 30 Stan L Rev at 531 (cited in note 22) (explaining that prejudice becomes difficult to define in all but the most extreme cases).} The law does not require bases for peremptory challenges for precisely this reason.
B. The Efficient Administration of Justice

Any restriction on peremptory challenges adds to court administrative costs. Courts must police, adjudicate and punish illegal juror strikes, all at a direct cost to the parties involved and the justice system as a whole. When the constitutional injury rests on a juror’s race or sex, proof turns on the relatively clear question of race or sex neutrality. If the constitutional injury rests on a juror’s religion, the court must first establish the juror’s religion, and then determine whether or not the striking party offered a religion neutral reason. Both of these questions significantly complicate the standard *Batson* injury.

Furthermore, without religion-based peremptory strikes, the judge would have to bear the burden of inquiring into a juror’s particular beliefs in voir dire, so he could exercise for-cause challenges properly. And every challenge of a potentially biased juror that the law prohibits or discourages by regulating religion-based strikes would put pressure on the lawyer to prove actual bias. Inevitably, this dynamic would lead to longer voir dire, as lawyer and judge “probe more deeply into the individually-held beliefs and practices of prospective jurors in order to ascertain how religious a prospective juror is.” Prohibiting religious-based peremptory strikes also provides lawyers with an easily abused strategic weapon. If one side makes a peremptory challenge, the other side might claim the challenge is religion-based, and the battle is joined to determine the strength of the juror’s innermost convictions. Unlike race and sex, religion is hard for a judge to “eyeball” in order to assess the merits of the claim. Unable to make a quick discretionary judgment in many cases, the judge would be forced to convene a mini-trial on the juror’s religion and the strike’s religion-neutral reason, with all its associated costs and delays.

C. Juror Privacy and Perception

A juror’s perception of the trial process is an important consideration in evaluating the legality of peremptory challenges. In *Batson* and *J.E.B.*, the Supreme Court expressed concern that discriminatory challenges “undermine public confidence in the...
fairness of our system of justice,” and “create the impression that the judicial system has acquiesced in suppressing full participation . . . or that the ‘deck has been stacked’ in favor of one side.”

One commentator argues that all peremptory challenges indicate to jurors “that the foundation of this system is not evidence, but rather rumor, innuendo, and prejudice.” However, these criticisms underestimate jurors and overstate the message that religion-based peremptory challenges send to them. First, it assumes that jurors cannot understand that challenges minimize jury prejudice by truncating the extremes of bias in the jury pool. But jurors understand that trust is largely an intuition, and each side wants a jury it can trust. In fact, courts expect jurors to employ precisely this intuition to determine the credibility of witnesses. Second, the argument overstates the meaning jurors receive from peremptory challenges. If a prospective juror witnesses or even experiences a peremptory challenge apparently based religion, he may not think the strike reflects a systemic consensus condoning religious stereotypes. He simply may see a lawyer striking a juror because the lawyer, on a hunch, does not trust that particular juror to serve impartially.

Despite the Court’s focus on the “discrimination and dishonor” engendered by peremptory challenges based on stereotypes, jurors may be more concerned with intrusive, prolonged voir dire than with the rapid reprieve from jury duty that a peremptory strike provides.

More is at stake for jurors than their equal protection rights. Any rule requiring court intrusion into prospective jurors’ religious beliefs could further erode the minimal privacy provided by the court system. Explicitly applying Batson to religion would increase the number of peremptory strikes subject to Batson

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140 Hoffman, 64 U Chi L Rev at 861 (cited in note 7).
141 See Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 Mich L Rev 338, 404 n 217 (1997) (“Where cases or statutes are not well suited to publicize a consensus . . . there is little weight to criticisms or defenses of the law based on what it may mean to people.”).
142 Id at 142 n 15.
143 Curriden, 80 ABA J at 65 (cited in note 29); King, 94 Mich L Rev at 2732, 2736 (cited in note 89).
challenges. Each challenge to a religion-based peremptory strike would require probing questions to establish third-party standing on the juror’s behalf. If the juror’s religion could threaten his impartiality, then the court must inquire whether the juror’s particular beliefs might sustain a challenge for cause. However, courts may not ask these questions unfettered. Although trial judges exercise broad discretion over voir dire, one court has held that questions about religious beliefs are relevant only if pertinent to religious issues involved in the case, if a religious organization is a party, or if the information is a necessary predicate for a for-cause challenge.\(^4\) In the context of press access, the Supreme Court has asserted that prospective jurors enjoy a limited right of privacy when voir dire may involve personal or embarrassing questions.\(^4\) If the constitutionality of a jury’s composition were to turn on the religion of the jurors, it would only magnify these legitimate privacy concerns.

**CONCLUSION**

*Batson* has revolutionized courtroom attitudes about race, but courts should not bring its imperfect administrative apparatus to bear on the subtler attributes of jurors’ consciences. The evaluation of peremptory challenges under the Equal Protection Clause involves a balancing act. *Batson* and *J.E.B.* strike a pragmatic balance, where a reduction of challenges based on race or sex might justify the restrictions on a lawyer’s ability to remove biased jurors. While *J.E.B.* was pending, Professor Randolph Stone argued that “No one likes discrimination, but this case comes down to whose rights should be given the most protection in court.”\(^4\) Evaluating religion-based peremptory challenges under *Batson* is not as simple as giving jurors the entire panoply of equal protection rights they enjoy elsewhere in life. Like the peremptory challenge itself, the assessment of its proper role should be practical. The life of the law is indeed experience and, drawing on that experience, a pragmatic approach can help to resolve the novel equal protection issues that are

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\(^14\) *Press Enterprise v Superior Court of California*, 464 US 501, 512 (1984). The Court has also held that the Free Exercise Clause forbids a court to submit the question of the truth of religious beliefs to a criminal jury. *United States v Ballard*, 322 US 78, 88 (1944). “Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.” Id at 86.

\(^14\) Curriden, 80 ABA J at 64 (cited in note 29) (quoting Randolph Stone).
founded in courtroom reality at the heart of the legal system — the jury box.