Batson Meets the First Amendment: Prohibiting Peremptory Challenges That Violate a Prospective Juror’s Speech and Association Rights

Cheryl G. Bader

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BATSON MEETS THE FIRST AMENDMENT: PROHIBITING PEREMPTORY CHALLENGES THAT VIOLATE A PROSPECTIVE JUROR’S SPEECH AND ASSOCIATION RIGHTS

Cheryl G. Bader*

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We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read.1

I. INTRODUCTION

Jury service is one of the most significant ways in which an individual can directly participate in the administration of justice and influence the adjudicative process.2 Yet the right of a prospective juror to be free from discrimination in her participation in jury service is put at risk by a litigant's unfettered discretion in the use of the peremptory challenge.3 In order to safeguard a potential juror's equal protection guarantee against discriminatory exclusion from jury service, the United States Supreme Court, in Batson v. Kentucky4 and its progeny, imposed significant restrictions on the way in which litigants exercise peremptory challenges. Litigants may not base peremptory challenges on the race,5 ethnicity,6 or gender7 of a prospective juror.

The Supreme Court's limitations on the way in which litigants utilize peremptory challenges demonstrates the superiority of a prospective juror's constitutional rights over the litigant's privilege to exercise peremptory challenges.8 Although Batson and the Supreme Court cases following and expanding Batson address only those peremptory challenges infringing upon a juror's equal protection rights involving

2. "The jury is the part of the nation responsible for the execution of the laws [and] for society to be governed in a settled and uniform manner, it is essential that the jury lists should expand or shrink with the lists of voters." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 251 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966).
3. See infra part II.B.
5. See id. at 89.
6. In Hernandez v. New York, 500 U.S. 352 (1991), the Court considered a claim that "the prosecutor in [a] criminal trial exercised peremptory challenges to exclude Latinos from the jury by reason of their ethnicity." Id. at 355. Although the Court affirmed the trial court's determination that the prosecutor did not eliminate Latino jurors on the basis of their ethnicity, id. at 369, had the defendant established ethnicity as the prosecutor's underlying motivation, the peremptory challenge would have violated the juror's equal protection rights.
8. See infra notes 101-10 and accompanying text.

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race, ethnicity, and gender, the Court’s language and underlying rationale support an expansion of *Batson* beyond these contexts.

The breadth of the doctrine created by *Batson* and its progeny (hereinafter referred to as the “*Batson* Doctrine”) can be understood to include a juror’s exercise of First Amendment association and speech rights as well. The Equal Protection Clause prohibits discriminatory treatment based not only upon membership in a cognizable group but also upon an individual’s exercise of a fundamental right. The rights to associate and speak freely are fundamental rights guaranteed by the First Amendment. A litigant’s peremptory exclusion of a potential juror from service on the basis of either the juror’s group affiliations or expressions of speech directly conflicts with the potential juror’s First Amendment rights. There is a paucity of lower court opinions or commentary addressing *Batson*’s application to prospective jurors’ association and speech rights, and the few lower courts that have discussed the issue have afforded it only superficial consideration. An expansion of *Batson* is, however, supported by the broad language, doctrinal framework, and rationale underlying the *Batson* Doctrine, and by the importance of safeguarding First Amendment rights.

This Article examines the conflict between the litigant’s peremptory challenge privilege and the First Amendment rights of a prospective juror, and argues for resolving the conflict in favor of the juror’s constitutionally protected rights. The peremptory challenge is merely an accommodation of the litigant’s desire to exert greater control over the adjudicative process. As a mere strategic device, the peremptory challenge is not afforded constitutional protection, is subject to various restrictions, and is not essential to achieve a fair and unbiased jury. In addition, litigants utilizing peremptory challenges rely upon, and thereby perpetuate, harmful stereotypes.

Part II of this Article provides background on the roles of the juror and the peremptory challenge in the United States judicial system, and sets forth the Supreme Court’s current restrictions on a litigant’s exercise of peremptory challenges. Building upon this backdrop, Part III examines more critically the purpose, status, and common usage of the peremptory challenge, and places in perspective this limited privilege. Part IV explores the potential impact of the peremptory challenge upon a

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9. See infra notes 59-90 and accompanying text.
10. See supra note 6.
11. See infra notes 91-96 and accompanying text.
12. See infra part IV.E.
prospective juror’s First Amendment rights and concludes that a prospective juror’s exclusion from jury service as a consequence of affiliations or expressions, which do not warrant removal of the juror for cause, constitutes discrimination against the prospective juror in the exercise of a fundamental right. Based upon this conclusion, this Article advocates extending the Batson Doctrine to peremptory challenges that are based upon a prospective juror’s association and speech rights.13

II. THE PEREMPTORY CHALLENGE PRIVILEGE V. A PROSPECTIVE JUROR’S RIGHTS

A. The Conflict

A call to jury service empowers the individual juror by allowing meaningful participation in our judicial system.14 A citizen serving as a juror simultaneously exercises a right and a privilege to serve and fulfills a civic obligation.15 Jury selection practices have a great effect on the juror’s ability to exercise her rights and privileges and fulfill her

13. The Supreme Court has not yet expanded Batson to protect constitutional rights of a potential juror beyond the equal protection right against racial, ethnic, or gender discrimination. The Court has denied certiorari in one case involving religious-based peremptory challenges. See Davis v. Minnesota, 114 S. Ct. 2120 (1994) (dissenting from the denial of certiorari were Justices Thomas and Scalia).

14. ""The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature . . . have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community."" Vikram D. Amar, Jury Service as Political Participation Akin to Voting, 80 CORNELL L. REV. 203, 220 (1995) (alteration in original) (quoting Letter from the Federal Farmer (IV), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 245, 249-50 (Herbert V. Storing ed., 1981)). In Powers v. Ohio, 499 U.S. 400 (1991), the Court recognized that ""with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."" Id. at 407; J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1430 (1994) (""[P]articipation in the fair administration of justice . . . reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy."" (citing Powers, 499 U.S. at 407)).

obligation. In addition to its impact on the potential jurors, the jury selection process is significant to the litigants whose fate the jurors will decide. It is widely believed that jury composition greatly affects the outcome of a case.

The jury trial is fundamental to our nation’s system of justice. It is the mechanism to which society turns in order to resolve disputes of the utmost importance. For example, criminal defendants are guaranteed the right to a trial by jury. In criminal prosecutions, the jury is the arbiter of the defendant’s guilt, and in capital cases, may even be called upon to determine whether a defendant will be put to death. Additionally, a vast number of civil lawsuits either culminate in a jury trial or settle at the prospect of one. In civil disputes, jurors have the power to decide crucial questions, such as allocation and degree of fault and the nature and amount of any compensatory or punitive damage awards. To the citizens who are afforded an opportunity to render a judgment on these weighty matters, and to the litigants whose interests will then be affected, jury selection methodology is significant. Accordingly, a conflict exists between the litigant’s interest in the unfettered exercise of peremptory challenges and the juror’s right to be free of discrimination in the jury selection process.

16. "'[I]t is true, the laws are made by the legislature; but the judges and juries, in their interpretations, and in directing the execution of them, have a very extensive influence . . . for changing the nature of the government.'" Amar, supra note 14, at 219 (alteration in original) (quoting Letter from the Federal Farmer (XV), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 315, 315 (Herbert V. Storing ed., 1981)).

17. U.S. CONST. amend. VI.

18. See id.; see also Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (holding that the Sixth Amendment right to trial by jury is incorporated into the Fourteenth Amendment’s definition of due process of law).


20. In the United States, approximately 20 million civil cases are filed per year, with more than 90% of all tort claims being settled out of court. See Rod Willis, Fit To Be Tied, WORLD, No. 1, 1993, at 30, 33, 39.

21. See U.S. CONST. amend. VII; see also 2 NATIONAL JURY PROJECT, supra note 19, § 19.01(2)(a).

22. A party may be entitled to compensation for some of the following: out-of-pocket expenses, lost earnings, pain and suffering, or emotional distress. See 2 NATIONAL JURY PROJECT, supra note 19, § 19.01(2)(b)(ii). Furthermore, jurors may be asked to award punitive damages—additional monetary compensation to punish or make an example of the defendant. See 2 id. § 19.01(2)(b)(iii).
B. The History and Nature of the Peremptory Challenge

Citizens throughout the United States and its territories are called to jury duty and are randomly selected by the summoning court to undergo the jury selection process for a particular case. Not all citizens, however, are qualified to sit on every jury. As part of the jury selection process, known as voir dire, the presiding judge or


25. For a general discussion of various jury selection procedures, see Jon M. Van Dyke, Jury Selection Procedures (1977). However, there are several features that are common to many jury selection procedures. See 1 National Jury Project, supra note 19, § 5.02. These features include: the use of a particular source to obtain the names of potential jurors; the random selection of names from the source list; the screening of potential jurors in a qualification process that results in a list of individuals qualified for jury service, which may be referred to as the “qualified wheel,” “jury pool,” “qualified pool,” or “pool”; and, the selection of names from the qualified list and summoning of jurors for jury service. See 1 id. Alternatively, in some jurisdictions a jury commissioner or commission prepares the jury list and administers the qualification criteria. See 1 id.

Additionally, there are jurisdictional variations in the methods employed to handle challenges for cause and peremptory strikes. For a discussion of the various systems, see Cathy E. Bennett & Robert B. Hirschhorn, Bennett’s Guide to Jury Selection and Trial Dynamics in Civil and Criminal Litigation §§ 17.2–5 (Eda Gordon ed., 1993).

26. The literal meaning of “voir dire” is “to speak the truth.” Black’s Law Dictionary 1575 (6th ed. 1990). The term is used to denote the preliminary examination which the court or attorneys may make of one presented as a potential juror or witness to determine his interest and competency. Id.

27. The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure both afford federal judges complete discretion as to whether to conduct the examination themselves or to permit the attorneys to conduct the voir dire. ABA Committee on Jury Standards, Standards Relating to Juror Use and Management No. 7 commentary at 62 (1993) [hereinafter ABA Juror Standards] (citing Fed. R. Civ. P. 24(a)). Generally, most federal judges conduct voir dire themselves. Id. (citing Gordon Berman, Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges 5 (1977)); Gobert & Jordan, supra note 15, § 9.05. The ABA Juror Standards themselves, adopted by at least 12 states, provide that the trial judge should conduct a preliminary voir dire examination, with counsel afforded a reasonable time period to question jurors. ABA Juror Standards, supra, No. 7(b).

State rules or statutes may specifically provide that the judge shall examine prospective
counsel pose questions to the prospective jurors to determine whether the jurors are qualified to sit fairly and impartially on that case. A juror's fitness to serve on a particular case may be compromised due to the juror's bias, prior experiences, relationship to the case or to some similar factor that interferes with the juror's ability to adjudicate the matter fairly and impartially.

Because the presence of a biased or unqualified juror undermines the integrity of the trial process, a litigant may challenge "for cause" any juror who the litigant believes is not qualified to fulfill her obligation to serve as a fair and impartial juror. The challenge for cause is the mechanism employed by the court to eliminate individuals whose bias, of whatever type, renders them incapable of serving as fair jurors. The court affords the litigant an unlimited number of challenges for cause. A litigant who moves the court to exclude the juror from service must establish the juror's lack of fitness. The trial judge then determines

jurors. See, e.g., CAL. CIV. PROC. CODE § 223 (West 1996); MASS. R. CIV. P. 47(a). Trial judges in 13 states conduct voir dire themselves, while attorneys in 18 states have primary control over voir dire questioning. ABA JUROR STANDARDS, supra, No. 7 commentary at 62 (citing NATIONAL CTR. FOR STATE COURTS, STATE COURT ORGANIZATION 1987, at tbl. 24 (1988)).

28. See ABA JUROR STANDARDS, supra note 27, No. 7 commentary at 62; see also CAL. CIV. PROC. CODE § 222.5 (West 1996); N.Y. CRIM. PROC. LAW § 270.15(c) (McKinney 1993).

29. See supra notes 24-28 and accompanying text.

30. See CAL. CIV. PROC. CODE § 229(f) (West 1996).


32. See id. § 7.16 (discussing disqualification of jurors due to prior knowledge of the facts); see also CAL. CIV. PROC. CODE § 229(d) (West 1996) (disqualifying due to interest in the event or "in the main question involved in the action").

33. See CAL. CIV. PROC. CODE §§ 229(a), (b) (West 1996); N.Y. CIV. PRAC. L. & R. 4110(b) (McKinney 1993); N.Y.C.RIM. PROC. LAW § 270.20(c) (McKinney 1993); GOBERT & JORDAN, supra note 15, §§ 7.21-23, 7.25-31.

34. For a listing of the most common grounds for challenges for cause, see GOBERT & JORDAN, supra note 15, § 7.04.

35. The Supreme Court has held that the right to a "fair trial in a fair tribunal" is essential to due process. In re Murchison, 349 U.S. 133, 136 (1955). Furthermore, the Court noted that "to perform its function in the best way 'justice must satisfy the appearance of justice.'" Id. (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)); see also V. HALE STARR & MARK MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS § 3.8.2 (2d ed. 1993).

36. For a discussion of the requirement of juror impartiality, see GOBERT & JORDAN, supra note 15, §§ 2.09-.12. For an overview on the development of the challenge for cause, see id. §§ 7.01-.05.

37. Id. § 7.01.

whether cause exists for the juror’s removal.\textsuperscript{39} If the court agrees that the juror is unfit, the court will excuse the juror from service on the case.\textsuperscript{40}

Virtually all jurisdictions also grant litigants the right to exclude a limited number of jurors without first establishing cause for a juror’s removal.\textsuperscript{41} These discretionary strikes are known as peremptory challenges or peremptory strikes.\textsuperscript{42} The peremptory challenge was incorporated into the American legal system from its English law roots,\textsuperscript{43} and was later codified as part of our federal system in 1790.\textsuperscript{44}

As a result of codification, federal prosecutors and defendants were each afforded a defined number of challenges, depending upon the nature of the offense,\textsuperscript{45} which they were permitted to exercise without legal cause. The peremptory challenge privilege was also codified into many state statutes.\textsuperscript{46} In England, the peremptory challenge is rarely used.\textsuperscript{47} In contrast, the peremptory challenge remains well-entrenched in this nation’s jury selection process.\textsuperscript{48}

By definition, peremptory challenges are employed against potential


\textsuperscript{40} See supra note 39.

\textsuperscript{41} In federal court, a party in a civil case ordinarily has three peremptory challenges. 28 U.S.C. § 1870 (1994). The number of peremptory challenges available in a criminal case varies depending on the potential punishment. See Fed. R. Crim. P. 24(b). The same is true in every state, where peremptory challenges or strikes are given by statute to both sides in criminal and civil cases. Swain v. Alabama, 380 U.S. 202, 217 & n.20 (1965).

\textsuperscript{42} The terms “challenge” and “strike” are used interchangeably in this Article.

\textsuperscript{43} In Swain, Justice White described the early use of the peremptory challenge in England: At common law, the defendant was allowed 35 peremptory challenges in all felony trials. 380 U.S. at 212. Originally, the prosecutor had a right to challenge an unlimited number of jurors without cause. See id. at 213. Later, the prosecution was allowed, after examination, to have any juror “stand aside” until the entire panel was examined and the defendant exercised his challenges. Id. At this point, if there was a deficient number of jurors remaining in the box, the prosecutor would have to show cause with respect to the jurors recalled to make up the required number. Id.


\textsuperscript{45} A defendant was entitled to 35 peremptory strikes in treason trials and 20 in trials for other felonies that were punishable by death. See Act of April 30, 1790, ch. 9, § 30.

\textsuperscript{46} See supra note 41 and accompanying text.

\textsuperscript{47} See Swain, 380 U.S. at 218. The Court noted, “In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country . . . .” Id.

\textsuperscript{48} See id. at 218-19.
jurers who have been deemed qualified to serve fairly and impartially on a particular case. The order of the voir dire process affords litigants an opportunity to challenge a potential juror for cause before exercising peremptory challenges. Therefore, a litigant's peremptory strike excludes a potential juror who was not challenged for cause by the litigant or for whom the court specifically did not find cause to exclude from jury service.

Peremptory challenges are generally exercised on the basis of the individual trial attorney's intuition as to the desirability of the particular juror.49 Prior to Batson, courts were generally reluctant to question the motivation underlying a litigant's peremptory challenge.50 The absence of judicial supervision over the exercise of peremptory challenges frequently subordinated the constitutional rights of a potential juror to a litigant's interest in unfettered utilization of the peremptory challenge. The Supreme Court in Batson and its progeny recognized the conflict between a litigant's unrestricted use of the peremptory challenge and a potential juror's equal protection interests, and has resolved the conflict in favor of the latter.

C. Batson's Limitations on the Peremptory Challenge

In Swain v. Alabama,51 the Supreme Court decided the first equal protection challenge to the use of the peremptory strike during the jury selection process. In Swain, an all-white jury convicted a black defendant of rape and sentenced him to death.52 The petitioner in Swain supported his equal protection challenge by noting that the prosecution exercised peremptory challenges to strike all six African-Americans from the jury

49. See State v. Gilmore, 511 A.2d 1150, 1167 (N.J. 1986) (noting that an attorney, when explaining the challenges upon which he exercised a peremptory challenge, cited "'gut reaction' based upon 'my life experience'"); JEFFREY ABRAMSON, WE, THE JURY 146 (1994) ("Lawyers have always relied on hunches, intuition, and their ideas about stereotypes to distinguish properspective jurors from proprosecution jurors.").

50. The nature of the "peremptory challenge gives a party the right to have an individual prospective juror excused without explanation." STARR & MCCORMICK, supra note 35, § 2.12, at 52 (citing 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 384 (2d ed. 1982)). However, prior to Batson, several state supreme courts disallowed the use of peremptory challenges based on group bias for race, sex, religion, or national origin. See, e.g., State v. Davis, 504 N.W.2d 767, 771 n.3 (Minn. 1993), cert. denied, 114 S. Ct. 2120 (1994). Federal and state statutes also limit the use of peremptory challenges. See 28 U.S.C. § 1862 (1994); N.Y. CIV. RIGHTS LAW § 13 (McKinney 1993).


52. See id. at 203.
panel. The petitioner also pointed to evidence that although blacks had in fact been called to jury service in Talladega County, Alabama, none had actually participated as a petit juror for fourteen years. Although the Swain Court recognized that selection for jury service should not be determined by an individual’s race, it set a virtually insurmountable evidentiary standard for establishing the existence of racial discrimination in the selection process. In order to prevail on an equal protection challenge under Swain, the petitioner needed to establish that the government had engaged in a pattern of systematic elimination of black venirepersons from the jury. The Court determined that the petitioner had not met this burden. As a result, the challenge was allowed to stand, and the potential juror was excluded from service.

In the landmark case Batson v. Kentucky, the Court reconsidered the standard established in Swain as it applied to a prosecutor’s peremptory challenges. In Batson, an African-American was convicted of burglary by an all-white jury selected from a panel from which the prosecution had eliminated four black venirepersons. The trial court denied the defendant’s motion to discharge the jury, rejecting defendant’s claim that the prosecution’s exercise of peremptory strikes violated both defendant’s Sixth Amendment right to a jury drawn from a fair cross-section of the community and his Fourteenth Amendment right to equal protection of the laws. The Kentucky Supreme Court affirmed the decision of the trial court. The United States Supreme Court reversed

53. Id. at 205.
54. See id. However, black individuals had served on grand juries, including the one that indicted the petitioner. Id.
55. See id. at 204 ("[J]urymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.") (quoting Cassell v. Texas, 339 U.S. 282, 286 (1950)); see also J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419, 1434 (1994) (Kennedy, J., concurring) ("[A] juror sits not as a representative of a racial or sexual group but as an individual citizen.").
56. In McCray v. Abrams, 750 F.2d 1113, 1120 (2d Cir. 1984), vacated, 478 U.S. 1001 (1986), the Second Circuit indicated that the Swain burden of proof had been met only twice: State v. Brown, 371 So. 2d 751 (La. 1979), and State v. Washington, 375 So. 2d 1162 (La. 1979).
57. Swain, 380 U.S. at 227.
58. Id. at 226.
60. See id. at 82.
61. Id. at 82-83.
62. Id. at 83. The Court also noted that the denial of participation in jury service based upon race constitutes unconstitutional discrimination by the State against the excluded juror. See id. at 87 (citing Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).
63. See id. at 84.
the decision of the Kentucky Supreme Court and established new precedent for evaluating a prosecutor’s exercise of peremptory strikes.

In Batson, the United States Supreme Court held that the Equal Protection Clause prohibits a prosecutor’s discriminatory use of peremptory challenges against individual jurors on the basis of race.64 In contrast to Swain, the Batson Court indicated that a defendant can establish a prima facie case65 of purposeful discrimination in the jury selection process without demonstrating a historic or widespread pattern of discrimination by the prosecution.66 The defendant must show only that the circumstances surrounding a particular challenge raise an inference that the prosecutor challenged the potential juror on the basis of race.67 Once the defendant establishes a prima facie case of discrimination, the burden shifts to the prosecutor to provide a “race-neutral” explanation for striking the juror.68 Therefore, upon the trial court’s determination that the defendant has set forth prima facie evidence of the discriminatory nature of a particular strike, the prosecution can no longer rely upon the discretionary nature of peremptory challenges. The prosecution must provide an explanation for the peremptory strike sufficient to rebut the defendant’s prima facie case. In order to meet this burden, the race-neutral explanation must be “clear and reasonably

64. Id.
65. To establish a prima facie case, a defendant must show: (1) that he is a member of a “cognizable racial group”; (2) that the prosecutor has exercised peremptory challenges to remove members of the defendant’s race from the venire; and (3) that these facts and other relevant circumstances “raise an inference” that peremptory challenges have been used by the prosecutor to exclude veniremen from the jury on account of their race. Id. at 96. In Powers v. Ohio, the Court determined that a criminal defendant has standing to raise the equal protection claim of an individual excluded from jury service. 499 U.S. 400, 413-15 (1991). A petitioner’s claim is not barred because his race differs from that of the excluded juror. See id. at 415. Therefore, the Court effectively eliminated the first prong of the Batson test—that the defendant be a member of a cognizable racial group—by allowing a white criminal defendant to challenge the state’s use of peremptory challenges against prospective black jurors. BENNETT & HIRSCHIORN, supra note 25, ¶ 17.14.

In Batson, the Court provided factors for determining whether the defendant had established a prima facie case: (1) evidence of a pattern of strikes against those of a particular race; and (2) the nature of the prosecutor’s questions and statements during voir dire and when exercising challenges. 476 U.S. at 97. Lower courts have cited other factors, such as: (1) whether most or all of the members of an identified group have been struck from the venire; (2) whether a disproportionate number of peremptory challenges were used to exclude specific racial or ethnic groups; or (3) whether excluded jurors shared race as their only common characteristic. See People v. McDonald, 530 N.E.2d 1351, 1357 (Ill. 1988); State v. Gilmore, 511 A.2d 1150, 1164-65 (N.J. 1986) (citing People v. Wheeler, 583 P.2d 748, 764 (Cal. 1978)).
66. See Batson, 476 U.S. at 95-96.
67. See id. at 96.
68. Id. at 97.
It is the role of the trial court to assess the race-neutral explanation proffered by the prosecution and to determine whether it is pretextual or sincere.\textsuperscript{70}

The Court in \textit{Batson} did not deviate from its holding in \textit{Swain} that the defendant does not possess the right to a jury made up, in whole or in part, of members of the defendant's own race.\textsuperscript{71} The right at issue was not the right of the defendant to be tried by a jury of which members of his own race are represented. Instead, the nature of the right at issue in \textit{Batson} was the denial of equal protection to the defendant by purposely excluding members of his own race from the jury.\textsuperscript{72}

In the line of cases succeeding \textit{Batson}, the Supreme Court clarified the underlying rationale of the \textit{Batson} Doctrine in terms of protecting the equal protection rights of the prospective juror. Following \textit{Batson} was the case of \textit{Powers v. Ohio}.\textsuperscript{73} In \textit{Powers}, the Court faced the issue of whether the prohibition against racial discrimination in the exercise of peremptory challenges should be imposed to protect the rights of the prospective juror in the absence of any violation of the rights of the defendant. In its decision, the Court ruled that a white criminal defendant is allowed to object to the prosecutor's discriminatory peremptory strike of black venirepersons.\textsuperscript{74} Although his own equal protection rights were not implicated by the discriminatory challenges, the white defendant in \textit{Powers} successfully asserted the equal protection claim of the excluded jurors under the principle of third-party standing.\textsuperscript{75}

\begin{footnotes}
\footnotetext[69]{Id. at 98 n.20 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).}
\footnotetext[70]{See id. at 98. "[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." Id. at 97. A prosecutor may not, however, rebut a defendant's prima facie case of discrimination by stating that he challenged the jurors sharing the same race as the defendant because of their shared race. Id. Additionally, a prima facie case is not rebutted by the prosecutor's denial of discriminatory motive or his affirmation of good faith in exercising peremptory challenges. Id. at 98. A race-neutral explanation is one "based on something other than the race of the juror;" Hernandez v. New York, 500 U.S. 352, 360 (1991), and must be "related to the particular case to be tried." \textit{Batson}, 476 U.S. at 98. The acceptability of a proffered justification should be determined by an analysis by the trial court of: "(1) the specificity of the explanation; (2) whether the reason is rationally related to the juror's qualifications or bias; and (3) whether the explanation is given in good faith." BENNETT & HIRSCHHORN, supra note 25, § 17.14.}
\footnotetext[71]{\textit{Batson}, 476 U.S. at 85 (citing \textit{Strauder} v. West Virginia, 100 U.S. 303, 305 (1879)).}
\footnotetext[72]{Id. (citing \textit{Strauder}, 100 U.S. at 303).}
\footnotetext[73]{499 U.S. 400 (1991).}
\footnotetext[74]{See id. at 404, 415.}
\footnotetext[75]{\textit{Id.} at 415. The Court found that the petitioner met each requirement of the three part test for vicarious standing: (1) "injury in fact," thus giving [the litigant] a 'sufficiently concrete interest' in the outcome of the issue in dispute[; (2)] a close relation to the third party[; and (3)] some hindrance to the third party's ability to protect his or her own interests." Id. at 411 (citations}
\end{footnotes}
In further developing the Batson Doctrine in Edmonson v. Leesville Concrete Co., the Supreme Court extended the reach of Batson to peremptory challenges employed by civil litigants. In Edmonson, an African-American plaintiff objected to his adversary’s exclusion of black jurors without the articulation of a race-neutral basis for the challenge. The Supreme Court again held that exclusion of prospective jurors on the basis of race violates their equal protection rights. Further, Edmonson resolved the issue of whether such discriminatory conduct by a private litigant constitutes state action. The Court concluded that a litigant’s use of peremptory challenges satisfies the two-pronged state action test. As to the first prong, the Court found that “[p]eremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude [otherwise qualified persons from jury service].” With regard to the second prong of the test, the Court noted that, in exercising a peremptory challenge, the litigant is acting in accordance with “state procedures [and] with ‘the overt, significant assistance of state officials.’” Even though a particular peremptory challenge is a function of the litigant’s prerogative, the litigant assumes the status of a state actor because of the context in which the peremptory challenge is executed.

In applying Batson to the private litigant, the Court was motivated by the compelling nature of Batson’s underlying policy against any form of invidious discrimination in the jury selection process. The Edmonson

omitted) (quoting Singleton v. Wulff, 428 U.S. 106, 112, 113-14, 115-16 (1976)). The Court explained, “The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice.” Id. The Court continued, “[T]he relation between petitioner and the excluded jurors is as close as, if not closer than, those we have recognized to convey third-party standing in our prior cases. Voir dire permits a party to establish a relation, if not a bond of trust, with the jurors.” Id. at 413 (citations omitted). “The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights.” id. at 415.

77. Id. at 616-17.
78. Id. at 628.
79. Id. at 620-22; see also Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (explaining that to determine whether state action exists, the two questions to be addressed are: (1) whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority; and (2) whether a person charged with inflicting the deprivation may be appropriately characterized as a state actor).
80. Edmonson, 500 U.S. at 620.
81. Id. at 622 (quoting Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988)).
Court explained, "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." The Court noted that the courtroom, in particular, is a forum in which there is a "real expression of the constitutional authority of the government" and that, therefore, "race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there." In Georgia v. McCollum, the Supreme Court further cemented the state action analysis it introduced in Edmonson. McCollum involved the prosecution's objection to a criminal defendant's racially motivated peremptory strike. In keeping with the reasoning of its state action analysis in Edmonson, the McCollum Court held that a criminal defendant who discriminatorily removes prospective jurors from the panel obtains the status of state actor. The Court concluded that the harm suffered by the prospective juror and the damage to the integrity of the system, as a result of a criminal defendant's discriminatory challenge, is of the same nature as the harm Batson sought to redress. The Court, therefore, afforded the prosecutor third-party standing to assert the equal protection right of the juror. The Court further determined that a criminal defendant exercising a peremptory challenge possesses no greater right to discriminate invidiously against prospective jurors on the basis of race than does a prosecutor or civil litigant. Accordingly, a criminal defendant is required to articulate a race-neutral ground for any peremptory challenge that appears on its face to be racially motivated.

Finally, in J.E.B. v. Alabama ex rel. T.B., the latest decision in the Batson line of cases, the Supreme Court addressed the application of Batson to gender-motivated peremptory challenges. In what is considered by some commentators to be the Court's broadest interpretation of the Batson Doctrine the Court held that a litigant's exercise of a peremp-

82. Id. at 630-31.
83. Id. at 628.
85. Id. at 44.
86. See id. at 52-55.
87. Id. at 48-50.
88. Id. at 56.
89. See id. at 57-59.
90. Id. at 59.
tory strike based upon the gender of the prospective juror violates the juror’s right to equal protection of the law. The Court concluded that the Equal Protection Clause prohibits gender-based, as well as race-based, discrimination, and that gender-based classifications are subject to heightened scrutiny. Furthermore, in the context of jury selection, gender-based discrimination poses the same danger to the process, and to its participants, as racially motivated strikes. A litigant who produces prima facie evidence that her adversary’s peremptory challenge is gender-based shifts to the adversary the burden of articulating a gender-neutral explanation for the strike.

The evolution of the Batson Doctrine demonstrates the Supreme Court’s increasing sensitivity to the equal protection interests of prospective jurors. The underlying rationale of the Batson Doctrine is that “individual jurors themselves have a right to nondiscriminatory jury selection procedures.” The Supreme Court reasoned that summary exclusion from jury service that perpetuates discrimination based upon stereotypical assumptions is antithetical to this nation’s justice system and violates the constitutional rights of the individual prospective juror. Weighing the government’s interest in affording litigants unrestricted discretion in utilizing peremptory challenges against the constitutional rights of prospective jurors, the Supreme Court concluded that discriminatory peremptory challenges do not further any important governmental objective.

Although the Supreme Court has shown a willingness to extend the reach of Batson beyond its original facts, all of the Court’s decisions to date expanding the doctrine have been grounded in the prospective juror’s equal protection guarantee against discrimination on the basis of race, gender, or national origin. The Supreme Court has not ruled upon Batson’s application to peremptory challenges that discriminate against

93. J.E.B., 114 S. Ct. at 1422.
94. Id. at 1424-25.
95. Id. at 1427.
96. Id. at 1429.
98. See id. at 1428 n. 13 (“The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system.”).
99. See id. at 1425-26.
prospective jurors on the basis of their First Amendment activities. For the reasons stated below, an expansion of the *Batson* Doctrine to the First Amendment context is logical and consistent with *Batson*’s underlying purpose.

III. PLACING THE PEREMPTORY CHALLENGE PRIVILEGE IN PERSPECTIVE

A. The Peremptory Challenge: Neither Constitutionally Protected nor Essential to a Fair Trial

While the peremptory challenge enjoys a long history as an integral fixture in our trial process, it is not constitutionally mandated. The peremptory challenge is neither specifically referred to in the text of the Constitution nor implicitly required to satisfy any constitutionally guaranteed rights afforded to a litigant at trial.

In addition to the absence of constitutional protection, the peremptory challenge also falls outside the rubric of trial procedures that are essential for a fair trial. Jury composition, and the selection process that creates the jury, may affect the fairness of the trial and the public

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100. *See supra* note 13. The Supreme Court’s recent opinion in *Purkett v. Elem*, 115 S. Ct. 1769 (1995), does not detract from the argument for *Batson*’s First Amendment expansion. In *Purkett*, the defendant objected to the prosecutor’s peremptory challenge to two potential jurors who were members of the defendant’s racial group. *Id.* at 1770. The Government argued that it struck one of the prospective jurors because he had long hair, a moustache, and a beard. *Id.* The Court held that this was a race-neutral use of a peremptory challenge. *Id.* at 1771. “‘The wearing of beards is not a characteristic that is peculiar to any race.’” *Id.* (quoting *EEOC v. Greyhound Lines*, Inc., 635 F.2d 188, 190 n.3 (3d Cir. 1980)). The Court also added: “And neither is the growing of long, unkempt hair.” *Id.*

Neither the Court nor the litigant’s raised the issue of a potential violation of the prospective juror’s First Amendment speech rights. Although personal appearance may, under certain circumstances, constitute a form of symbolic speech, there must be a “communicative element . . . sufficient to bring into play the First Amendment.” United States v. O’Brien, 391 U.S. 367, 376 (1968); *see Alabama and Coushatta Tribes v. Big Sandy Independent School District*, 817 F. Supp. 1319, 1334 (E.D. Tex. 1993) (wearing of long hair held to be a protected expression under the First Amendment); *Freeman v. Flake*, 448 F.2d 258, 260 (10th Cir. 1971) (upholding of school regulation of long hair despite the fact that it may constitute symbolic speech); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.49 (4th ed. 1991).


102. “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.’” *J.E.B.*, 114 S. Ct. at 1426 n.7 (quoting *McCollum*, 505 U.S. at 57); *see also* Stilson v. United States, 250 U.S. 583, 586 (1919).
perception of justice at work.\textsuperscript{103} However, the integrity of the jury would not be compromised even by the total elimination of the peremptory challenge.\textsuperscript{104} The peremptory challenge, unlike the challenge for cause, is not specifically designed to target unqualified jurors.\textsuperscript{105} No rule of law or practice requires that a litigant’s exercise of a peremptory challenge relate in any way to the juror’s ability to sit impartially on the case.\textsuperscript{106} Indeed, litigants utilize the peremptory challenge as a strategic device to design a jury sympathetic to the particular litigant’s case.\textsuperscript{107} Therefore, neutral potential jurors may be excluded in favor of other more partial jurors. This result is counterintuitive to the concept of a fair and unbiased jury.

Some commentators elevate the importance of peremptory challenges based on the theory that challenges for cause are insufficient for eliminating bias.\textsuperscript{108} They argue that, all too often, a lawyer’s “gut instinct” of a juror’s bias can be an accurate assessment of bias but is not one that the lawyer can readily “prove” during voir dire.\textsuperscript{109} The argument follows that, since the lawyer is unable to meet his burden of establishing that the juror is unfit, a challenge for cause will not be available to remove the juror. The reasoning underlying this contention is unpersuasive.

\textsuperscript{103} See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991). The Court stated: Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.

\textsuperscript{104} “The inherent potential of peremptory challenges to distort the jury process . . . should ideally lead the Court to ban them entirely from the criminal justice system.” Batson, 476 U.S. at 107 (Marshall, J., concurring); Raymond J. Broderick, \textit{Why the Peremptory Challenge Should Be Abolished}, 65 TEMP. L. REV. 369, 422 (1992) (stating that the peremptory challenge is a “flaw in our judicial fabric” which should be totally abolished).

\textsuperscript{105} “Unlike challenges for cause, peremptory strikes require no justification, no spoken word of explanation, no reason at all beyond a hunch, an intuition.” Abramson, \textit{supra} note 49, at 131.

\textsuperscript{106} See \textit{id.}


\textsuperscript{109} For a discussion of what a litigant must prove in order to remove a juror for cause, see Hittner & Nichols, \textit{supra} note 38, at 445-47.
If it is assumed, arguendo, that opponent's of this Article's application of Batson are correct in their assertion that challenges for cause are insufficient to eliminate bias, it would become necessary to reexamine what constitutes bias in jury selection. Their argument necessitates an overly broad definition of bias. To these critics, bias is not simply the inability of a prospective juror to sit fairly and impartially but also improperly includes the potential that the juror may find facts antagonistic to the litigant's desired results.

The claim that peremptory challenges should be utilized to compensate for deficiencies in the administration of challenges for cause ignores the simplest and most appropriate cure for the alleged deficiency: a requirement that trial courts afford attorneys a fair opportunity to establish a basis for a challenge for cause. To the extent that appropriate limitations on the peremptory challenge privilege highlight judicial deficiencies regarding challenges for cause, the constitutional limitations on the peremptory challenge privilege suggested by this Article may indeed serve to enhance the proper functioning of the challenge for cause. Moreover, deficiencies in the implementation of challenges for cause should be addressed directly and should not serve as an excuse for the expansion of peremptory challenges beyond constitutional limitations. Such utilization distorts the intended function of the peremptory challenge and undermines the credibility of the challenge for cause as the mechanism for ensuring the jury's impartiality.

If after an appropriate opportunity to support her contention that a juror is biased, an attorney is unable to meet an objective legal test for an exclusion for cause, the trial court may properly deny the exclusion. The court's denial in these circumstances, while frustrating to the litigant, is not conceptually distinct from any other instance in which a litigant believes her claim to be meritorious but is nevertheless unable to prevail due to an inability to garner the requisite proof.110

At the core of a litigant's rigid attachment to the peremptory challenge is an assumption that an individual's perceptions and responses are influenced by human characteristics such as race, ethnicity, gender, socioeconomic status, demographics, and religious, political, and philosophical beliefs that comprise the individual. The validity of this assumption does not provide any justification for discriminatory

110. Within the framework proposed by this Article, the attorney who is unable to develop her intuition into proof of bias may nevertheless be able to remove the juror through the exercise of a peremptory challenge. So long as the impression is not based upon factors that implicate the juror's exercise of a constitutional right, the peremptory challenge is valid.
exclusion of potential jurors. The fact that a prospective juror does not reach the jury box as a "blank slate" does not render the juror "biased" under the standard accepted for exclusion of jurors for cause. Our justice system does not automatically equate with a lack of fitness for jury service the unique human qualities and life experiences that comprise the individual and comport with our treasured notion of human individuality.

A discomfort with the potential effects of human individuality on jury verdicts fuels the opposition to any limitations upon the exercise of peremptory challenges. Those who oppose either restricting or eliminating peremptory challenges on the theory that peremptory challenges are necessary to achieve a fair trial, view the peremptory challenge as a challenge for "semi-cause." Under this view, the fact that a potential juror is not a completely neutral slate undermines the fairness of a verdict in which that juror participated. To the extent that society is prepared to equate a well-developed persona, pre-existing beliefs, and a background rich in life experience with an inability to fulfill the role of an impartial juror, consideration must be given to issues such as the appropriate threshold for an exclusion for cause, the definition of impartiality, and perhaps the desirability of our present jury system. Only upon recognition of the distinction between the peremptory challenge and the challenge for cause—and their relative importance to a fair, impartial trial—can we place in proper perspective the imposition on litigants of further peremptory challenge regulation.

B. The Peremptory Challenge: A Limited Privilege

The privilege of exercising peremptory challenges against prospective jurors is already far from absolute. Constraints on peremptory challenges are imposed by the Supreme Court, statutes, and court rules. Additionally, judges may, within their discretion, place limits on various practical aspects of the selection process. Judicially imposed constraints include the number of challenges afforded a litigant and the procedures under which they may be utilized.

111. See supra notes 59-99 and accompanying text.
112. See supra notes 27, 41 and accompanying text.
115. See Silverman, supra note 114, at 702-03.
116. See Morris, 623 F.2d at 151-52.
Judges may also set forth the number of peremptories based upon the nature of the case and the number of parties to the action.\(^{117}\) The trial judge may require multiple defendants to share a set number of challenges.\(^{118}\)

In addition, either local court rules or the individual judge determines the particular procedure used for peremptorily challenging jurors. For instance, a court may require litigants to exercise peremptory challenges to an entire prospective panel before impaneling the first six or twelve remaining jurors.\(^{119}\) Alternatively, a court might require litigants to levy challenges against potential jurors who are initially seated in the jury box and replace challenged jurors with previously unseated panelists.\(^{120}\) A trial judge may also have discretion to entertain peremptory challenges either outside or in the presence of other jurors.\(^{121}\)

Court procedures for selecting and striking alternate jurors also vary.\(^{122}\) Trial courts are afforded great latitude in implementing particular jury selection procedures despite the limitations they place upon the litigant’s freedom to exercise peremptory challenges.\(^{123}\) The many statutory and court imposed restrictions on peremptory challenges place their subordinate status in perspective and demonstrate that the peremptory challenge is more in the nature of a privilege than an absolute right.\(^{124}\)


\(^{118}\) For a discussion of the various ways in which peremptory challenges are employed when multiple defendants are involved, see Starr & McCormick, *supra* note 35, § 2.12, at 55 (citing 3 ABA Criminal Justice, *supra* note 23, No. 15-2.6(a) commentary at 63-67).

\(^{119}\) *See* Bennett & Hirschkorn, *supra* note 25, §§ 17.2-4.

\(^{120}\) *Id.* §§ 17.2-5.

\(^{121}\) *See id.* §§ 17.18-23; *see also* United States v. Morris, 623 F.2d 145, 151 (10th Cir.), cert. denied, 449 U.S. 1065 (1980).

\(^{122}\) As a guide, many states follow Rule 24(c) of the Federal Rules of Criminal Procedure.

\(^{123}\) *See* Morris, 623 F.2d at 151 (explaining that the formulation of appropriate procedures in administering peremptory challenges is subject to the broad discretion of the trial judge).

\(^{124}\) *See supra* notes 101-10 and accompanying text. Peremptory challenge regulations are akin to other established practices and tenets promoting the notion that a just result is accomplished through strict adherence to established rules and procedures. For instance, the rules of evidence are inherently exclusionary, limiting that which a litigant may argue or present to the jury. Rules of jurisdiction and venue dictate which courts are available to hear a case. *See* Fleming James, Jr., et al., *Civil Procedure* § 2.1 (4th ed. 1992). Statutes and court rules adopted by various jurisdictions, as well as the practices of individual trial judges, impose further restraints on a litigant’s autonomy.

These rules and regulations, within which a litigant must operate, are not designed to impose arbitrary constraints upon the litigant’s freedom. Rather, the purpose of such limitations is to promote a greater degree of structure and provide procedural as well as substantive safeguards against abuses.
C. The Peremptory Challenge: The Litigant’s Desire for a “Partial” Jury

The peremptory challenge remains a favorite tool of the trial lawyer because it provides her with a great measure of control. Litigants endeavor to employ the peremptory challenge to maximize control of case determination through the selection of “favorable” jurors. Efforts to restrict the litigant’s ability to influence juror selection are generally met with opposition, and even hostility. These opponents view limitations on peremptory challenges as an encroachment on a valued entitlement. This view portrays a misunderstanding of both the extent of the peremptory challenge privilege and the actual role played by the peremptory challenge in ensuring a fair and impartial jury.

The competitive nature of our adversarial system and a lawyer’s ethical responsibility to represent her client zealously all but ensure that a litigant will seek to construct the most partial jury possible. In furtherance of winning the case, litigants may seek to exclude not only antagonistic jurors, but also neutral jurors in an effort to include the greatest number of jurors who exhibit qualities which the advocate believes will further the best interests of her case. Far from creating a completely neutral adjudicative body, the advocate’s goal is to form a jury with the maximum degree of bias; bias which will sway the jury to the litigant’s favor. Therefore, the advocate will use her peremptory challenges as a strategic tool to “stack the jury.”

A system of unfettered discretion in the exclusion of prospective jurors does not serve the purpose of ensuring an impartial jury. A principle underlying our adversarial system is that the competing interests of the judicial system. The imposition of such rules limits the litigant’s control over the trial process and thereby achieves the goal of fairness. See id. § 1.1. The basic premise of achieving fairness through constraints on the litigant’s autonomy has general applicability and includes limitations on a litigant’s ability to control the selection of jurors. See id. § 8.14.

125. Robert Cartwright, former president of the American Trial Lawyers Association, advocates use of the peremptory challenge as a means for trial attorneys to select jurors who will “identify with and be sympathetic to their clients” and thereby provide the clients with a tremendous advantage. R.E. CARTWRIGHT, JURY SELECTION, TRIAL 28-31 (1977).

126. See, e.g., Barbara A. Babcock, Voir Dire: Preserving “Its Wonderful Power,” 27 STAN. L. REV. 545 (1975) (arguing that the rights to voir dire and peremptory challenges are necessary to producing an impartial jury and that regulation of these rights should be directed towards increasing their effectiveness to all litigants).

127. Id. at 555-56 (offering historical and functional arguments favoring the constitutional necessity of peremptory challenges). Professor Babcock explains, “[Q]uite aside from the impartial jury guarantee, the peremptory challenge is inherent in the jury trial right itself . . . .” Id. at 556.
of two litigants—to achieve the jury most favorably inclined toward their own positions—will balance one another, resulting in the creation of a fair and impartial jury.\(^\text{128}\) With the system working ideally, each side’s attempt to create a favorably disposed jury will be tempered by their opponent’s competing desire to create the same. In theory, each side uses peremptory challenges to exclude jurors with the greatest tendency to favor its adversary’s position, resulting in a jury that will be the closest possible to a neutral, blank slate. This theory assumes, of course, that each litigant is equally able to detect, and therefore eliminate, those jurors most likely to be favorably disposed toward the other side.\(^\text{129}\)

Even if we accept the theory that, in our adversarial trial system, a litigant’s attempt to manipulate the selection of jurors will be counterbalanced by his opponent’s exercise of the same power, we do not automatically dispose of all procedural safeguards against abuses to the system. The American system of justice does not completely rely upon the expectation that the adversarial nature of our system will ensure the fairness of the proceedings. Justice depends upon the combination of the adversarial process and judicial checks on the litigants who operate within the process.

A parallel restriction on a litigant’s ability to control the selection of those responsible for adjudicating the case is the prohibition against “judge-shopping.” The judge-shopping limitation is total and complete, regardless of whether the judge is sitting as the arbiter of law, fact, or both.\(^\text{130}\) Judge-shopping is viewed as antithetical to the integrity of the adjudicative process.\(^\text{131}\) Indeed, it would seem absurd to provide the litigant with the power to dismiss a presiding judge merely because she senses that the judge does not appear to be favorably disposed to either her or her case. The judge’s race, ethnicity, gender, political affiliations,


\(^{129}\) This assumption of an equal balance of power between opposing litigants, however, may not prove accurate. In cases where one side has greater resources to expend on the jury selection process, this assumption may be undermined. To the extent that an imbalance of power exists, in general, the adversarial system is not a sufficient insurer of a just result. See Stephen P. Jones, Note, The Prosecutor’s Constitutional Duty to Disclose Exculpatory Evidence, 25 U. MEM. L. REV. 735, 743-44 (1995). The limited effect of the adversarial system holds true in the context of jury selection as well.


\(^{131}\) Id. at 2095.
group memberships, previous judicial opinions, or extra-judicial writings
do not give the litigant grounds to excuse the judge, unless such factors
rise to a level requiring judicial recusal.\textsuperscript{132} There is no functional
equivalent of a peremptory challenge in the selection of a presiding
judge. To allow litigants to judge-shop would improperly permit the
litigants to manipulate the trial process and undermine the justice system.

Similar to judge-shopping, the peremptory challenge enables the
litigant to manipulate the selection of jurors. Accordingly, restricting a
litigant's control over the selection of jurors limits her ability to
manipulate the selection of the trier of fact.

In addition to the fact that an adversarial jury selection process may
indeed run counter to the goal of attaining an impartial jury, the
adversarial nature of jury selection, in and of itself, does not protect the
rights of prospective jurors who are subject to the process. The
advocate’s responsibility is to pursue the interest of her client. To the
extent that the potential juror’s interests are inconsistent with those of the
litigant, the advocate will properly advance only the interest of the
litigant. The fact that two litigants are at odds in a lawsuit does not
ensure that one of the litigant’s will pursue the rights of the prospective
juror. In fact, each litigant may seek to invade the juror’s private beliefs
during the jury selection process. Additionally, each litigant may seek to
exclude the same juror.

D. \textit{The Peremptory Challenge: The Perpetuation of Stereotypes}

Trial attorneys developing a methodology for exercising peremptory
challenges often rely on generic, assumed correlations between particular
characteristics and attitudes in jurors.\textsuperscript{133} Some litigators develop
selection criteria based on their individual views of which personal

\begin{footnotesize}
\textsuperscript{132} "Prejudice growing out of business, political, or social relations has been held insufficient
doing to disqualify a judge." Scott v. Class, 532 N.W.2d 399, 404 (S.D. 1995) (quoting 46 AM. JUR. 2D,
Judges § 162 (1994)).

\textsuperscript{133} For examples of how litigants use a juror's gender or occupation to predict attitudes, see
Hans & Vidmar, supra note 117, at 63-64; see also Horwitz, supra note 128, at 1403 n.66 (ranking,
in order of importance, the characteristic factors significant in juror selection: (1) Personal
characteristics—intelligence, education, strong-mindedness, physical infirmity; (2) Occupation; (3)
Personality; (4) Race; (5) Physical signs; (6) Nationality; (7) Body language; (8) Sex; (9) Age; and
(10) Marital status (citing ROBERT A. WENKE, THE ART OF SELECTING A JURY 64-65 (1979))); ANN
F. GINGER, JURY SELECTION IN CIVIL & CRIMINAL TRIALS § 19.11, at 1067 (2d ed. 1985) (citing
the Sannito-Arnolds study which "found a high frequency of 'prosecution jurors' among those in
precision occupations such as secretaries, engineers, programmers, machinists, bankers, bookkeepers,
accountants, and supervisors of many employees").
\end{footnotesize}
attributes are the most effective indicators of how a person will vote, as well as upon anecdotal data from past cases. Furthermore, attorneys frequently utilize a body of literature that proposes direct relationships between particular juror attributes and the verdicts they reach.

Another word for these relationships is "stereotypes." Some attorneys reject these stereotypes as broad generalizations that cannot reliably predict juror voting tendencies. These critics assert that reliance upon generalizations can actually distract a litigant from criteria that will more accurately assess the favorability of the juror. Nevertheless, popular stereotypes provide the basis upon which many trial attorneys decide to exclude particular jurors.

In fact, an entire "science" and a lucrative industry has developed around the strategy of exercising peremptory challenges. An increasing number of litigants with adequate financial resources are hiring consultants to assist them in the process of selecting jurors. Consulting practices range in level of sophistication. A relatively modest form of jury selection "science" involves hiring an expert who observes the voir dire process and provides the litigant with a professional "judgment" about prospective jurors. At a more sophisticated level, the consultant stages a simulated trial and hires "mock jurors" to observe the trial and describe their reactions to the arguments. The purchased responses from the mock jurors become the data on which the consultant creates a

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134. See Hans & Vidmar, supra note 117, at 63-64.
135. See, e.g., EDWIN H. SUTHERLAND & DONALD R. CRESSEY, CRIMINOLOGY 430-31 (8th ed. 1970); GINGER, supra note 133, at 1092, 1102 (including a sample jury questionnaire developed by trial attorneys that probe a prospective juror's ethnic background, religion, organizational membership, and political affiliations).
137. "Because attorneys often have insufficient information to make individual judgments about the unconscious prejudices of prospective jurors, they tend to act on the basis of stereotypes and presumptions." Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries, 86 Yale L.J. 1715, 1720-21 (1977) (footnote omitted).
138. See 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, 210 (1989). In the article, Alschuler cites to a manual produced by Dallas, Texas, District Attorney Wade, which instructs prosecutors to use popular stereotypes in striking potential jurors, including indications that women jurors can't be trusted, except when using their "women's intuition" in cases involving crimes against children. Id. Another excerpt stated that "[e]xtermely overweight people, especially women and young men, indicates a lack of self-discipline and often times instability. I like the lean and hungry look." Id. The manual was leaked to Justice Marshall and used in his concurrence in Batson v. Kentucky. Id.
139. See ABRAMSON, supra note 49, at 146-49.
composite profile of the most and least ideal prospective juror. The desirable juror will have those common characteristics found among the observers who indicated favorable reactions to the litigant's position in the case. Thus, the jury consultant infers a correlation between the shared attributes and the likelihood of a particular attitude toward the case. She then extends this inference to the chance of a juror voting for a particular verdict.

An alternate jury selection consulting method consists of an expert designing a prototype of the ideal juror based on more general inferences about the correlation between personal characteristics and beliefs held by individuals with those characteristics. Jury consultants may also study area demographics to supplement their data.

The underlying assumption in the field of jury science is that certain characteristics of an individual, such as age, race, ethnicity, religion, employment status and history, marital and familial status, area of residence, and political affiliations can be correlated with particular attitudes. Of course, this premise is neither new nor unique to proponents of complex jury selection methodology. Indeed, the theory that one can predict how a juror will vote based upon specific beliefs unrelated to the subject matter of the case is at the heart of the peremptory challenge itself.

140. See id. at 152-53. See generally Solomon M. Fulero & Steven D. Penrod, The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?, 17 OHIO N.U. L. REV. 229, 244 (1990) ("Some . . . researchers have adopted an approach in which mock jurors—often experienced or currently sitting jurors—are presented the same case or cases in an effort to establish links for particular fact patterns.").

141. See Fulero & Penrod, supra note 140, at 244.

142. See ABRAMSON, supra note 49, at 148.

143. "The examination of jurors' demographic and socioeconomic characteristics is of great significance . . . ." Id. at 143 (emphasis added) (quoting HIROSHI FUKURAI ET AL., RACE AND THE JURY 156 (1993)); see also id. at 148 ("Demographic data would be kept on each respondent.").

144. "[E]ach juror's psychological attributes and proclivities, which will influence a particular verdict, are closely intertwined with the juror's ascriptive characteristics (e.g., age, race, and gender) and socially achieved status (e.g., education and income)." ABRAMSON, supra note 49, at 143 (quoting FUKURAI ET AL., supra note 143, at 156).
IV. EXPANDING *BATSON* TO THE FIRST AMENDMENT

A. *The Equal Protection Clause: Protecting a Juror's Fundamental First Amendment Rights*

A litigant's "privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause." The Equal Protection Clause of the United States Constitution guarantees that the government will not subject its citizens to unequal treatment on the basis of an individual's membership in a cognizable group or the exercise of a fundamental right. The rights to associate and to express oneself freely are fundamental rights within the rubric of the equal protection guarantee. Governmental action that inflicts disparate treatment based upon an individual's speech content or affiliation choices is evaluated under equal protection standards. An equal protection evaluation depends upon the level of judicial scrutiny—using either the strict, heightened, or rational basis standard—that is afforded to a particular classification. Therefore, under the *Batson* Doctrine, application of the Court's restrictions on peremptory challenges depends upon the level of scrutiny afforded to the particular challenge. In *J.E.B. v. Alabama* ex rel. *T.B.*, the Supreme Court noted: "Parties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review."

Classifications based upon one's exercise of the fundamental rights to associate and to speak freely are afforded strict scrutiny, two levels of scrutiny higher than mere "rational basis." Accordingly, the

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146. See U.S. Const. amend. XIV, § 1; *Shapiro v. Thompson*, 394 U.S. 618 (1969) (applying strict equal protection scrutiny to the fundamental right to interstate travel); see also *Nowak & Rotunda*, supra note 100, § 14.1.

147. See *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972).

148. See id. ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself . . . [t]here is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard." (footnote omitted) (quoting *Alexander Meiklejohn*, *Political Freedom* 27 (Oxford Univ. Press 1965) (1948))).

149. 114 S. Ct. 1419, 1429 (1994) (disallowing the exercise of gender-based peremptory challenges because they could not withstand the "heightened" scrutiny afforded to gender-based classifications).

150. See *Nowak & Rotunda*, supra note 100, § 14.3.

151. For a discussion of the three standards of review employed by courts in an equal protection analysis, see *id*.
striking of a potential juror exercising speech and association rights falls outside of those challenges subject only to rational basis review and must be examined under a strict scrutiny standard.

The propriety of permitting peremptory challenges motivated by a juror’s First Amendment exercise is determined by balancing the government’s interest against the constitutional infringement. The equal protection inquiry in these circumstances requires a balancing of the governmental interest which is furthered by the unequal treatment against the individual’s interest in the exercise of a fundamental right.\(^{152}\) The only governmental interest furthered by discriminatory treatment of potential jurors, based upon their exercise of First Amendment rights, is an interest in affording litigants greater freedom to use peremptory challenges.\(^{153}\) This interest is far from compelling and is insufficient to warrant infringement on a juror’s speech and association rights.\(^ {154}\) The governmental interest in the use of peremptory challenges, a privilege that is not constitutionally protected and is subject to regulation, is not more compelling than an individual juror’s constitutionally protected rights.

A prospective juror’s First Amendment rights of freedom of association and speech are fundamental rights vulnerable to infringement. During jury selection, litigants attempt to gather as much information as possible about each prospective juror, including any attitudes, associa-

152. Police Dep’t v. Mosley, 408 U.S. 92, 95 (1972).
153. Cf. J.E.B., 114 S. Ct. at 1426 (inquiring “whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant’s effort to secure a fair and impartial jury”). For a complete discussion of the purposes served by peremptory challenges, see GOBERT & JORDAN, supra note 15, § 8.01. See also Benjamin H. Barton, Note, Religion-Based Peremptory Challenges After Batson v. Kentucky and J.E.B. v. Alabama: An Equal Protection and First Amendment Analysis, 94 Mich. L. Rev. 191, 208 (1995). Although Barton’s analysis does find a compelling governmental interest in allowing peremptory challenges, he concludes that religion-based peremptory challenges do not withstand strict scrutiny review because religion-based peremptory challenges are premised on stereotypical assumptions which are not narrowly tailored to achieve the ultimate goal of a fair and impartial trial. Id. at 209. “[T]he available studies provide no support for the claim that religious affiliation alone is an accurate predictor of juror attitudes.” Id. In addition, Batson concludes that because of the availability of less restrictive means to remove biased jurors, religion-based peremptory challenges fail strict scrutiny review. Although Barton’s analysis is directed toward religion-based peremptory challenges, the same arguments apply to speech and association-based peremptory challenges.
154. Cf. Georgia v. McCollum, 505 U.S. 42, 55 (1992) (holding that a criminal defendant’s right to use peremptory challenges in a racially discriminatory manner violates the equal protection rights of excluded jurors); Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting) (“Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.”).
tions, and opinions the juror holds which the litigant believes may affect the juror’s adjudication of the case at hand. In an effort to discover these views, litigants seek information that implicates the juror’s exercise of association or speech rights. Moreover, based upon the information they have obtained, litigants may utilize peremptory challenges to remove jurors whose speech or affiliations do not meet with the litigant’s approval.

B. Illustrations of Peremptory Challenges That Implicate the Juror’s First Amendment Rights

In the jury selection context, questions concerning organizational affiliations that are unrelated to juror fitness constitute an infringement of the prospective juror’s First Amendment association right. Although a litigant may wish to question a potential juror regarding the clubs and organizations in which the juror is a member, to the extent that probing the juror’s organizational memberships does not reveal information that affects the juror’s fitness for service, the government does not have a substantial interest in facilitating the inquiry. For example, a juror’s membership in either the Boy Scouts of America, Green Peace, or Act Up is inappropriate to the juror’s ability to render a fair and impartial verdict in the average medical malpractice law suit. To the extent that the potential juror may not wish to reveal such memberships, the very question invades the juror’s privacy and implicates the right to free association. If a question regarding club membership is relevant to the

155. “Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.” J.E.B., 114 S. Ct. at 1429.
156. See United States v. Barnes, 604 F.2d 121, 140 (2d Cir. 1979) (explaining that a prospective juror’s privacy should be considered in determining scope of voir dire inquiry), cert. denied, 446 U.S. 907 (1980); Brandborg v. Lucas, 891 F. Supp. 352, 360-61 (E.D. Tex. 1995) (granting a prospective juror’s petition for habeas corpus from conviction for contempt in failing to answer voir dire questions that infringed upon her privacy rights); see also Michael R. Glover, Comment, The Right to Privacy of Prospective Jurors During Voir Dire, 70 CAL. L. REV. 708 (1982) (exploring the conflict of interest between parties’ impartial jury rights and potential jurors’ privacy rights).
157. The Court has struck down government subpoenas requiring compulsory disclosure of membership lists. See Gibson v. Florida Legislative Investigative Comm., 372 U.S. 539, 546 (1963); NAACP v. Alabama, 357 U.S. 449, 462 (1958) (“This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.”). The NAACP Court emphasized that “privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” Id. The Court also recognized that compulsory disclosure of membership may lead to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility” toward members, thereby inducing members to withdraw from their associations. Id.
potential juror’s fitness to sit fairly and impartially on the case, then there is merit to the position that any impact the question has on the juror’s First Amendment exercise is a necessary consequence of ensuring a fair trial. If, however, the question does not pertain to the juror’s ability to sit fairly and impartially, but rather is merely information that the litigant desires for the purpose of exercising peremptory strikes, then posing the question presents an unjustified infringement on the juror’s constitutional right to associate freely.

The way in which peremptory challenges are presently exercised creates a danger of encroaching upon a juror’s First Amendment right to speak freely as well. By its very nature, the voir dire process requires a prospective juror to engage in the act of speech. In contrast to the other parts of the trial process, voir dire is designed as a mechanism whereby prospective jurors speak about themselves, their backgrounds, and their attitudes. Questioning a potential juror on matters that are not relevant to her fitness to serve on a particular case, and excluding that juror from service based upon answers that would not warrant an exclusion for cause, constitutes an infringement of the potential juror’s free speech right.

As a point of illustration, in the typical trial of a “slip and fall” tort claim, a prospective juror’s views on gun control should not, in and of itself, affect the juror’s fitness for service on that case. Accordingly, a court should not permit the litigant to base a peremptory challenge on views expressed by the potential juror relating to gun control. One can assume that a court concerned with efficient adjudication of the case will be inclined, based on time limitations alone, to deny a litigant the opportunity to delve into a juror’s views on matters that do not bear directly on the particular case. Some courts, however, are more permissive in the way they allow litigants to question jurors. A court may be of the view that, even though a particular question is not

158. In the above context, the compelling nature of the government’s interest in eliminating unfit potential jurors outweighs any infringement upon the potential juror’s First Amendment right.

159. Jury selection is the only opportunity during the trial for interchange between jurors and litigants. Court rules prohibit parties and their attorneys from engaging in any discourse with jurors. See Model Code of Professional Responsibility DR 7-108 (1995). During the course of the trial, the jurors’ ability to communicate about the case with others, including family members, the court, and even fellow jurors, is restricted. See William W. Schwarzer, Reforming Jury Trials, 132 F.R.D. 575, 576 (1991).

pertinent to the exclusion of a juror for cause, there is "no harm" in allowing litigants to pursue collateral matters in connection with their exercise of peremptory challenges.\textsuperscript{161} However, a more permissive approach to the voir dire process exposes the prospective juror to exclusion based upon an expression of speech unrelated to the juror's ability to adjudicate the case fairly. Accordingly, a court's view in such an instance that there is "no harm" in permitting litigants to question jurors on collateral matters, and to base peremptory challenges on a juror's response to such questions, betrays a lack of sensitivity to the juror's right to free speech.

In some jurisdictions, the practice is to conduct voir dire in the absence of any judicial officer.\textsuperscript{162} Under such a procedure, litigants are left unchecked in the jury selection process. Because each litigant has an interest in extracting from potential jurors the maximum amount of information possible, there is a heightened danger that, in the questioning process, a prospective juror's First Amendment rights will be violated.

In the illustration involving the juror who is questioned on his views on gun control, perhaps the juror will indicate that he strongly favors all measures of gun control and, based upon this response, the attorney for the defendant in the personal injury case labels him a "liberal," and thereby predicts that he is likely to favor an injured plaintiff over a large insurance company defendant. Counsel's peremptory removal of the juror based upon this stereotype impermissibly excludes the juror from participation in the trial process because of views which he expressed that do not warrant court exclusion for cause.

In addition to the free speech implications that directly result from the voir dire discourse, the exercise of peremptory challenges may infringe upon the prospective juror's speech that is only peripherally related to the voir dire process. Because many forms of communication, including certain conduct, are considered speech,\textsuperscript{163} a prospective juror may exercise his right to speak in the course of the jury selection process in ways that do not involve a direct response to a voir dire question.

\textsuperscript{161} "An appropriate question to prepare for the intelligent exercise of peremptory challenges does not have to meet the same standards of relevance as one that would be used to establish a challenge for cause." Mauldin v. State, 874 S.W.2d 692, 698 (Tex. Ct. App. 1993) (citing Plair v. State, 279 S.W. 267, 269 (Tex. Crim. App. 1926)).

\textsuperscript{162} See id.

\textsuperscript{163} See, e.g., Texas v. Johnson, 491 U.S. 397, 419-20 (1989) (holding that flag burning is an expression of free speech consistent with the First Amendment); Cohen v. California, 403 U.S. 15, 24-26 (1971) (wearing a jacket with offensive language is protected as "speech" under the First Amendment).
To continue with the gun control illustration, a litigant may observe that a prospective juror drove to the courthouse in an automobile sporting a bumper sticker that reads “Guns don’t kill people . . . people kill people.” Another juror might arrive to jury duty wearing a tee shirt with the slogan “Guns don’t kill people . . . bullets kill people.” And a third juror might be observed reading a National Rifle Association publication. In these instances, the litigants have not questioned the jurors as to their views on gun control. If, however, a litigant exercises a peremptory strike against a juror based upon her observation of the juror’s expression of speech, the strike would similarly implicate the juror’s freedom to speak.⁶⁴

C. The Impact on the Prospective Juror

In order to appreciate the potential impact of the jury selection process on the individual, one must view the experience through the prospective juror’s eyes. A potential juror is summoned to the courthouse by court officials to participate in jury selection. After appearing within the confines of the courthouse, the potential juror is subjected to a qualification process through which she will either be selected or rejected from jury service based upon the quality of her answers. In those instances where the juror is peremptorily excluded from service, the litigant’s peremptory challenge to a juror is executed by the court.⁶⁵ To the juror, therefore, removal from jury service is the action of the court itself. As compared with discriminatory treatment at the hands of a litigant, the apparent denial of the juror’s First Amendment rights by a court itself may be more consequential to our justice system, and the participants in our system, than the message gleaned from a litigant’s denial.

In addition to executing the litigant’s decision to challenge the juror, the court approves the content of the questions litigants pose during the voir dire process. In permitting this inquiry, and the exclusion based upon the juror’s responses, the court confirms the relevance of the juror’s affiliations or exercise of speech to the juror’s qualifications for service.

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⁶⁴. The restrictions on peremptory challenges proposed by this Article will require a trial court to determine not only the litigant’s motivation for the challenge but also whether the potential juror is engaged in protected First Amendment activity.

In allowing First Amendment-based peremptory challenges, the court is inadvertently sanctioning restraints on speech or affiliation as they relate to participation in jury service. In so sanctioning, a court undermines the protected nature of the exercise of those precious rights, even if the restraints do not diminish the frequency with which those rights are practiced. Furthermore, by allowing speech and affiliation to be utilized as a basis for juror exclusion, a court is implicitly stating that a litigant’s desire to influence the jury composition is more important than a juror’s First Amendment freedoms.

D. Protection of a Potential Juror’s First Amendment Freedoms

The Supreme Court has held in several contexts that actions taken by a governmental entity with respect to an individual’s speech or organizational memberships may constitute impermissible discrimination and, therefore, violate the First Amendment. For instance, denials of tax exemptions, unemployment benefits, welfare payments, and public employment based upon a person’s exercise of her First Amendment rights, is an impermissible interference with a citizen’s constitutional rights. In these contexts, the Supreme Court has held:

[E]ven though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

A potential juror’s fundamental participation in our system of justice

166. See Speiser v. Randall, 357 U.S. 513, 528-29 (1958) (holding that a California statute requiring veterans to take an oath in order to receive a tax exemption was a denial of freedom of speech and violated the Due Process Clause of the Fourteenth Amendment).

167. See Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that a California statute denying unemployment benefits to an applicant who, for religious reasons, refused to work on Saturdays violated the First Amendment).

168. See Perry v. Sindermann, 408 U.S. 593, 597 (1972) (“For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.”); Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (Stewart, J., concurring) (likening the right to travel to the right of association in striking down a statute which required a one year residency prerequisite in order to receive welfare payments).


should not be diminished by his pursuit of a constitutionally protected interest. As the Court has noted in the public employment context, "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." 171

One cannot draw a convincing distinction between government denial in these contexts and the governmental action of dismissing a potential juror through a peremptory challenge based upon her exercise of her First Amendment rights of speech or association. 172 By allowing First Amendment-based peremptory challenges, the court is not only sending a perverse message that the subordinate peremptory challenge privilege is superior to the juror’s First Amendment rights, but is also implicitly conveying that certain affiliations and speech are preferable or more acceptable to the government than others. These messages undermine the credibility of our justice system and contradict the tenets underlying the First Amendment.

In addition, conditioning jury service on the juror’s response to affiliation-related inquiry may have an impermissible “chilling effect” on the juror’s decision to exercise his constitutional rights. Peremptory exclusions motivated by the juror’s group affiliations or expression of beliefs that do not warrant removal for cause are exercised on the basis of assumed bias rather than individual bias specific to the situation. Let’s take, for example, a criminal prosecution for armed robbery. Assume, arguendo, that members of the organization “Mothers Against Drunk Drivers” (“M.A.D.D.”) have a greater-than-average tendency to convict in criminal prosecutions. A defense attorney’s exclusion of a M.A.D.D. member on the assumption that the individual juror will vote to convict may not bear any relation to the individual juror’s actual bias in connection with the particular circumstances of the case at trial. The affiliation-based exclusion wrongfully prevents a qualified, unbiased juror from participating in jury service and perpetuates a stereotype against M.A.D.D. members.

Similarly, exclusion from jury service may chill a prospective

171. Id. at 76.
172. The juror acts as an agent of the government when serving on the jury. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991) (“The peremptory challenge is used in selecting an entity that is a quintessential governmental body . . . . The jury exercises the power of the court and of the government that confers the court’s jurisdiction.”).
juror’s exercise of her speech rights. It is arguable that exclusion from the jury does not in fact preclude the juror from wearing shirts, sporting bumper stickers, or publicly reading material that expresses the juror’s views. However, a juror may be inhibited from wearing or publicly displaying expressions of her views for fear of facing rejection from service on a trial.

To the extent that there exists any risk of chilling a prospective juror’s First Amendment exercise, the government may not enforce a discriminatory peremptory challenge motivated by the prospective juror’s speech. As previously discussed, speech related restrictions on a citizen’s receipt of governmental benefits are not permitted. The government may not limit employee speech that involves matters of public concern, unless it can establish that “the speech ‘substantially interfered’ with government duties.” It follows from this analogy that the government cannot, through peremptory challenges, inhibit a potential juror’s speech on matters of political or social concern that do not substantially interfere with the juror’s ability to adjudicate the case impartially. “The government as employer has far broader powers to restrict its employees’ speech than does the government as sovereign.” Similarly, if the government-juror relationship is one of sovereign and citizen, rather than employer-employee, the government’s intrusion on the juror’s speech right is even less justified.

173. “[I]t is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.” Pickering, 391 U.S. at 574; see also Shelton v. Tucker, 364 U.S. 479, 480 (1960) (striking down an Arkansas statute requiring every public-employed teacher to list annually “every organization to which he has belonged or regularly contributed within the preceding five years”).
174. See supra notes 166-71 and accompanying text.
175. The Supreme Court has afforded greater protection to speech involving topics of general interest—such as political or social views—than to speech that involves only the employee’s personal disputes or grievances that have no relevance to the public. See Cohen v. San Bernardino Valley College, 883 F. Supp. 1407, 1416-17 (C.D. Cal. 1995) (citing Connick v. Myers, 461 U.S. 138, 146 (1983) (“When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”)).
177. Id.
E. Lower Court Application of Batson to a Potential Juror’s First Amendment Association and Speech Rights

There is a paucity of authority concerning the application of the Batson Doctrine to a juror’s First Amendment rights. Only two federal circuit courts have directly addressed Batson’s applicability to speech and association rights. Although both circuits declined to extend the doctrine, the holdings of these courts lack both depth of analysis or any convincing rationale.

In United States v. Villarreal, the Fifth Circuit upheld a prosecutor’s peremptory challenges to all potential jurors who indicated an unalterable opposition to capital punishment in a prosecution in which the United States sought the death sentence. The reasoning of Villarreal, however, is marred by the court’s inability to distinguish properly between a challenge for cause and a peremptory challenge. Had the court concluded that a juror’s fundamental opposition to the application of the death penalty warrants exclusion of the juror for cause, the Batson Doctrine would not have been implicated. The Batson Doctrine is not offended by the exclusion for cause of a juror who is incapable of rendering a fair and impartial judgment because of a deeply held belief to which the juror subscribes. Rather than determine whether the potential juror’s opposition to the death penalty impaired the government’s ability to receive a fair trial, the Villarreal court simply refused to find a violation of the juror’s First Amendment or equal protection rights on the grounds that “[p]olitical belief is not the overt and immutable characteristic that race is,” and that extending Batson to the First Amendment would effectively eliminate the peremptory challenge.

179. See id. at 728-29.
180. Of course, it would be up to the prosecutor to convince the judge that the potential juror could not be fair and impartial. See Batson v. Kentucky, 476 U.S. 79, 97 (1986).
181. Where the juror’s deeply held belief does not affect her ability to render a fair and impartial judgment, a litigant’s peremptory exclusion on the basis of the juror’s expression of her belief is a constitutional violation worthy of protection.
182. Villarreal, 963 F.2d at 729. This decision pre-dates the Supreme Court’s extension of Batson beyond race.
183. The demise of the peremptory challenge has been predicted by critics of each expansion of Batson. See, e.g., Ferdico, supra note 92; Horwitz, supra note 128; Winchurch, supra note 92. Thus far, the peremptory challenge remains a viable practice. See supra notes 6, 138 and accompanying text.
The Tenth Circuit has also considered *Batson’s* application in the First Amendment context. In *Morgan v. City of Albuquerque*, the court declined to extend *Batson* to protect a juror’s First Amendment association rights. In *Morgan*, the plaintiff in a personal injury action objected to the defendant’s peremptory challenge of two potential jurors based upon the jurors’ “association with persons with disabilities.” The father of one of the excluded jurors was missing three fingers. The other excluded juror worked as a teacher of disabled children. The court summarily disposed of the issue as follows: “Plaintiff’s final contention is that the use of peremptory challenges to strike persons who have some association with persons with disabilities violates the potential jurors’ First Amendment rights. We find this argument meritless.”

It is unclear from the court’s superficial treatment of the issue whether the court’s conclusion as to the absence of merit relates to either: (1) disagreement with the premise that a juror’s First Amendment right may be implicated by association-based peremptory exclusions; or (2) a conclusion that employment and familial relationships fall outside of the scope of “associations” protected under the First Amendment. Accordingly, the *Morgan* holding may simply be a reflection of the court’s belief that the association rights of the excused jurors were not implicated under the specific facts of that case.

**F. Lower Court Application of Batson to Religion-Based Peremptory Challenges**

An examination of lower court consideration of *Batson’s* application to peremptory challenges that implicate a prospective juror’s religious exercise and affiliation is instructive to an analysis of *Batson’s* First Amendment reach. A handful of cases have addressed the First Amendment implications of religion-based peremptory challenges.

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184. 25 F.3d 918 (10th Cir. 1994).
185. *Id.* at 920.
186. *See id.* at 919.
187. *Id.* at 920.
188. While this Article does not focus upon the application of *Batson* in the context of religion-based peremptory challenges, it assumes that *Batson* applies on the theory that one’s religious affiliation constitutes both a cognizable group and the exercise of a fundamental right and, therefore, is subject to an equal protection as well as a First Amendment analysis. For a discussion of *Batson’s* application to religion-based peremptory challenges, see Angela J. Mason, Note, *Discrimination Based on Religious Affiliation: Another Nail in the Peremptory Challenge’s Coffin?*, 29 GA. L. REV. 493 (1995); Recent Cases, 106 HARY. L. REV. 1164 (1994).
In *State v. Davis*, the Supreme Court of Minnesota refused to extend the *Batson* Doctrine to the state’s challenge of a juror based upon his status as a Jehovah’s Witness. The Minnesota court opined that “[t]he use of the peremptory strike to discriminate purposefully on the basis of religion does not . . . appear to be common and flagrant.” The court also concluded that extending the *Batson* Doctrine to religion “would unduly complicate voir dire and be excessively intrusive for the end sought to be achieved.”

The *Davis* court acknowledged that inquiring about a juror’s religious affiliation on voir dire is improper unless the inquiry is necessary to determine a challenge for cause. However, the court failed to recognize the logical inconsistency of prohibiting a litigant from probing the religious identity of the juror for the purpose of exercising a peremptory challenge and, yet, allowing the litigant to use that very information to justify the challenge.

The Court of Criminal Appeals of Texas did extend the *Batson* Doctrine to religious affiliation in *Casarez v. State*. In its analysis of the prosecutor’s peremptory challenge to a Pentacostal juror, the court applied the strict scrutiny standard required by the Equal Protection Clause. The Texas court held that the equal protection right of the juror was denied due to the discriminatory classification that impaired the ability of the juror, and the entire class of Pentacostalists, to enjoy a fundamental right to religious exercise.

Unlike *Davis*, *Casarez* post-dates the Supreme Court cases expanding *Batson* beyond race. The *Casarez* court relied upon the breadth of the *Batson* Doctrine and the abhorrence of stereotypical assumptions that underlies the *Batson* Doctrine to reject the First Amendment-based peremptory challenge. Furthermore, the court reasoned that the state’s interest in exercising religion-based peremptory challenges in order to obtain a qualified jury is not compelling and, therefore, cannot justify infringement of a juror’s fundamental right.

189. 504 N.W.2d 767 (Minn. 1993), cert. denied, 114 S. Ct. 2120 (1994).
190. Id. at 771.
191. Id.
192. See id. at 772 (citing Coleman v. United States, 379 A.2d 951, 954 (D.C. 1977)).
194. See id. at *8.
195. See id. at *9.
196. See id. at *10.
197. See id. at *9.
While not directly holding that *Batson* prohibits peremptory challenges motivated by a juror’s religious affiliation, the reasoning of *State v. Gilmore* lends support to the proposition. In *Gilmore*, the Supreme Court of New Jersey affirmed the lower court’s decision to reverse a conviction because the prosecutor peremptorily excluded a black juror in violation of the defendant’s right under the New Jersey Constitution to have a jury drawn from a fair cross-section of the community. The court rejected the state’s contention that its challenge to the juror was justified because blacks are predominantly Baptists and, as such, may be inclined to give more credit to the testimony of a Baptist minister and Baptist practitioners, who were anticipated defense witnesses. Membership in the Baptist Church was deemed insufficient to justify peremptory exclusion of the juror. In its rejection of the prosecutor’s explanation, the court expressed its view that “peremptory challenges to remove potential jurors on the basis of presumed ‘group bias’ or mere ‘group affiliation’” are “[b]eyond [their] scope and therefore a perversion of [their] purpose.” “That purpose . . . is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences.” Although the constitutional right at issue in *Gilmore* is the defendant’s right to be tried by a fair cross-section of the community, the court’s criticism of the prosecutor’s reliance upon “assumptions about Blacks and Baptists that are quite unflattering, not to say invidiously discriminatory, to both the racial group and the religious group,” demonstrates a sensitivity to the rights of jurors who are subject to discriminatory treatment.

In contrast, several courts, without directly addressing the issue of *Batson*’s application to jurors’ First Amendment rights, have sanctioned a litigant’s use of religious affiliation or exercise to justify a peremptory challenge. In *United States v. Clemmons*, the defendant objected to the prosecutor’s challenge of a black juror. In an effort to provide a

199. See id. at 1155.
200. See id. at 1168.
201. See id. at 1168-69.
202. Id. at 1161.
203. Id. at 1162.
204. Id. at 1168.
206. Although there was some question as to whether the juror was in fact black, the court assumed the juror was black for purposes of its decision. See id. at 1156.
“race-neutral” explanation for the challenge, the prosecutor stated his belief that the juror was of Asian-Indian decent and that “‘Hindus tend . . . to have feelings a good bit different from ours about all sorts of things.’”207 The prosecutor, without providing either support for this assumption or any rational relationship to the case at bar, expressed concern that the potential juror “‘may have religious beliefs that may affect his thinking.’”208 The court concluded that the prosecutor’s decision to exclude the juror, “because of uncertainty about his religious perspective . . . did not violate [the juror’s] right to equal protection.”209 The holding in Clemmons pre-dates the Supreme Court’s expansion of the Batson Doctrine beyond the context of race, which may account for the Third Circuit’s reluctance to extend Batson to the context of religion.210

Another example of lower court reluctance to expand Batson to the context of religion is People v. Malone.211 The Appellate Court of Illinois accepted, as part of a valid, race-neutral explanation to the prosecutor’s peremptory challenge of a black juror, the fact that “she read the Bible every day.”212 In support of its holding, the court noted that the prosecution also peremptorily challenged a white woman who “was near graduation from a theological seminary after which, she stated, she would be assigned as a parish minister and that her primary activities were editing the seminary’s newspaper and reading ministry-related materials.”213 While challenges motivated by a potential juror’s religious affiliations or practices may indeed be “race-neutral,” they nevertheless violate the juror’s right to equal protection. While the Malone court enforced the requirement that peremptory strikes be justified on criteria apart from race, it failed to recognize that a race-neutral strike may nevertheless violate a constitutional right of the potential juror. The Malone court’s singular focus on race-neutrality

207. Id. (quoting Appellant’s Brief app. at 57).
208. Id. (quoting Appellant’s Brief app. at 57).
209. Id. at 1157.
212. Id. at 588.
213. Id. at 589-90. Although the trial court did excuse one juror for cause, on the basis that the juror’s religious beliefs precluded him from taking any action that would inhibit another person’s freedom, there is no indication in the court’s decision that religious practice or affiliation was otherwise relevant to juror fitness to serve on the case. Id. at 588. The case involved the robbery of a bartender and owner of a bar in Chicago and did not appear to involve matters of religion. Id. at 586.
betrayed an insensitivity to the stricken jurors’ First Amendment rights.

The Fifth Circuit, in United States v. Greer,214 considered the appeal of several members of a white supremacist group convicted of various civil rights violations in connection with the group’s vandalism of a synagogue and physical attacks on blacks and hispanics who frequented a community park.215 The defendants argued that they were denied the right to a fair and impartial jury in part because the trial court refused to require Jewish jury panelists to so identify themselves.216 The Fifth Circuit rejected the defendant’s claim that they were denied the ability to use their peremptory challenges effectively in the absence of information identifying Jewish prospective jurors.217 The court, citing Supreme Court precedent, explained that it is not sufficient that a voir dire question, if asked, would be helpful to the exercise of a peremptory challenge.218 To be constitutionally required, failure to pose the question must render the defendant’s trial fundamentally unfair.219

The court recognized that requiring people to identify themselves by their religious affiliation as a precondition for jury service on a particular case creates the danger of fostering religious persecution. The court remarked: “[H]aving the judge determine which jurors are Jewish requires questions disturbingly reminiscent of those asked by the very people the [defendants] sought to celebrate in their planned re-creation of Kristallnacht.”220

While the court did not consider the First Amendment implications of the defendant’s voir dire requests, the court did note: “[E]ven if the defendants had learned which prospective jurors were Jewish, they constitutionally could not have based their peremptory challenges upon this information, for the Supreme Court has sought to eliminate racial and ethnic discrimination in the process of jury selection.”221 In upholding the trial judge’s refusal to pose questions bearing upon prospective jurors’ religious affiliations, the Greer court demonstrated a willingness to extend Batson to religion-based peremptory challenges.

214. 939 F.2d 1076 (5th Cir. 1991), cert. denied, 113 S. Ct. 1390 (1993).
215. See id. at 1082-83.
216. Id. at 1084.
217. See id. at 1085.
218. See id. (citing Mu’Min v. Virginia, 500 U.S. 415 (1991)). The court also rejected defendant’s contention that the trial court improperly denied their motion to remove all black, hispanic, and Jewish panelists for cause. Id. at 1084.
219. Id. at 1085 (citing Mu’Min, 500 U.S. at 425-26).
220. Id.
221. Id.
G. Prohibition on First Amendment-Based Peremptory Challenges: The Litigant's Right to a Fair Trial Remains Intact

A prohibition against the exercise of a peremptory challenge that conflicts with a juror's First Amendment rights will not in any way hinder a litigant's right to a fair trial. Indeed, many have agreed that the total elimination of the peremptory challenge from the American court system would promote trial fairness. Several scholars have advocated the abolition of the peremptory challenge. A complete bar would certainly avoid infringement on potential jurors' constitutional rights. The elimination of the peremptory challenge may also result in the formation of more representative juries that include a greater diversity of juror backgrounds, experiences, and perspectives. Although the elimination of the peremptory challenge merits serious consideration by policymakers charged with the responsibility of ensuring a fair, effective, and participatory judicial system, the complete abolition of peremptory challenges is not required to bring the jury selection process within constitutional parameters. This Article suggests a less extreme position which, if adopted, will result in substantial restrictions on the way in which peremptories are presently exercised but would not entirely prohibit their use.

The restrictions on peremptory challenges proposed by this Article do not disturb the litigant's ability to pursue a challenge for cause that impacts upon a juror's First Amendment rights. To the extent that a potential juror's affiliations or expression of beliefs affect the juror's ability to sit impartially on a particular case, inquiry about those affiliations and beliefs is an appropriate prerequisite of a challenge to the potential juror for cause. To insure that the voir dire inquiry does not cross constitutional boundaries, the trial court must assess the relevance of the proposed question to a challenge for cause. The nature and depth


223. Critics calling for the elimination of peremptory challenges include: Broderick, supra note 104; Felice Banker, Note, Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges from Jury Selection, 3 J.L. & Pol'y 605 (1995); and Horwitz, supra note 128.

224. See Banker, supra note 223, at 611 (arguing that peremptory challenges have led to discrimination by attorneys against "potential jurors on the basis of race, gender and other invidious grounds"); see also Broderick, supra note 104, at 422 (stating that the peremptory challenge system has led to the regular exclusion of certain classes of citizens from jury service).
of a voir dire probe to remove jurors for cause would be unaltered by the constitutional constraints on peremptory challenges.

Several courts have considered proposed voir dire questions that impact upon a potential juror’s exercise of First Amendment rights. Questions eliciting jurors’ opinions or beliefs on controversial topics must concern subjects that are “‘inextricably bound up with the conduct of the trial.’”

Courts have permitted inquiry on jurors’ political views, racial prejudices, and attitudes concerning topics such as abortion, homosexuality, and drug use, as areas which impact upon the juror’s fitness to serve on the particular trial. Courts have allowed viewpoint questioning to the extent necessary to eliminate biased jurors. For instance, in criminal cases where the prosecution has requested the death penalty, litigants may probe a juror’s views on capital punishment which affect the juror’s ability to impose a sentence of death.

A litigant’s attempt to inquire beyond the purpose of removing potential jurors for cause, however, creates a risk of infringing on the First Amendment rights of potential jurors. Without directly considering the First Amendment implications, many courts have restricted the nature

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227. See id. (citing Ham v. South Carolina, 409 U.S. 524 (1973), and United States v. Bear Runner, 502 F.2d 908 (8th Cir. 1974)).

228. See id. (citing People v. Murawski, 117 N.E.2d 88, 90 (Ill. 1954), Wasy v. State, 123 N.E.2d 462, 464 (Ind. 1955), and State v. Barnett, 445 P.2d 124, 125 (Or. 1968)).

229. See id. (citing State v. Murray, 375 So. 2d 80, 83 (La. 1979)).

230. See id. (citing State v. Conrad, 304 So. 2d 318, 319 (La. 1974)).

231. Cordero involved the criminal prosecution of a political activist arrested for disrupting Congress. The District of Columbia Court of Appeals found that the trial court improperly failed to inform potential jurors of the controversial political issues involved in the trial and improperly failed to explore whether the defendant’s political beliefs and affiliations would effect the juror’s ability to render a just verdict. See 456 A.2d at 844-45.


and depth of inquiry concerning jurors' opinions and beliefs. For example, in *United States v. Bray*, a defendant, charged with the bombing of an abortion clinic, submitted 101 proposed questions concerning potential jurors' abortion-related beliefs, activities, and personal experiences. The trial court posed several questions that determined potential jurors' inability to sit impartially on the case. Nevertheless, the defendant appealed the trial court's failure to inquire into the personal abortion-related experiences of potential jurors and their family members.

On appeal, the Fourth Circuit noted its "unequivocal approval of the district court's refusal to put the question," stating that "[p]otential jurors have rights of privacy . . . ." The *Bray* court recognized that the privacy interest of potential jurors rises above the right of a criminal defendant to obtain greater information on which to exercise peremptory challenges.

Courts must also determine the relevance of proposed voir dire questions concerning juror memberships and affiliations. In addition to assessing whether the inquiry is appropriate, courts must determine whether the potential juror's group membership affiliation warrants the jurors' removal for cause. In *United States v. Salamone*, a prosecution for the illegal possession of firearms, the Third Circuit reviewed the trial court's exclusion for cause of one potential juror and five

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233. 805 F.2d 393 (4th Cir. 1986) (table case, reported in full at 1986 WL 18037).
234. See id.
235. See id.
236. See id.
237. See id. at *4-5.
238. In addition to imposing limitations on questions that invade the personal experiences and beliefs of potential jurors, courts have rejected proposed questions that are simply duplicative. See McManus v. State, 591 S.W.2d 505, 520 (Tex. Cr. App. 1979) (en banc), overruled on other grounds by Reed v. State, 744 S.W.2d 112 (Tex. Cr. App. 1988).
239. In *Cordero v. United States*, the court noted that the defendant's proposed questions concerning the prospective jurors' membership in "veterans' organizations, 'fraternal or other' societies, lobbying groups, or anticommunist organizations . . . were too sweeping; they were not 'reasonably calculated' to discover prejudice against appellant because of his political views or associations." 456 A.2d 837, 845 n.17 (D.C. 1983); see also Dennis v. United States, 339 U.S. 162, 171-72 (1950) (rejecting the argument that employees of the federal government are inherently biased in a contempt action for failure to appear before the House Committee on Un-American Activities and should have, therefore, been excluded for cause on voir dire); Richardson v. Communications Workers of Am., 530 F.2d 126, 131 (8th Cir.), cert. denied, 429 U.S. 824 (1976) (finding no abuse of discretion by trial court in refusing to summarily disqualify all union members from the jury without some indication of bias in wrongfully discharged employee's action against unions).
240. 800 F.2d 1216 (3d Cir. 1986).
potential alternate jurors based solely upon their membership in the National Rifle Association ("NRA"). Although the court specifically did not consider the issue of the potential jurors’ First Amendment rights, which had been raised in an amicus brief filed by the NRA, the court did note its disapproval of the government’s assumption of juror prejudice on the basis of group affiliation alone. Concluding that the potential jurors’ NRA affiliation did not warrant their exclusion for cause from jury service, the court stated: “To allow trial judges and prosecutors to determine juror eligibility based solely on their perceptions of the external associations of a juror threatens the heretofore guarded right of an accused to a fair trial by an impartial jury . . .”

The relevant inquiry in assessing the constitutionality of a probe that implicates a potential juror’s association and speech rights is whether the potential juror’s affiliations or expressions of beliefs constitute cause for the juror’s exclusion from service. Under the formulation proposed by this Article, inquiry reasonably related to exclusion of a potential juror for cause may include the potential juror’s affiliations and expressions of beliefs. Because restrictions on First Amendment-based peremptory challenges do not affect a litigant’s ability to challenge potential jurors for cause, these restrictions will not impede the litigant’s pursuit of a fair trial by an impartial jury.

H. Batson’s First Amendment Expansion Furthers Its Underlying Rationale

Expanding the Batson Doctrine to prohibit peremptory challenges that implicate a prospective juror’s First Amendment rights is warranted for several reasons. First, the Batson Doctrine, viewed at its most rudimentary level, repudiates the harm engendered by discrimination against prospective jurors on the basis of their race or gender, and concludes that the harm inherent in such discrimination outweighs the benefit gained by the litigant’s unfettered exercise of peremptory challenges. The Supreme Court has emphasized the significance of a juror as an individual rather than a mere representative of a group: “‘Jury competence is an individual rather than a group or class matter. That fact

241. Id. at 1217.
242. Id. at 1225. In expressing its criticism of the prosecution, the court remarked: “The government conveniently ignores, however, the total absence on this record of any indication that the excluded jurors individually possessed such views which would rightfully justify their dismissal. Instead, the government relies on a theory of ‘implied bias’ . . .” Id.
243. Id.
lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.”

The harm resulting from discrimination against prospective jurors on the basis of their group associations and exercise of speech also outweighs the litigant’s benefit from using a peremptory challenge. This Article has already established that the peremptory challenge is not constitutionally protected, not essential to a fair trial, and that its implementation is subject to limitations. In order to complete the analysis, it is necessary to evaluate the harm caused by discrimination against prospective jurors based upon the exercise of their First Amendment rights.

As with discrimination against a juror on the basis of race, gender, or national origin, discrimination based upon the juror’s exercise of her First Amendment rights is a matter of constitutional significance. Accordingly, balancing the interest of the litigant in the free exercise of peremptory challenges against the potential juror’s First Amendment interests involves pitting a common law or statutory trial privilege against a constitutionally guaranteed right. The constitutional dimension of the discrimination makes the harm associated with the infringement more significant than any loss to the litigant caused by monitoring his use of peremptory strikes.


245. A prohibition on peremptory challenges motivated by a potential juror’s group membership also furthers the litigant’s Sixth Amendment right to a jury that represents a fair cross section of the community. The Supreme Court, in Taylor v. Louisiana, 419 U.S. 522 (1975), reversed the defendant’s conviction because the prosecution’s peremptory exclusion violated the defendant’s constitutional right to a jury compromised of a representative cross section of the community. See id. at 526-33. The underlying goal of the fair cross section standard is to bring to the deliberation process a gamut of diverse personal experiences, beliefs, and perspectives. Therefore, restricted use of peremptory challenges will contribute to a more representative jury composition. See Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries, 86 YALE L.J. 1715, 1733 (1977).

246. See supra notes 101-02 and accompanying text. It is also worthy to note that First Amendment limitations on peremptory challenges would restrict all parties to the litigation equally. The prohibition against striking a juror in a manner that implicates the juror’s First Amendment right does not, by its nature, tend to favor, for example, plaintiffs over defendants or defendants over prosecutors. Thus, this expansion of Batson does not disturb the equilibrium of the playing field.

247. See J.E.B., 114 S. Ct. at 1427-30. The harm to jurors from discriminatory challenges extends beyond the mere instance of their removal from service. As the Court states: “Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system.” Id. at 1430. The Court continues: “It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the
Abhorrence of discrimination based upon invidious stereotypes in the selection of jurors is at the core of the Batson Doctrine. The Supreme Court has expressed its concern over the stigmatizing effect of stereotyping individuals. The Court in J.E.B. stated:

The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.

The discrimination in a "pure Batson" situation involves utilizing racial, ethnic, and gender stereotyping—violative of a prospective juror’s equal protection rights—in order to make assumptions as to a prospective juror’s inclination toward a particular disposition of the case. In the First Amendment context, the discrimination involves stereotyping jurors and inferring their likely disposition of the case based upon the stereotypes derived from a juror’s speech and associations, in violation of the juror’s equal protection and First Amendment rights. While the stigma associated with a litigant’s rejection of a juror based upon a stereotype inferred from either the juror’s affiliations or expressions may be less severe to the potential juror than the stigma associated with rejection prompted by

chance to take part directly in our democracy.” Id. (citing Powers v. Ohio, 499 U.S. 400, 407 (1991)). Enabling citizens to take part in our democracy is the very goal the First Amendment was designed to foster.

See Batson v. Kentucky, 476 U.S. 79, 89 (1986). Opponents of the Batson Doctrine argue that a juror’s race and gender are factors that affect perceptions and inclinations in the adjudication of a case. See, e.g., J.E.B., 114 S. Ct. at 1434-35 (Rehnquist, C.J., dissenting) (opposing the extension of Batson to gender based strikes); Batson, 476 U.S. at 121-39 (Burger, C.J., dissenting). Nevertheless, the Court forbade litigants from using such factors in the exercise of peremptory challenges. Id. at 89.

In J.E.B., the Court reaffirmed its abhorrence of employing stereotypes as a basis for peremptory challenges, even if some degree of support for validity of the stereotype exists, stating:

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.

J.E.B., 114 S. Ct. at 1427 n.11. In its rationale, the Court emphasized the exclusion of segments of society and the resulting stigmatization that occurs when stereotypes are used as the basis of action. Even if a litigant can show some statistical justification for excluding a juror based on group affiliations or expressions of that juror, the court should nevertheless prevent the litigant from using peremptory challenges to strike the juror in order to avoid any stigmatizing effect on the rejected juror. See id. at 1427.

Id. at 1427 n.11.
 stereotyping based on immutable qualities such as race, ethnicity, or gender, the distinction lies merely in the degree of stigma produced in the “pure Batson” context as compared to the First Amendment context. All forms of court-sanctioned stereotyping have the potential to stigmatize the victim of discriminatory treatment. Because individuals are influenced by social comparison and the views that others hold of them, a stereotyped individual has a tendency to view herself through a more myopic lens and, therefore, to conform to the stereotype. 

While a citizen may experience his own participation in jury service more in terms of the personal inconvenience to his own life than for the opportunity to influence the adjudication process, the citizen may simultaneously attach great value to this nation’s jury system as an institution and recognize the collective responsibility it requires. Accordingly, the importance of non-discriminatory access to jury service transcends the desire of an individual prospective juror to participate in the judicial system. To ensure the inclusive nature of the jury selection process, courts must protect the individual rights of citizens not to be excluded from equal participation in jury service. 

Furthermore, persistent stereotyping based upon speech or association poses the danger of polarizing segments of society based upon group associations or the contradictory view to which each segment subscribes. When we stereotype individuals based upon specific instances of conduct, we form a framework containing a multitude of assumptions. The categorization of people according to these assumptions restricts the range of perceptions the “stereotyper” can form about the individual she stereotypes. To the extent that the trial court approves the exclusion of jurors on the basis of labels created by the litigant, the potential juror is told, in effect, that she does not qualify for a type of government service due to the litigant’s categorization and the accompanying assumptions which the court has accepted.

Additionally, extending Batson to the First Amendment context enables more citizens to participate in the justice system. While there


252. "Every American citizen can vote or be voted for and may be a juror." DE TOCQUEVILLE, supra note 2, at 251.

253. "The jury is both the most effective way of establishing the people’s rule and the most efficient way of teaching them how to rule." Id. at 254.
may be empirical or anecdotal evidence\textsuperscript{254} that the majority of citizens view jury service as an undesirable burden,\textsuperscript{255} there exists competing evidence, also both empirical\textsuperscript{256} and anecdotal,\textsuperscript{257} that many citizens want to be selected to adjudicate a case and may, in fact, tailor their responses to voir dire questions in an effort to please litigants, thereby increasing their chances to be selected to hear the case. Prospective jurors may even provide inaccurate answers in the hope that by doing so they will not be excused.\textsuperscript{258} Even if a substantial percent of citizens view jury service as a burden to be avoided rather than a valued privilege, the fact remains that exclusion from service may constitute an infringement of the juror’s constitutional rights and contravene the policies underlying Batson.

There is no merit to the argument that exclusion from jury service, or from any form of participation in government, is acceptable simply because the citizen finds the service burdensome or bothersome. Jury service, similar to other forms of government participation, is a right,\textsuperscript{259} as well as an obligation.\textsuperscript{260} The protection against constitutional infringement in the exercise of the privileges of citizenship is not diminished by a citizen’s lack of appreciation for those privileges.\textsuperscript{261} The unfortunate reality may indeed be that the majority of citizens do not

\textsuperscript{254} See Andrea Gerlin, \textit{Jury-Duty Scofflaws Try Patience of Courts}, WALL ST. J., Aug. 9, 1995, at B1, B1 ("In Los Angeles County, the percentage of jurors not responding to jury-duty notices rose to about 48% last year from 36% two years earlier.").

\textsuperscript{255} The disaffection with jury service is likely attributable, in large part, to the disruption it brings to the juror’s daily routine. To the extent that a juror is excluded from a particular case, she is, nevertheless, required to continue to report to the courthouse and be available to serve on other cases. Thus, a prospective juror may prefer to be selected to try the case over exclusion. See Edward Rafeedie, \textit{The Conduct of Trials, a Neglected Area of Judicial Reform}, 23 SW. U. L. REV. 205, 208 (1994) (explaining that "[w]hat jurors dread most about jury service is the prospect of sitting around waiting").


\textsuperscript{257} Id. Citizens concerned about their right to serve as jurors have formed the organization, We the Jury, devoted to the protection and promotion of the right. We the Jury publishes a monthly newspaper which includes articles advising citizens how they can minimize the risk of being challenged from jury service by attorneys.

\textsuperscript{258} Id.


\textsuperscript{260} See supra note 15 and accompanying text.

\textsuperscript{261} For instance, many citizens view the right to vote, not as a precious right to be treasured, but as a burdensome obligation that they prefer not to exercise. The right to vote is nevertheless afforded constitutional protection. Reynolds v. Sims, 377 U.S. 533, 554-56 (1964) (citing to the line of cases establishing the right to vote as constitutional).
hold in proper regard the privilege of participation in our system of justice.\(^{262}\) Even if this is an accurate assessment, it does not diminish the constitutional protection afforded the right to such participation.

Furthermore, even if it frees the individual from an unwanted obligation, rejection may nevertheless be psychologically stigmatizing. A juror excluded from sitting on a particular case on the basis of race, gender, or ethnicity may simultaneously feel relieved of an obligation and harmed by the invidious discrimination. Similarly, a juror struck from service as a consequence of exercising her First Amendment rights may feel simultaneously relieved of an obligation and offended by the preclusion. Institutionalized invidious discrimination offends the nation's citizenry and undermines the credibility of the nation's jury system.\(^{263}\)

Moreover, the argument that exclusion from jury service may be viewed as a blessing rather than a curse has equal application to a "pure Batson" situation.\(^{264}\) One can argue that a prospective juror excluded from jury service on the basis of race or gender, may ultimately be pleased by the exclusion. The relief felt by a dismissed juror would not, of course, justify the discriminatory challenge. The exclusion is a violation of the juror's Fourteenth Amendment right to equal protection of the laws regardless of her desire to serve on that jury.\(^{265}\)

A prohibition on the exercise of peremptory challenges arising from the prospective juror's speech and association practices reduces the potential for stigmatizing jurors and chilling the exercise of such rights, and thereby minimizes the risk of undermining the value we attach to the First Amendment freedoms. Opponents of Batson's expansion into the realm of the First Amendment may contend that any chilling effect on

\(^{262}\) See supra notes 254-58 and accompanying text.

\(^{263}\) As indicated above, while this Article does not seek to equate the magnitude of the stigma associated with rejection from jury service on the basis of one's exercise of First Amendment rights to speech or association with the magnitude of the stigma associated with exclusion from jury service on the basis of immutable qualities such as race, ethnicity, or gender, the distinction between the stigmas is merely one of degree.

\(^{264}\) The argument could also be made with regard to the categorical exclusion of persons from the panel of eligible jurors on the basis of their race, gender, or ethnicity.

\(^{265}\) Just as a litigant may object to a peremptory strike which is improperly based upon the juror's race or gender via third-party standing, see Powers v. Ohio, 499 U.S. 400, 415 (1991), a litigant may similarly oppose a peremptory strike that violates a juror's First Amendment right. An expressly stated wish of a juror to pursue the protection of that right is not a prerequisite for a grant of third-party standing. Affording the litigant standing to assert the First Amendment right of a potential juror is consistent with Batson and the doctrine of third-party standing generally. Accordingly, proof that the excused juror approves the litigant's pursuit of the juror's First Amendment right is unnecessary.
a juror’s exercise of her speech or association rights produced by exclusion from jury service is likely to be minimal at best. It may be accurate to assume that denial of the right to serve on a jury will not deter, to any great extent, a potential juror from associating or speaking freely. Nevertheless, any measure of inhibition by a potential juror to exercise her First Amendment rights is significant.

In addition to comporting with the language and logic of the Batson Doctrine, requiring peremptory challenges to be speech and association neutral recognizes the importance of a citizen’s First Amendment rights. Those who would bemoan the demise of the peremptory challenge by an expansion of Batson into the realm of the First Amendment fail to appreciate the high cost of government-sanctioned discrimination against individuals in the exercise of their constitutional rights. It is from this perspective—recognizing the constitutional significance of speech and association rights—that the limitations on peremptory challenges must be viewed.

While a lengthy dissertation expounding upon the precious nature of the First Amendment rights to speak and to associate freely is beyond the scope of this Article,266 it is important to state that the litigant’s interest in unfettered peremptory challenges is pitted against a constitutional value that has often been credited as the most central ingredient of this country’s social and political freedom.267 Legal and political scholars, as well as philosophers and poets, have extolled the virtues of the First Amendment’s protection since it was first penned.268 To

266. See generally Daniel A. Farber & Philip P. Frickey, Practical Reason and the First Amendment, 34 UCLA L. REV. 1615, 1640 (1987) (stating that free speech, democracy, and self-realization are all connected in “a web of mutually reinforcing values”); Stanley Ingber, Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts, 69 TEX. L. REV. 1, 43 (1990) (noting that some may argue that free speech “cultivate[s] individual habits of the mind, . . . nurture[s] intellectual values[, and] promote[s] the democratic personality”).


268. William Douglas eloquently expressed his appreciation of the First Amendment:

In the oscillating movement of the planets man is a tiny speck—a microcosm. We seek truth, and in that search, a medley of voices is essential. That is why the First Amendment is our most precious inheritance. It gives equal time to my opponents, as it gives to me.

I hope it is always that way in this great land, which, in spite of its shortcomings, is still the hope of mankind across the globe.
permit the peremptory challenge, which is neither constitutionally protected nor necessary for a fair trial, to take precedence over First Amendment guarantees, emasculates and degrades this precious constitutional right and undermines the principles and policies that it promotes.

The First Amendment nurtures our citizenry with the free flow of ideas and the ability to form, maintain, and share convictions. A political structure that provides its members an opportunity to associate and express thoughts freely breeds a more dynamic, creative, and satisfied society. Restraints on this freedom inhibit the individual’s, as well as society’s, potential for growth.

Our First Amendment guarantees, so tightly woven into our political fabric, are not without costs. Protecting the sanctity of ideas and our ability to engage in their exchange includes, by its very nature, protection of unpopular ideas.\textsuperscript{269} There are instances in which the pursuit of a conflicting interest or freedom may legally succumb to the protection of a First Amendment interest. It is the clash of opposing interests that tests our commitment to the First Amendment values.

\textit{I. The Practical Implications of Batson’s Expansion}

Under this Article’s proposed expansion of \textit{Batson}, a First Amendment-based objection to a peremptory challenge would be raised and resolved in much the same manner as traditional \textit{Batson} challenges. The opponent of the challenge must establish a prima facie case that the strike was motivated by either the potential juror’s group associations or expressions\textsuperscript{270} that are unrelated to cause. A court evaluating whether the litigant has met the evidentiary threshold will consider all of the facts and circumstances surrounding the challenge, including: the nature of the juror’s First Amendment exercise; common stereotypes associated with such exercise; characteristics of other potential jurors who were excluded from the panel by the litigant; and characteristics of other potential jurors

\begin{itemize}
  \item [\textsuperscript{269}] See \textit{e.g.}, Texas v. Johnson, 491 U.S. 397, 417 (1989) (holding that desecration of the American flag is afforded First Amendment protection).
  \item [\textsuperscript{270}] A litigant could also establish a prima facie case of First Amendment discrimination to a peremptory challenge based upon the juror’s religious affiliation or practices. Religion-based peremptory challenges are not, however, the focus of this Article.
\end{itemize}
whom the litigant opted to retain on the jury panel.

If the opponent of a challenge establishes a prima facie case of First Amendment discrimination, the burden shifts to the proponent to set forth a "First Amendment-neutral" basis for the challenge. If the proponent justifies the challenge on grounds unrelated to the juror's First Amendment-protected activities, a court should uphold the challenge. If however, the challenger is unable to provide a satisfactory, non-pretextual explanation that does not implicate the juror's constitutional rights, the challenge should be disallowed under the Batson Doctrine.

A court's evaluation of the merits in a "pure" Batson challenge is fact-sensitive. The court must determine the motivation underlying an individual litigant's actions and the candor of the explanation the litigant offers. The same fact-sensitive inquiry applies to a First Amendment Batson challenge.

A comparison of characteristics shared by those jurors who have been previously struck and jurors whom the litigant has sought to retain can inform the court as to the sincerity of the litigant's explanation and whether the court is assessing the explanation for its race, gender, or First Amendment neutrality. If, for example, in connection with the challenge of a black juror, the proponent of the challenge attributes the strike to the juror's status as a business owner, the litigant's failure to challenge a white business owner would be instructive in evaluating the role of the juror's race in the litigant's decision to challenge. Similarly, if the same juror had indicated membership in M.A.D.D. and the litigant maintained that the impetus for the strike was the juror's status as a business owner, rather than her group affiliation, the litigant's failure to challenge business owners who are not affiliated with M.A.D.D. would undermine the credibility of the neutral explanation.

While a trial court would employ the same principles to determine a "pure" Batson challenge and a First Amendment-based Batson challenge, evaluating the constitutionality of a particular peremptory challenge may be more difficult in the context of the First Amendment than in the racial, gender or ethnicity contexts. Immutable characteristics of potential jurors are generally readily apparent. A court can, for example, calculate the number of black or female jurors a particular litigant has excluded to reach the conclusion that either race or gender is

271. But see United States v. Clemmons, 892 F.2d 1153, 1156 (3d Cir. 1989), cert. denied, 496 U.S. 927 (1990) (explaining that the race of a potential juror was not apparent to the litigant). In our multi-cultural "melting pot," racial ambiguity is not uncommon.
a predominant factor in the litigant’s pattern of exercising challenges. On
the other hand, it may be difficult for a court to draw an inference from
parallels between multiple challenges that implicate the First Amendment
rights of jurors.

Close scrutiny of a litigant’s pattern of exercising peremptory
challenges may, however, reveal First Amendment-related motivation. In
the example of the juror affiliated with M.A.D.D., if the litigant who
exercised the challenge did not challenge another otherwise similarly
posed potential juror who engaged in a different First Amendment
activity, such as membership in the Boy Scouts of America, the court
could determine that the juror was struck because of her M.A.D.D.
membership.

An additional complication in applying Batson to First Amendment-
related peremptory challenges arises because the evaluation of a potential
juror’s race is factual, whereas an evaluation of a potential juror’s First
Amendment exercise may require legal determinations. For example, it
may become necessary for the trial court to determine whether a juror
who is wearing a tee shirt sporting the slogan “No Nukes” is engaged in
speech-related conduct. Accordingly, a trial court may be required to
apply the legal principles attendant to the First Amendment in order to
assess the constitutional propriety of a particular peremptory challenge.
The fact that compliance with a constitutional mandate requires the court
to engage in complex and possibly time-consuming legal thought is not
an acceptable argument for abandoning a constitutional mandate.
Although an added layer of legal analysis imposes an additional burden
upon the trial court, the imposition is necessary to ensure that peremptory
challenges are exercised within constitutional parameters.

The restrictions that this Article suggests would in no way impact
the litigant’s ability to exercise a challenge for cause that implicated the
challenged juror’s First Amendment rights. A litigant who can establish
that a juror’s affiliation with a particular association prevents the juror
from rendering a fair and impartial verdict, can eliminate the juror for
cause. In the latter circumstance, the juror’s First Amendment right may
be compromised in order to ensure the litigant’s constitutional right to a
fair trial. Accordingly, questions concerning a juror’s expression, group
associations, or religious affiliation are appropriate to the extent that

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272. See Cohen v. California, 403 U.S. 15, 18 (1971) (holding that a defendant wearing a jacket
bearing offensive language was exercising his First Amendment right of speech).
eliciting such information is necessary for the litigant to challenge the juror for cause.273

V. CONCLUSION

In 1985, Batson v. Kentucky provided the basis for a new doctrine prohibiting peremptory challenges motivated by invidious discrimination against a prospective juror. In its current application, the Batson Doctrine protects a prospective juror’s equal protection right against racial, ethnic, and gender discrimination. Expanding the Batson Doctrine to provide equal protection to a prospective juror’s rights to associate and speak freely is warranted under the broad language, doctrinal framework, and rationale of Batson. The peremptory challenge is a mere privilege and not a constitutionally protected right. Courts must prevent a litigant from abusing the privilege by discriminating against a prospective juror on the basis of the juror’s affiliations or expressions of speech. The First Amendment should not bend to accommodate the peremptory challenge. The Constitution is the foremost body of law governing our nation. It is offensive to the Constitution to allow litigants to discriminate against potential jurors based upon their associations and speech. Until courts prohibit association and speech-based peremptory challenges, the First Amendment will be impermissibly subordinated to the peremptory challenge privilege. While litigants may desire control in constructing the entity that renders judgement on the case, accommodating litigants at the expense of the First Amendment carries too steep a price.

273. See United States v. Salamone, 800 F.2d 1216 (3d Cir. 1986). In Salamone, an unlawful firearm possession prosecution, jurors were improperly excluded for cause based solely upon NRA membership. See id. at 1229. Although the court specifically declined to address the First Amendment issue raised in an amicus brief filed by the NRA, the court noted the offensive nature of bias based upon stereotypical assumptions related to a juror’s affiliations. See id. at 1224-27.