

Peremptory Challenges to Jurors Based Upon or Affecting Religion

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In recent years the Supreme Court has held that peremptory challenges based upon race¹ or sex,² and possibly ethnicity,³ violate the Equal Protection Clause.⁴ The Court has yet to decide whether religion-related peremptories also are invalid, although a number of lower courts have struggled with the question and reached conflicting conclusions.⁵ Sooner or later the Court will have to deal with the question, and in doing so it will discover that its task is more difficult

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¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

² *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

³ *Hernandez v. New York*, 500 U.S. 352 (1991); *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000) (citing *Hernandez* as involving “ethnic origin”). *But see J.E.B.*, 511 U.S. at 143 n.16 (suggesting *Hernandez* concerned race). *See also Rico v. Leftridge-Byrd*, 340 F.3d 178, 182-84 (3d Cir. 2003) (holding that it was not objectively unreasonable to apply *Batson* to peremptory strikes of Italian-Americans, but affirming the Pennsylvania Supreme Court’s finding that the prosecutor’s strikes were not motivated solely by prospective jurors’ Italian-American heritage); *cf. Purkett v. Elem*, 514 U.S. 765, 769 (1995) (implying alterable physical characteristic—in this case long, unkempt hair and beard, suggesting lifestyle—was not a forbidden basis for peremptory challenge).

⁴ U.S. CONST. amend. XIV.

⁵ A number of courts have held that peremptories based on religion do not violate the Constitution. *See, e.g., State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 511 U.S. 1115 (1994) (allowing a peremptory challenge based on juror’s being Jehovah’s Witness and going to church three times a week, and prosecutor’s experience that Jehovah’s Witnesses were reluctant to exercise authority over others); *Casarez v. State*, 913 S.W.2d 468, 492 (Tex. Crim. App. 1995) (en banc) (holding that peremptory challenges based on jurors’ being members of Pentecostal Church did not violate the Constitution).

Other courts have held that peremptories based on religion do violate the Constitution. *See, e.g., State v. Hodge*, 726 A.2d 531, 550-56 (Conn.), *cert. denied*, 528 U.S. 969 (1999) (holding that peremptories based on “religious affiliation” violate Equal Protection Clause, but noting that the challenge in question had a different basis).

For citations to numerous other decisions on religion-related peremptories, see Suzanne Bell Chambers, *Applying the Break: Religion and the Peremptory Challenge*, 70 IND. L.J. 569, 585 n.122 (1995); and Susan Hightower, Note, *Sex and the Peremptory Strike: An Empirical Analysis of J.E.B. v. Alabama’s First Five Years*, 52 STAN. L. REV. 895, 901-03 (2000).

than in cases involving race and sex, for in addition to applying equal protection doctrine and the “impartial jury” guarantee of the Sixth Amendment,⁶ it will have to take into account the Religion Clauses of the First Amendment.⁷

I. JURY SELECTION AND PEREMPTORY CHALLENGES GENERALLY

In order to evaluate the arguments for and against the constitutionality of peremptory challenges relating to religion, it is necessary first briefly to survey generally the subject of jury selection, including the principles that govern the formation of the venire and challenges for cause, as well as peremptory challenges. Only with this wide focus will it be possible to appreciate the special questions presented by the application of the Religion Clauses to the use of peremptory challenges.

If trial by jury is employed in the prosecution of crime, which constitutionally it must be if the prosecution is for more than a petty offense,⁸ the jury must be randomly selected from a venire that is a fair cross-section of the population. The requirement that the venire be a fair cross-section is found in the Sixth Amendment’s provision that a criminal defendant is entitled to trial by an “impartial jury.”⁹ The Supreme Court has said that “jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.”¹⁰ It may not matter for present purposes whether the Court means to lay down an absolute right to a fair cross-section in each and every venire, or only that a departure from the fair cross-section must not be intentional.¹¹

⁶ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

⁷ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

⁸ *Lewis v. United States*, 518 U.S. 322, 325 (1996) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

⁹ The present discussion is confined to criminal cases, and therefore I refer only to the Sixth Amendment. The Seventh Amendment also provides for “the right of trial by jury,” U.S. CONST. amend. VII, but this requirement has not been applied to the states. See *Alexander v. Virginia*, 413 U.S. 836 (1973). Article III, § 2, cl. 3 of the original Constitution requires that in federal courts “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .” U.S. CONST. art. III, § 2, cl. 3.

¹⁰ *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); see also *Duren v. Missouri*, 439 U.S. 357, 366 (1979).

¹¹ 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, 184-85 (1989) (examining the difference between “systematic” and “purposeful” exclusion); Joanna Sobol, Note, *Hardship Excuses and Occupational Exemptions: The Impairment of the “Fair*

What makes a venire a fair cross-section for Sixth Amendment purposes is that it be composed of representatives of “cognizable groups” in numbers proportional to their numbers in the population. “Cognizable groups” are groups that have shared beliefs about the way the world works—beliefs about facts—or shared beliefs about how the world ought to work—beliefs about the good or values. In addition, for a group to be “cognizable” for Sixth Amendment purposes, it must be of a certain size.¹² In regard to factual beliefs, if the group that holds these beliefs is very small, the beliefs, if they are to affect the outcome of litigation, must be introduced through the formal trial process of sworn and cross-examined witnesses, authenticated documents and so on, and not through the informal process of “jury notice,” i.e., the jurors simply taking into account what they think they already know. The requirement that a group be of a certain size to be cognizable is based upon the need of fair notice to the parties of the basis upon which the verdict will rest, and reflects the weakness of the political claims of small groups in the society, under the fundamental constitutional philosophy, to have their beliefs automatically taken into account.¹³ In regard to beliefs about the good, it may be that there is no way for a small group to influence the outcomes of a jury system. A small belief group is not a “cognizable group,” entitled to representation on the venire with a consequent chance to be included in the petty jury, and so to influence the verdict through the informal process, nor is it entitled to put its beliefs about the good before the jury through the formal process. The jury generally will receive the law from the judge, a law that usually will reflect the values of large or at least mid-size groups in the population, whether it has been enacted by the legislature or created by the courts. In the limited instances in which the jury is given the task of deciding what is good and not simply what occurred—e.g., whether conduct was negligent, or in certain criminal cases, what the punishment should be—evidence ordinarily will not be received on questions of value. If small belief groups, so far as values are concerned, are to affect the outcomes of cases tried to juries, they must become large groups, so that they can influence the content of the law enacted by the legislature or announced by the judges, or so that they can be recognized as “cognizable groups” entitled to representation on venires with a chance for their members

Cross-Section of the Community”, 69 S. CAL. L. REV. 155, 195-96 (1995) (discussing “systematic exclusion”).

¹² See *J.E.B.*, 511 U.S. at 134 (requiring “identifiable segments playing major roles in the community”); *Taylor*, 419 U.S. at 530.

¹³ See John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395, 399-401 (1985).

to be on petty juries.

Challenges “for cause” assure that there are not on the petty jury representatives of groups that are noncognizable in regard either to facts or to values, or at least that there are not on the jury representatives of such groups who present more than a certain risk that they will resort to impermissible beliefs. Challenges for cause may be seen as not in conflict with the fair cross-section requirement of the Sixth Amendment, but a means for enforcing it, at least assuming a certain standard for “cause.” Thus, to say that a defendant has a right to a petty jury that is randomly drawn from a fair cross-section of the population, properly understood, means that the petty jury is randomly drawn from a fair cross-section of cognizable groups, that is to say from the qualified population. “Cognizable groups” does not include small belief groups, persons under a certain age, or persons who lack a certain physical and intellectual capacity. It does not matter whether the unqualified are excluded at the threshold of the selection process, at a later stage, or when the petty jury is finally chosen from the venire. The method that is used may affect whether a particular individual sits on a jury, but it will not affect the representation of cognizable groups.

The foregoing analysis sees the Sixth Amendment’s “impartial jury” guarantee as containing a single requirement of random selection from a fair cross-section of cognizable groups, so that challenges for cause simply enforce that single requirement. An alternative view is that the requirement of an “impartial jury” contains two norms, the first being the requirement of random selection from a fair cross-section, the second, that no one sit on a petty jury whose presence creates a significant risk that the verdict will depend upon a belief not held by a cognizable group. Under the second approach, challenges for cause are to enforce the second norm contained within the requirement of an impartial jury.¹⁴

The notion of excluding a person for cause because of a risk of juror “misconduct” does not state a different idea. The misconduct in question may be the employment of beliefs, whether about facts or values, that are not permitted to be used by jurors because of the decision just referred to, which restricts the use of background knowledge to that possessed by cognizable groups. In order to justify exclusion for cause, it need not be certain that a prospective juror will employ prohibited beliefs; there need only be a certain likelihood that this will occur. It is the law of challenges for cause

¹⁴ See *Morgan v. Illinois*, 504 U.S. 719, 728-36 (1992) (holding that the Sixth Amendment and due process may require a juror to be removed for cause).

that determines what risk requires exclusion. At the same time, a party may be injured by an incorrect exclusion, because it will deprive him of a juror who was randomly selected from a fair cross-section of the population and who might well have limited himself to permissible background beliefs.

As already noted, in addition to the ordinary law of cause, there is a constitutional standard in the "impartial jury" requirement of the Sixth Amendment against which dismissals of jurors in criminal cases must be measured. In a line of cases involving the jury's role in deciding whether capital punishment should be applied, the Supreme Court has held that although it is proper to dismiss from the jury persons whose opposition to capital punishment would substantially impair their ability to apply the law and weigh the evidence, it violates the Sixth Amendment and possibly the Due Process Clause to sustain challenges against persons who merely harbor doubts about capital punishment. To exclude these persons when there is only some risk that they will allow themselves to be governed by impermissible views, violates the defendant's right to the results of random selection from a representative cross-section of cognizable groups.¹⁵

An unanswered question relevant to this discussion is the status of per se rules adopted by legislatures or courts to exclude for cause all those who have a certain characteristic.¹⁶ For example, drawing upon a recent case against tobacco companies that involved questions of both liability and damages,¹⁷ suppose the court excluded from the jury all those who belonged to the immediate family of a smoker who was a member of the class of plaintiffs that sought recovery, or all those who had a certain relationship by blood or marriage to such a smoker.¹⁸ By way of further example, in a prosecution in 1950 of the Secretary of the American Communist Party for contempt of Congress, the defendant at trial sought to have excluded for cause all federal employees.¹⁹ Since the prosecution was in the District of Columbia, this would have included a substantial percentage of the

¹⁵ *Buchanan v. Kentucky*, 483 U.S. 402, 414-16 (1987); *Lockhart v. McCree*, 476 U.S. 162 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Lockett v. Ohio*, 438 U.S. 586, 595-97 (1978); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

¹⁶ See Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 549 n.16 (1975) (quoting *Hopt v. Utah*, 120 U.S. 430, 433 (1887) (detailing typical reasons for exclusion for cause)).

¹⁷ *Scott v. Am. Tobacco Co.*, 814 So. 2d 544 (La. 2002).

¹⁸ In *Scott*, the court found error in the trial court's refusal to exclude certain family members for cause, but not in its refusal to exclude others. *Id.*

¹⁹ *Dennis v. United States*, 339 U.S. 162, 164-65 (1950).

population. On appeal, the defendant called to the Supreme Court's attention an Executive Order requiring that the loyalty of all government employees be assured by their superiors. The Court held, nevertheless, that the Sixth Amendment's provision for an impartial jury did not require the exclusion of this class of persons.²⁰ The alternative to a per se rule is to consider all the information available about a prospective juror and then to apply a burden of proof rule relating to the risk of misconduct. Such a rule would embody a judgment about how bad it is for a juror to use impermissible beliefs compared to how bad it is to prevent the use of permissible beliefs. Thus, a per se rule might reflect a legislature's or court's decision not to leave it to individual judges to make particularized determinations on this matter. A defendant may complain that the ordinary law of cause or the Sixth Amendment entitle him to just such a particularized judgment, or he may claim the opposite, that they entitle him to the application of a per se rule to keep off the jury all persons who have a certain characteristic that creates a certain risk of misconduct.²¹

Here we may speak of another aspect of jury selection that has perplexed some courts.²² In view of the concern that the venire be a fair cross-section of the population, presumably because of the consequences for the composition of the petty jury, why is not the petty jury itself required to be a fair cross-section? In a recent case involving a violent conflict between elements of the Jewish and Black communities in Brooklyn, the trial judge attempted to create a petty jury that would represent the affected groups.²³ His efforts were repudiated by the court of appeals.²⁴ We have just seen that there is concern with the composition of the petty jury in that persons who are members of noncognizable groups and who pose a certain risk of misconduct may or must be excluded for cause. But keeping such persons off the jury is quite different from making sure that there are on the jury representatives of all the groups whose beliefs may

²⁰ *Id.* at 172; *see also* *United States v. Greer*, 968 F.2d 433, 434 (5th Cir. 1992) (en banc) (in prosecution for conspiracy to deprive Blacks, Hispanics, and Jews of constitutional rights, holding that it was not error to refuse to strike for cause all Blacks, Hispanics, and Jews); *Coleman v. United States*, 379 A.2d 951, 953-54 (D.C. 1977) (in prosecution for holdup of priests in Catholic rectory, holding that it was not error to refuse to exclude for cause all Catholics).

²¹ *See* *United States v. Ferri*, 778 F.3d 985, 992-93 (3d Cir. 1985) (discussing "implied bias").

²² *See, e.g.*, *State v. Gilmore*, 511 A.2d 1150, 1160 (N.J. 1986).

²³ *United States v. Nelson*, 277 F.3d 164, 172 (2d Cir.), *cert. denied*, 537 U.S. 835 (2002).

²⁴ *Id.* at 213.

properly influence verdicts and in proportions that reflect their size in the population. Since the jury is limited to twelve persons, in order to comply with the suggested standard, only the very largest cognizable groups could be represented on the petty jury. Excluded would be not only small groups whose beliefs ought not to affect verdicts through “jury notice,” but even mid-size groups as well, against the use of whose beliefs by way of jury notice there cannot be a valid objection on the basis of lack of fair notice to the parties or of entitlement under the basic political philosophy. Under the prevailing system, although it may turn out that there are in fact no representatives of some or any mid-size belief groups on a particular jury, such groups do have a chance to have representation on petty juries, because selection is at random from a large venire that is a fair cross-section of all large and mid-size groups. Complete exclusion of mid-size groups from petty juries would have a significant effect on verdicts and also on the excluded groups. As will be appreciated, the policy underlying jury trial has something in common with proportional representation.

Returning to challenges for cause and their relation to a party’s right to random selection from a venire that is a fair cross-section of cognizable groups, it is necessary to distinguish between exclusion from the jury for reasons intrinsic to its proper functioning—for instance that there is a certain risk of juror misconduct—and exclusion for extrinsic policy reasons. In the latter category would be rules of disqualification of those who hold certain public offices or who perform functions deemed essential to the community, such as police or members of the Armed Forces.²⁵ In the case of extrinsic policy, exclusion is not for the sake of the jury system, but to protect another important activity, either because the excluded class must be available for that activity or because engaging in jury service will in some way render the members of the class less effective in the performance of the other activity. The extrinsic policy may be deemed adequately served not by a flat exclusion, but by making available to the persons in the class concerned an excuse from jury service, leaving it to individuals to decide whether their other obligation would be compromised.²⁶

In the case of some exclusions, both intrinsic and extrinsic objectives are served: If persons in the excluded class served as jurors,

²⁵ See *Taylor*, 419 U.S. at 532-35; *Rawlins v. Georgia*, 201 U.S. 638, 640 (1906) (stating that “for the good of the community . . . their regular work should not be interrupted”).

²⁶ See *Duren*, 439 U.S. at 362 n.10, 367-69.

they might not be effective jurors because of their concern about their other responsibilities. The excluded or excused group may or may not be a cognizable group for fair cross-section purposes. It may be a group for purposes of the extrinsic policy—e.g., doctors or parents of young children—but not so far as concerns distinctive beliefs about the world or values. Or perhaps although the group may have distinctive beliefs, it may not be large enough to be cognizable.²⁷

Taylor v. Louisiana,²⁸ a case that involved a state law that excluded women from jury service unless they had filed a consent to be subject to it, combined all the aforementioned characteristics. Women, the Supreme Court held, were a cognizable group for Sixth Amendment purposes because, speaking generally, they had different factual beliefs and values than men and constituted over half the population. Allowing them to be excluded meant that venires would not be a fair cross-section of the population of cognizable groups for Sixth Amendment purposes. The state law excluding women could have served the extrinsic policy of encouraging women to devote themselves to their traditional functions in the domestic sphere and to stay out of a contentious public arena, but the Supreme Court refused to accept this policy as having sufficient importance to outweigh the fair cross-section value. Excluding women could have been for intrinsic reasons as well—women, it might have been thought, generally do not have the attributes necessary to be effective jurors—but if this was a reason for the state law, the Supreme Court either rejected its factual premise or, as in the case of the extrinsic policy, found it insufficient to justify depriving the defendant of a venire that was a fair cross-section. As will be seen below, the Court's insistence that women are a cognizable group with distinctive beliefs is in conflict with the reasoning, shortly to be discussed, that the Court uses to support its conclusion that the Equal Protection Clause is violated by the use of a peremptory challenge to a juror based on sex.²⁹

A case to be discussed later, *McDaniel v. Paty*,³⁰ involving the exclusion of ministers of religion from the legislature, resembles *Taylor* in its structure, with both intrinsic and extrinsic policies to be considered, but implicates not only the Religion Clauses of the First

²⁷ For an indication of the importance of size, see *id.* at 369-70, and *Taylor*, 419 U.S. at 531.

²⁸ 419 U.S. 522 (1975).

²⁹ See *J.E.B.*, 511 U.S. at 157 (Scalia, J., dissenting); *infra* note 48 and accompanying text.

³⁰ 435 U.S. 618 (1978); see *infra* note 125.

Amendment, but also the Sixth Amendment and the Equal Protection Clause.

To the foregoing discussion of jury selection, especially the Sixth Amendment requirement of a fair cross-section of the population and challenges for cause, must now be added considerations flowing from the Equal Protection Clause, especially its policy of special protection for suspect classes, groups in regard to which there has been a history of invidious discrimination. Invidiousness may involve elements of hatred, repugnance, fear, or inferiority. As a result of these feelings, and perhaps because of its size, the suspect class may be relatively powerless to protect itself through the ordinary political process. A group cognizable for Sixth Amendment purposes, constituted as such by its distinctive beliefs and size, may have no claim to be a specially protected class for equal protection purposes. A Sixth Amendment cognizable group may not be subject to invidious discrimination, and a specially protected group for equal protection purposes may have no distinctive beliefs or be too small to constitute a Sixth Amendment cognizable group. The two ideas are constructed for entirely different purposes. On the other hand, these two sorts of groups may coincide: An ethnic or national-origin or racial group—or a religious group—may be both a cognizable belief group and, perhaps in part because of its distinctive beliefs, subject to invidious discrimination and so a suspect class.³¹

There may be a conflict between the policy of the Sixth Amendment and that of the Equal Protection Clause. Suppose a prospective juror is a member of a distinctive belief group, but it is not a cognizable group because in the jurisdiction in which the court sits, the group—assume it is a racial-ethnic group like the Hmong from Southeast Asia—is not large enough. Because there is a certain risk of juror misconduct in the form of a member of the group employing knowledge as a juror that ought only to influence the verdict if introduced through the formal process, a challenge for cause is made. Assume that if only the Sixth Amendment is taken into account—the risk of misconduct—the challenge would be sustained. This ruling would enforce only the fair cross-section policy. But suppose the racial-ethnic group to which the prospective juror belongs is also a suspect class subject to invidious discrimination. In some cases perhaps it can be argued that exclusion of the juror will not violate the Equal Protection Clause because if the probability of misconduct is high enough to warrant

³¹ See *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977) (holding that Mexican-Americans are a “distinct class” for equal protection purposes).

exclusion for cause, there will be no invidiousness implied by exclusion. But if the challenge for cause is rejected because of injurious consequences to the excluded juror and his group, or because of some supposed injury to the trial process itself or to the judicial system as a consequence of exclusion, then the policy of the Sixth Amendment would be subordinated to that of the Equal Protection Clause.

Another case can be imagined. Suppose an accused is prosecuted for the murder of a Korean grocer and in the course of jury selection seeks to exclude all Koreans for cause. Possibly Koreans would be a distinctive belief group for Sixth Amendment purposes, possessing attitudes and ideas different from other racial-ethnic groups, but they are not numerous enough in the jurisdiction to qualify for Sixth Amendment purposes. Defendant claims that there is a serious risk that Korean jurors will use their distinctive but impermissible background beliefs, and that because of this risk, his Sixth Amendment right to an impartial jury would be violated by allowing them to serve. He also claims that because of their identification with the victim, there is an additional risk that Korean jurors will ignore the law and the evidence in determining their verdict. Koreans may also be a specially protected class for purposes of the Equal Protection Clause. This is not necessarily because of their distinctive beliefs nor because of their size, but because they have been subjected to invidious discrimination. If, as in the case of the Hmong, a challenge for cause is rejected, this represents a determination that the evil of reinforcing invidious discrimination outweighs the defendant's interests under the Sixth Amendment.³²

If we return to the *Taylor* case, discussed above,³³ this time taking into account the Equal Protection Clause, we can see that the result in that case—striking down the exemption of women—did not sacrifice the Sixth Amendment to the Equal Protection Clause, nor the reverse. The decision upheld both: it avoided any invidiousness that the absence of women on the venire and the petty jury might have implied, and it assured to defendant the result of random selection from a cross-section to which he was entitled under the

³² An example of equal protection concerns being held to outweigh the interests of the parties or Sixth Amendment rights may be found in cases rejecting challenges for cause to deaf jurors, and even peremptory challenges, though here the "misconduct" of which there is a risk is not the application of impermissible beliefs, but the inability to perceive evidence. *People v. Guzman*, 555 N.E.2d 259 (N.Y. 1990) (challenge for cause); *People v. Green*, 561 N.Y.S.2d 130 (Westchester County Ct. 1990) (peremptory).

³³ See *supra* notes 28-29 and accompanying text.

Sixth Amendment. The only policy rejected, at least when given such broad protection as the exemption made available to all women, was the extrinsic policy that excluded women in order to protect their traditional role. Of course it must be kept in mind that the fact that the Sixth Amendment and the Equal Protection Clause call for the same result is purely coincidental, because they proceed on different rationales. Indeed, the rationale that was to the fore in *Taylor*—that women have distinctive beliefs—is, as we will see, largely repudiated in the later case of *J.E.B v. Alabama ex rel. T.B.*,³⁴ involving peremptory challenges and the Equal Protection Clause.

In the case of Blacks also, there ordinarily will not be a conflict between the Sixth Amendment and the Equal Protection Clause. Would Blacks be a cognizable group for Sixth Amendment purposes? Even if Blacks are sufficiently numerous, the Supreme Court would be most reluctant to ascribe to them distinctive beliefs and values, because this would openly collide with the attitudes it seeks to promote in its equal protection jurisprudence. Thus there is no equivalent to the *Taylor* decision in the case of Blacks. In any event, even if both the Sixth Amendment and the Equal Protection Clause are relevant in the case of Blacks, both clauses point in the same direction: A challenge for cause simply on the basis that a juror is Black should not be sustained.

Finally, a short digression may be permitted to consider disqualification of voters, which may be analogous to disqualification of jurors for cause. Familiar grounds for disqualification of voters would be alienage, minority, conviction of felony, or mental incompetence.³⁵ These grounds of disqualification are ordinarily the result of constitutional or statutory provisions and not of judge-made law. They are in the nature of per se rules, and do not provide for individualized determinations, which often are undertaken in the case of challenges for cause to jurors. Most of the grounds of disqualification of voters are concerned with the quality of the electoral process—excluding classes of persons unlikely to have the intelligence, information, or values necessary to make a useful political contribution. Other grounds for exclusion may have more subtle purposes, such as to exclude those considered not part of the political community or to punish persons who have attacked its basic values.

³⁴ 511 U.S. 127 (1994).

³⁵ See, e.g., D.C. CODE ANN. § 1-1001.02 (2)(A) (alien); (2)(B) (age); (2)(C) (mentally incompetent); (7)(A) (convicted of felony) (2001 & Supp. 2003); *Sherman v. United States*, 155 U.S. 673 (1895).

If, as noted earlier, the task of jurors is mainly to make determinations of fact, in the case of voters it is the opposite, to make determinations of value. Of course, determinations of value will, to an extent, be premised upon determinations of fact. Neither in regard to facts nor values are voters restricted to employing beliefs held by a group of a certain size in the population. As has been suggested, jurors are limited to the fact and value beliefs held by some group of substantial size, unless the beliefs are introduced through the formal process of proof. Thus in the case of voters, there is nothing analogous to the idea of a “cognizable group” found in Sixth Amendment jurisprudence, nor is there random selection from a fair cross-section. The voter votes as an individual, all qualified individuals may vote, and every voter may rely on whatever fact and value opinions he has. Thus, the only misconduct that need be considered in the case of voting, not already provided for by the *per se* rules of disqualification, would be bribery or coercion.³⁶

The statement just made that there are no restrictions imposed upon the information and values voters may apply may have to be qualified by limitations coming from the Equal Protection Clause. If it is unconstitutional for a jury to render a verdict not capable of justification except by reference to an animus toward a suspect class, it would similarly be unconstitutional for the voters to be thus motivated.³⁷ Both the jurors and the voters exercise state power. Whether there are additional restrictions imposed on jurors and voters by the Religion Clauses will be considered in due course.

We come now to the question of peremptory challenges, and in the first place whether their allowance conflicts with the Sixth Amendment right to an “impartial jury.” If the Sixth Amendment right is understood to guarantee that the petty jury will be a body of persons that is exclusively the result of random selection from a fair cross-section, by definition there is a conflict. If a peremptory challenge removes a person who is a member of a cognizable group in respect to factual beliefs or values, perhaps precisely because he is a member of such a group, it interferes with the operation of the laws of chance that otherwise might have placed that person on the petty jury. But to find a violation of the Sixth Amendment in these circumstances would be an unreasonable interpretation of the

³⁶ See *Brown v. Hartlage*, 456 U.S. 45, 54 (1982) (bribery); see also 42 U.S.C. § 1973i (2000) (coercion).

³⁷ See *Romer v. Evans*, 517 U.S. 620, 634 (1995) (holding that state constitutional amendment adopted by referendum was “born of animosity toward the class of persons affected”).

Amendment in view of the fact that at the time the Amendment was adopted, the use of peremptories was well established, and there is no reason to think the Framers intended to abolish the practice.³⁸ The Sixth Amendment, in assuring a venire that is a fair cross-section and requiring exclusion from the petty jury of persons challengeable for cause because of a risk of misconduct, has achieved its purpose even though the jury may be further narrowed by the parties' removing those who, although members of cognizable groups, are at one extreme or the other of the venire.³⁹ This conclusion is supported by Justice O'Connor's view in the capital punishment cases, referred to above, that although it is not permissible to exclude for cause a person who merely has doubts about capital punishment, it is permissible to exclude such a person by a peremptory challenge.⁴⁰

What do peremptory challenges do? Challenges for cause, as we have seen, remove those who pose a certain risk of misconduct, especially the misconduct of going beyond the bounds of permissible beliefs in regard to either facts or values. These challenges can be seen as simply enforcing the Sixth Amendment policy. But a juror may still pose some risk of misconduct, even though not sufficient to warrant removal for cause. The parties may use their limited number of peremptories to remove jurors who pose this lower, although not insignificant, risk. Some may argue that this use of peremptories will help bring about a truly impartial jury, but this is not an impartial jury in the sense required by the Sixth Amendment. In addition to eliminating a risk of misconduct, the parties may remove through peremptories persons who pose no risk of misconduct, since they will employ beliefs entirely within the permitted range, but who in the judgment of the parties simply would be unfavorable to them. There is nothing objectionable about providing this opportunity for the operation of self-interest. Indeed, allowing the parties to participate in this way, without even a demand for rationality—though doubtless they will have their reasons—may make verdicts more acceptable to those directly affected and to the public.⁴¹

³⁸ See *Batson v. Kentucky*, 476 U.S. 79, 119 (1986) (Burger, C.J., dissenting) (citing *Swain v. Alabama*, 380 U.S. 202 (1965)).

³⁹ See *Holland v. Illinois*, 493 U.S. 474, 478-80 (1990).

⁴⁰ *Brown v. North Carolina*, 479 U.S. 940 (1986) (O'Connor, J., concurring in denial of certiorari); see also *State v. Bolton*, 896 P.2d 830, 842 (Ariz. 1995).

⁴¹ See *Holland*, 493 U.S. at 480 ("But it [the fair cross-section value] has never included the notion that, in the process of drawing the jury, that initial representativeness cannot be diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interests"); see also *J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring) (quoting *Holland* and referring to "[o]ur belief that experienced lawyers will often correctly intuit which jurors are

In *Batson v. Kentucky*,⁴² peremptory challenges based on race, and in *J.E.B. v. Alabama ex rel. T.B.*,⁴³ peremptory challenges based on sex, were held unconstitutional. If peremptory challenges generally do not violate the Sixth Amendment, neither do peremptory challenges based on race or sex. A racial group may or may not be a cognizable group for Sixth Amendment purposes. As noted above, *Taylor v. Louisiana*⁴⁴ held that men and women are cognizable groups. If a group is not a cognizable group, elimination of one of their members by a peremptory challenge has no significance from a Sixth Amendment perspective. Even if a group is a cognizable group, elimination of one of its members by a peremptory challenge is not a violation of the Sixth Amendment for the reason stated above—that this would be an unreasonable interpretation of the Framers' intent in historical context. Thus, it is the Equal Protection Clause alone, and not the Sixth Amendment, that is violated by peremptory challenges based on race or sex. Early in the use of the Equal Protection Clause to prohibit peremptories based on race, it was suggested that it was the right of the party opposed to the challenge, or a combination of his right and that of the excluded juror, that was violated.⁴⁵ Later cases have emphasized the right of the juror not to be excluded.⁴⁶

The justification for finding peremptory challenges based on race or sex in conflict with the Equal Protection Clause may be that the Court disagrees with the factual premises upon which such challenges are based. The Court may reject entirely the idea that different races or the two sexes have different beliefs, or it may disagree with the importance that the peremptory implicitly attaches

likely to be the least sympathetic"); *id.* at 160-63 (Scalia, J., dissenting) (stating that adversarial trial strategies, such as peremptories, should be judged within the system as a whole); Babcock, *supra* note 16, at 551; Chambers, *supra* note 5, at 575-76; Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 771-72 (1992); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 559 (1992). *But see* United States v. Martinez-Salazar, 528 U.S. 304, 316 (2000) (noting "a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury"); *J.E.B.*, 511 U.S. at 137 n.8 ("The only legitimate interest it [a party] could possibly have in the exercise of its peremptory challenges is securing a fair and impartial jury."). *Georgia v. McCollum*, 505 U.S. 42, 57 (1992), recognizes that the role of litigants in determining jury composition provides one reason for wide acceptance of verdicts.

⁴² 476 U.S. 79 (1986).

⁴³ 511 U.S. 127 (1994).

⁴⁴ 419 U.S. 522 (1975).

⁴⁵ *Batson*, 476 U.S. at 87.

⁴⁶ *E.g.*, *J.E.B.*, 511 U.S. at 140, 142 n.13; *McCollum*, 505 U.S. at 48-49.

to the fact of race or sex. On the other hand, the Court may not disagree with the premises, but judge that even if they are correct, these facts—the difference in ideas between the races or sexes—are social constructs, and bad ones at that, because they have pernicious effects on individuals and groups. Even if the differences are facts of nature, the Court may think that they are unhappy facts and should not be reinforced by legal recognition, including through the use of peremptory challenges premised on these facts. As to the first suggested justification, it would be unusual for a court to deny a peremptory challenge simply because it disagreed with the opinion or hunch on which it is based—indeed that would be inconsistent with the argument in favor of the usefulness of peremptories. As to the second suggested justification, in the case of sex it is in obvious conflict with the *Taylor* case, where the Court expressly relied upon its view that men and women have different beliefs, in reaching the conclusion that each sex is a cognizable group for Sixth Amendment purposes. The Court neither condemned the idea that a difference exists nor suggested that the difference produced evil consequences.⁴⁷ But in *J.E.B.*, the Court took the view that the treatment of women over a long period of time, including their complete exclusion from juries, had been invidious, and that this historical background conferred invidiousness on present-day use of peremptories against women. It remains something of a mystery how this reasoning leads to the further conclusion that peremptories used against men are also infected with invidiousness, though this was in fact the situation involved in *J.E.B.*⁴⁸

It has long been held that there is no constitutional right to peremptories either in the Sixth Amendment or anywhere else in the Constitution.⁴⁹ The only question is whether the Equal Protection Clause forbids their use in certain situations. If a peremptory

⁴⁷ 419 U.S. 522 (1975); see *J.E.B.*, 511 U.S. at 139 n.11 (“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.”); *id.* at 149 (O’Connor, J., concurring) (“[T]o say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.”); *id.* at 157 (Scalia, J., dissenting) (noting conflict with *Taylor v. Louisiana*); see also *Bush v. Vera*, 517 U.S. 952, 1051 n.5 (1996) (Souter, J., dissenting) (“Without denying the possibility that race . . . makes a difference in jury decisionmaking . . . it seems to me that the better course is to ensure a fair shake by denying each side the right to make race-based selections. The cost of the alternative is simply too great.”); *Brown v. North Carolina*, 479 U.S. 940, 942 (1986) (O’Connor, J., concurring in denial of certiorari) (“[*Batson*] is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact.”).

⁴⁸ See *J.E.B.*, 511 U.S. at 156 (Scalia, J., dissenting).

⁴⁹ See *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988).

challenge otherwise allowable is denied because of the ground on which it is based, the cost falls on the challenging party in respect to the benefits that peremptories confer: eliminating jurors who pose some risk of misconduct; eliminating jurors the parties think not favorably disposed towards them; and allowing the parties to participate in the construction of the tribunal that is to judge them.

It is important not to exaggerate the effect of eliminating peremptories based on race and sex. If the probabilities of juror misconduct rise above a certain level, there will be available a challenge for cause or a challenge based upon that aspect of the Sixth Amendment's requirement of an impartial jury that limits the effects of random selection.⁵⁰ If a juror is excused for cause when race or sex plays some part in bringing the probabilities of misconduct to a dangerous level, there may be, as in the case of peremptories, some possibility of injury to the dismissed juror and the class he represents. But because of the high likelihood of misconduct, as suggested earlier, few would see this exclusion as invidious. The Court has indicated that if a peremptory is based upon some circumstance other than sex or race, the mere fact that it has a disparate impact on one sex or a race will not cause a violation of the Equal Protection Clause.⁵¹

Batson held that the state-action requirement of the Fourteenth Amendment was satisfied by the fact that the peremptory challenge there in question had been exercised by the prosecutor, acting for the state.⁵² Subsequent to that decision, it was held that the state-action requirement is also satisfied when the challenge is made by a party to a civil case⁵³ and even by a criminal defendant.⁵⁴ The result in the last situation—deeming the criminal defendant to be exercising state power even though the state is pursuing him and he is doing everything in his power to escape—is more or less fantastic.⁵⁵ Even in the case of civil parties, to hold that they fall within the purposes of the state-action requirement of the Equal Protection Clause when they make peremptory challenges, loses sight of the justification for

⁵⁰ See *supra* notes 38-40 and accompanying text. For a discussion of situations in which the Sixth Amendment requires exclusion, see *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (O'Connor, J., concurring).

⁵¹ *J.E.B.*, 511 U.S. at 143.

⁵² *Batson*, 476 U.S. at 89.

⁵³ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

⁵⁴ *McCollum*, 505 U.S. at 59.

⁵⁵ See *J.E.B.*, 511 U.S. at 150 (O'Connor, J., concurring); *McCollum*, 505 U.S. at 62-63 (O'Connor, J., dissenting); Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989).

peremptories in allowing the parties to pursue within certain limits their own interests, in the hope that this will win acceptance of verdicts. If in exercising peremptories, the parties are state actors, why are they not state actors when they offer evidence or make argument?⁵⁶ A few courts indeed have adopted this extension and forbidden evidence to be introduced when it concerns the attitude or behavior of members of an ethnic group.⁵⁷ Apparently, these courts judge that the collateral social damage from the parties' introducing such evidence and jurors' drawing inferences based on ethnic or racial generalizations, even though they may be correct, outweighs the importance of allowing relevant evidence to be considered.⁵⁸ Although the selection of evidence to be introduced is made by the party, not by the state, with the law making a contribution only in that it allows the evidence to be put before the trier, the limitations of the Equal Protection Clause are to be enforced. So far as peremptory challenges are concerned, those based on race or sex violate the Equal Protection Clause no matter what party makes them, and evidently this is settled law. Possibly it can be argued that there is less reason to see the state-action requirement of the Equal Protection Clause satisfied in the case of peremptories than in the case of introducing evidence, since in the former, the only effect is the absence on the jury of an individual who otherwise would be there, whereas with the latter, a basis is provided upon which the jury—clearly an organ of the state—rests its verdict.

II. THE RELIGION CLAUSES GENERALLY

In order to answer the questions presented by peremptory challenges relating to religion, it is necessary briefly to consider in

⁵⁶ Justice Scalia asked this question in his dissent in *J.E.B.*, 511 U.S. at 163.

⁵⁷ *E.g.*, *United States v. Vue*, 13 F.3d 1206, 1211-13 (8th Cir. 1994).

⁵⁸ In *Jinro America, Inc. v. Secure Investments, Inc.*, 266 F.3d 993 (9th Cir. 2001), the court held it error to allow an expert to testify to the practice of Korean businesses to engage in fraud and corruption, this practice being suggested to have probative value as to whether a certain transaction engaged in by plaintiff, a Korean company, was a sham. The holding was based, not upon constitutional considerations, but in part at least on Federal Rule of Evidence 403, which requires that evidence be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." FED. R. EVID. 403. But the court did not make clear whether the error lay simply in the evidence's use of "ethnic or cultural stereotyping," or in the likelihood that the stereotype would cause the jury to return a verdict based on disgust, fear, or hostility. *Jinro*, 266 F.3d at 1007-08. The court's opinion reviews many other cases involving evidence of ethnic group characteristics. *See also* *United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000) (holding that both Federal Rule of Evidence 403 and due process were violated by allowing detective to testify in drug prosecution to drug habits of Cubans).

addition to the Sixth Amendment and the Equal Protection Clause, the general law of the Religion Clauses of the First Amendment. Both the Free Exercise Clause and the Establishment Clause must be considered: the first because the exclusion of a juror on account of his religion may burden the exercise of his religion; the second because the standards for permissible government action under that clause—action that includes the exercise of power by juries—may give reason to exclude from juries persons likely to disregard them, and also because forbidding the exercise of peremptory challenges based upon religion may provide a degree of support for religion not permitted by the Establishment Clause.

As is well known, the Free Exercise Clause is currently the site of a struggle between two sharply opposed views concerning the rights of conscience and the limits of the ordinary political process, between what may be referred to as the *Sherbert-Yoder* reading of the Free Exercise Clause⁵⁹ and the *Smith* reading of that clause.⁶⁰ Under *Sherbert-Yoder*, if government action burdens the practice of a person's religion, the burden being judged such from a secular and not from a religious point of view, even though there may be a secular purpose to the government action, the imposition of the burden must be justified by a compelling state interest that is promoted by the least intrusive means. As applied in the *Sherbert* case itself, this meant that a Seventh Day Adventist who could not find a job because her religion prevented her from working on Saturday was required to be given unemployment compensation even though the state's unemployment program did not allow it in the circumstances; and in the *Yoder* case, that Amish parents could not be compelled by the criminal law to send their children to school past the eighth grade when their religion forbade it. Under the *Smith* approach, if the burden on religion is the result of a "neutral, generally applicable law"—such as that all children must attend school until the age of sixteen—that is the end of any claim under the Free Exercise Clause, no matter how heavy the burden on the practice of religion or the slightness of the state interest advanced by the law.⁶¹

Whether the *Smith* rule is established beyond reconsideration is not entirely clear. The rule announced in *Smith* arguably was dictum,

⁵⁹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1961).

⁶⁰ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

⁶¹ *Id.* at 880. In fact in the *Smith* case, as will be mentioned shortly, an exception was articulated for the situation presented by *Yoder* of Amish parents being unwilling to send their children to school past the eighth grade. See *infra* note 72 and accompanying text.

uttered without benefit of briefs or oral argument on the question involved. It was reexamined in *Church of the Lukumi Babalu, Inc. v. City of Hialeah*,⁶² in which it was found in fact not to apply. Four years later the rule was reiterated in *City of Boerne v. Flores*,⁶³ in which, although there was an extensive review of historical materials relevant to the interpretation of the Free Exercise Clause and a rejection of Congress's power to alter the *Smith* rule and restore *Sherbert-Yoder*, there was no actual application of *Smith* to the case at hand. The dissenters to the decision in *Smith* continue to insist that it is an incorrect reading of the Free Exercise Clause and that under the circumstances *stare decisis* should not be seen as an obstacle to repudiating it.⁶⁴

The *Smith* rule, in spite of the seemingly clear statement of it set forth above, is in fact very unclear. This unclarity leaves the way open for a minimalist interpretation that would permit the *Sherbert-Yoder* rule to continue to apply in a large number of situations. Indeed, the unclarity of the *Smith* rule could allow for its almost complete elimination at the hands of perplexed or determined lower courts, and some have already set about this task.⁶⁵ A plurality of the Supreme Court holds the view that the *Smith* rule involves two distinct ideas: "neutral" and "generally applicable." For the plurality, "neutral" refers to the fact that a law is reasonably capable of justification on a secular ground—e.g., in the case of a prohibition on the use of peyote, the situation involved in *Smith*, the protection of health—and also, perhaps, that the legislature was actually motivated by that reason.⁶⁶ "Generally applicable" refers to the purpose of the law as determined from the text itself and from its administration.⁶⁷ Other Justices believe that "neutral" and "generally applicable" mean substantially the same thing.⁶⁸

In *Church of the Lukumi Babalu Aye*,⁶⁹ the Court struck down under the Free Exercise Clause city ordinances prohibiting animal

⁶² 508 U.S. 520 (1993).

⁶³ 521 U.S. 507 (1997).

⁶⁴ See, e.g., *Church of the Lukumi Babalu Aye*, 508 U.S. at 559 (Souter, J., concurring).

⁶⁵ E.g., *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir.), *cert. denied*, 528 U.S. 817 (1999); *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996).

⁶⁶ See *Church of the Lukumi Babalu Aye*, 508 U.S. at 533.

⁶⁷ See *id.* at 542-45. Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001), argues that there are two distinct requirements.

⁶⁸ *Church of the Lukumi Babalu Aye*, 508 U.S. at 557 (Scalia, J., concurring).

⁶⁹ 508 U.S. 520 (1993).

sacrifice for ritual purposes, holding that the ordinances were not neutral and generally applicable, with the consequence that the *Sherbert-Yoder* rather than the *Smith* standard applied. The Court found that the ordinances permitted the killing of animals for many secular purposes—sport and science, for instance—while prohibiting religious sacrifice. But the fact that the ordinances permitted almost all secular killings, but not all, left a doubt as to the sense in which they were non-neutral and not generally applicable. Does a law fail the *Smith* test only when a religious use is the sole object of prohibition, or might it also fail that test even though some secular uses are also covered by the prohibition?⁷⁰ If it might fail though some secular uses are forbidden, how many and what kind of secular uses? Might a law be neutral and generally applicable only when its prohibition extends to religious use and to all secular uses? What policy would determine the point along the scale where the line is to be drawn? The inclusion within the prohibited class of some or of many secular uses will determine the relative effect of a government action or program on the positions of religion and nonreligion in the society. But there still must be resort to some fundamental philosophy to determine what is the permissible relative effect. No solution can be found simply by reference to “underinclusiveness” or by a mechanical insistence that if one secular use is permitted, religious use must also be permitted. From the fundamental constitutional philosophy must be derived both the value attached to various secular objectives and the value attached to the practice of religion. This question will be discussed further in considering another part of the *Smith* opinion, which states that the *Smith* rule does not apply when provision is made in the law for “individualized assessment” of liability or benefits. In any event, holding that the Free Exercise Clause never entitles religion to exemption when all secular instances are prohibited, cannot rest upon simple assertion.

Apart from the unclarity of “neutral [and] generally applicable,” there are exceptions to the *Smith* rule expressly set forth in the *Smith* opinion itself: It does not apply in “hybrid” cases, and as just mentioned, it does not apply in cases in which there is “individualized governmental assessment.”⁷¹ If a case comes within one of these exceptions, the familiar *Sherbert-Yoder* standard applies. These exceptions in the hands of lower courts unhappy with the *Smith* rule

⁷⁰ See *Fraternal Order of Police*, 170 F.3d at 364-67 (holding that Free Exercise Clause was violated by refusal to allow police to wear beards for religious reasons when allowed for medical reasons); Duncan, *supra* note 67, at 868-83 (discussing “underinclusiveness”).

⁷¹ *Smith*, 494 U.S. at 881, 884.

also have the capacity virtually to destroy it.

The hybrid exception applies when, in addition to a claim under the Free Exercise Clause, there is also a claim on some other constitutional ground, for instance free speech, freedom of association, substantive due process, or protected property rights. In *Smith*, the Court distinguished *Yoder* on the ground that it involved a substantive due process claim: the right of parents to determine the education of their children.⁷² Courts and commentators have pointed out that if there is a violation of an independent constitutional right, invocation of the Free Exercise Clause is superfluous.⁷³ Some courts have held that all that is needed to satisfy the hybrid exception is a “colorable” independent constitutional claim.⁷⁴ Such a colorable claim will activate the free exercise claim and make *Sherbert-Yoder* applicable. However, no court has been able to explain why such a merely colorable constitutional claim should have this effect. Some courts have noted that there is scarcely a case in which another colorable constitutional claim cannot be made.⁷⁵ For example, in *City of Boerne v. Flores*,⁷⁶ mentioned above, one of the two Supreme Court decisions since *Smith* that reaffirmed its doctrine, an Archbishop wished for pastoral reasons to enlarge a church, but was prohibited from doing so by the local Landmark Commission. In addition to his free exercise claim, did not the Archbishop have a colorable claim of deprivation of constitutionally protected property rights? In *Smith* itself, in addition to the free exercise claim, the petitioners could have argued that their rights to free speech and freedom of association had been violated: peyote use was probably an expressive activity and almost certainly involved association with others.

The exemption stated in *Smith* for cases in which the state has in place a system of “individualized governmental assessment,” of which *Sherbert* was suggested to be an example,⁷⁷ is almost as unclear as the hybrid exception. The reference could be to situations in which there is a high degree of official discretion, which might be exercised

⁷² *Id.* at 888.

⁷³ Jonathan B. Hensley, Note, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119 (2000) (reviewing lower court decisions).

⁷⁴ *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir.), *reh'g granted and opinion withdrawn*, 192 F.3d 1208 (9th Cir. 1999), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000) (vacating lower court's judgment and remanding with instructions to dismiss as not ripe for review), *cert. denied*, 531 U.S. 1143 (2001).

⁷⁵ *See, e.g., id.* at 705.

⁷⁶ 521 U.S. 507 (1997).

⁷⁷ *Smith*, 494 U.S. at 884.

to the unjustified disadvantaging of religion, thus eliciting the protective response of the *Sherbert-Yoder* requirement.⁷⁸ Another possibility is that what the Court means to cover by this “individualized” exception are situations in which, although law is made and discretion limited, this is done in a common-law fashion, by the accumulation of precedents, perhaps in the course of interpreting broad statutory language. But why would use of this process of law-making call for departure from the *Smith* rule? Finally, a system of “individualized governmental assessment” could refer simply to those cases in which a law disadvantages religion to a degree that conflicts with the fundamental norm underlying the Religion Clauses regarding the permissible relative effect of state action on the positions of the religious and the secular in society. This idea of the significance of the breadth of entitlement or of burdens under a government program is familiar in Establishment Clause analysis,⁷⁹ but here it appears in connection with the Free Exercise Clause. If animal sacrifice is permitted for science and sport, then possibly the Free Exercise Clause requires that it be allowed for religious purposes. Language in *Sherbert* suggests that this idea of permissible relative effect, either in regard to entitlements or burdens, could be part of the explanation for that decision: If unemployment compensation is provided to those who are not available for work for some “personal reasons,” then it must be provided to those who are not available for work for religious reasons.⁸⁰ As will be appreciated, this way of reading the “individualized assessment” exception suggests that in fact it is not an exception to the *Smith* rule at all, but that the existence of various provisions in the government program has rendered it not a “neutral law of general applicability.” And to repeat what was stated earlier, if the values embodied in the Free Exercise Clause require that religion not be excluded from a benefit when some or many secular activities are admitted to it, it should not be out of the question that those same values may require that religion receive a benefit even when the legislature has attempted to limit the advantages of a program to a particular state objective and to exclude all other interests, secular and religious. Thus, in the context of the

⁷⁸ For useful observations on *Smith*'s “individualized assessment” exception, see *American Friends Service Committee Corp. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991). See also Kenneth D. Sansom, Note, *Sharing the Burden: Exploring the Space Between Uniform and Specific Applicability in Current Free Exercise Jurisprudence*, 77 TEX. L. REV. 753, 765 n.85 (1999).

⁷⁹ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

⁸⁰ *Sherbert*, 374 U.S. at 401-02 n.4 (1963).

Sherbert case, the very values that require the state to give unemployment compensation to Mrs. Sherbert when it makes them available to those who cannot work for some secular personal reasons, may require it to give compensation to Mrs. Sherbert even if it does not do so for any secular personal reasons. This is because the Free Exercise Clause attaches such great value to a person's being able to live in accordance with her conscience: If the state pursues a certain secular objective—e.g., by an insurance scheme it seeks to offset the effects of economic recession and business dislocations—it must be equally protective of religious conscience.

Whatever exactly the *Smith* rule is, its announcement signaled a sharp break from an important idea of the Framers, embodied in the Free Exercise Clause, an idea referred to by Justice O'Connor in *City of Boerne* when she spoke of the "special constitutional status" of religion.⁸¹ This idea essentially is that a person has a moral duty to act in accordance with his conscience and that the state has a correlative duty not to interfere with the discharge of this primary duty except for weighty reasons. Even if the Free Exercise Clause does not rest upon the same morality that moves the conscience of the individual, it does rest upon a morality that recognizes an individual's duty to act in accordance with conscience.

This idea received eloquent expression in Chief Justice Hughes's dissenting opinion in *United States v. McIntosh*.⁸² That case concerned a Presbyterian minister who had applied for naturalization. The case involved the interpretation of an act of Congress that required as a condition of naturalization an oath of allegiance. The minister was willing to take the oath, but only if he could reserve the duty he believed he owed to God. The majority of the Court held that under the statute he was not qualified to become a citizen. Chief Justice Hughes, in a much-quoted dissent, took the position that the statute should not be interpreted in a manner so contrary to our founding ideology and political traditions. His opinion in *McIntosh*, even though not directly addressed to a constitutional question, implied that the source of the constitutional right to the free exercise of religion lies in a belief in an obligation to follow conscience. What marks off the right of free exercise from other constitutional rights—for instance the right of free speech—is the importance attached to the state of mind of the individual, his sense of an obligation that transcends human authority. Chief Justice Hughes's view of the correct interpretation of the Naturalization Act, as illuminated by the

⁸¹ *City of Boerne*, 521 U.S. at 563 (1997) (O'Connor, J., dissenting).

⁸² 283 U.S. 605, 627, 633-34 (1931) (Hughes, C.J., dissenting).

tradition of respect for conscience, became the view of the Court itself in *Girouard v. United States*,⁸³ which overruled *McIntosh*.

Unease in some of the lower courts manifested by a narrow understanding of when the *Smith* rule applies, a liberal reading of its exceptions, or outright unwillingness to believe that *Smith* means what it says as applied to certain pre-*Smith* cases, evidences the magnitude of the break between the *Smith* rule and the earlier understanding, just referred to, of the importance of obligations believed to be derived from a source higher than human authority. An example of the second type of response to *Smith* is the panel decision in *Thomas v. Anchorage Equal Rights Commission*,⁸⁴ where the court held that the refusal on religious grounds of a landlord to rent to unmarried couples, contrary to a state statute, came within the hybrid exception to *Smith*—a colorable constitutional property right as well as a free exercise claim—and that there was no compelling reason to override religious conscience in the circumstances.⁸⁵ Examples of the third response to *Smith* are the decisions of those courts that have refused to find that *Smith* overrules the so-called “ministerial exception,” under which decisions relating to the employment of clergy are constitutionally exempt from state regulations applicable to other sorts of employment.⁸⁶

Mention also may be made of a line of decisions in which the Supreme Court has held that because of free exercise concerns, there must be special rules for deciding intra-church disputes, which will enable civil courts to avoid answering questions about religious doctrine or polity, even though they are free to answer similar doctrinal and organizational questions in a secular context.⁸⁷ Lower courts continue to observe this special rule requirement even though it may be in contravention of *Smith* and not within any of its exceptions.⁸⁸

As already suggested, in assessing challenges to jurors on religious grounds, not only must the Free Exercise Clause be

⁸³ 328 U.S. 61 (1946).

⁸⁴ 165 F.3d at 711-12, 717-18.

⁸⁵ Compare *Bob Jones University v. United States*, 461 U.S. 574 (1983), a pre-*Smith* decision, which upheld against a free exercise claim the denial of tax exemption to an educational institution that discriminated in admissions on racial grounds for religious reasons.

⁸⁶ E.g., *EEOC v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000).

⁸⁷ E.g., *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969).

⁸⁸ See, e.g., *Pentecostal Church of God I.M. of New Haven, Inc. v. Pentecostal Church of God International Movement*, 31 Conn. L. Rptr. 1 (2001).

considered, but the Establishment Clause as well. Refusal to allow such challenges when challenges on nonreligious grounds are allowed might give a degree of assistance to religion that is forbidden by the Establishment Clause. At the other extreme, if a religiously-motivated verdict would violate the Establishment Clause, it might be required by that clause that a challenge aimed at eliminating the risk of such a verdict be sustained.

Under the Establishment Clause, the primary focus is on the “purpose” of a law or other government action, although occasionally attention also is given to actual effects, whether benefits or burdens.⁸⁹ The notion of purpose in this context appears to embrace two ideas: first, that the law be capable of justification on a secular ground—possibly meaning without reference to the transcendent or supernatural, though doubtless this does not exclude all ideas of value—and second, that on its face the relative effect of the law in regard to benefits or burdens on the positions of religion and nonreligion in the society be of a certain kind. What is the permissible relative effect, as noted earlier, must be derived from a substantive constitutional philosophy that attaches a certain importance to religion compared to other human interests. It should be noted that this second requirement may be violated even though the law or other government action is capable of justification on entirely secular grounds.

In addition to limiting the “purpose” of government programs in the ways just indicated, there is some basis for believing that the Establishment Clause also requires that such programs actually have been motivated by secular and not religious beliefs. The strongest precedent for this additional requirement is *Epperson v. Arkansas*,⁹⁰ where in invalidating a law prohibiting the teaching of evolution in the public schools, the Supreme Court relied on statements made in the public debate preceding the vote on the popular initiative that resulted in the law, that the theory of evolution was inconsistent with the creation account in the Bible.⁹¹ A government action might be capable of justification on secular grounds, but still actually have been motivated by religious belief. Thus, if the Free Exercise Clause is concerned with the actual effect of legislation on religious believers and the problem posed for their consciences, the Establishment

⁸⁹ For a summary of the Court’s tergiversations on this matter, see *Zelman*, 536 U.S. at 655-60.

⁹⁰ 393 U.S. 97 (1968).

⁹¹ *Id.* at 106-09. Additional support for the proposition that actual motive matters may be found in *Edwards v. Aguillard*, 482 U.S. 578 (1987), but the Court’s opinion is not clear on the point.

Clause may be concerned with the actual beliefs and motivations of legislators and other government officials and even of voters.

Among the Supreme Court's many Establishment Clause decisions, it is only with difficulty that one can find consistency. Thus, is it possible to uphold an act of Congress that permits religious organizations to discriminate on religious grounds in the treatment of their employees—e.g., firing a janitor employed by a Mormon-owned gymnasium open to the public because he was not “temple worthy”⁹²—and at the same time to strike down legislation that exempts religious publications from a state sales tax?⁹³

In recent years the Court has increasingly relaxed the restrictions of the Establishment Clause and widened the area within which legislative discretion may operate.⁹⁴ Furthermore, bit by bit, it has abandoned or relaxed limiting ancillary tests that when adopted were intended to implement general Establishment Clause objectives. In school aid programs, for example, the Court no longer requires any sort of “separation” between the secular and the religious in private schools—e.g., a state-employed sign-language translator may assist a student attending a parochial school, even by translating religion lessons.⁹⁵ The recent decision permitting a voucher program that includes religiously-affiliated schools⁹⁶ marks the culmination of a long trend to relax earlier doctrinal restrictions.

The relation between the Establishment Clause and the Free Exercise Clause continues to be notoriously difficult to explain. Under *Sherbert*, there was a possibility that everything that was not forbidden by the former was required by the latter; Justice Harlan pointed this out in his dissent in *Sherbert*.⁹⁷ Under the *Smith* regime, there is less likelihood of conflict between the two clauses because the tendency of *Smith* is to conform free exercise analysis to that of the Establishment Clause: If the “purpose” of the program is permissible—i.e., it is neutral and generally applicable—it does not matter that an effect may be to burden the free exercise of religion. As mentioned earlier, the Establishment Clause itself is only rarely suggested to be concerned with the actual effect of a government program on the practice of religion; it is concerned with purpose and

⁹² *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

⁹³ *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

⁹⁴ For the most recent step in this direction in connection with aid to education, see *Zelman*, 536 U.S. 639.

⁹⁵ *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); see also *Mitchell v. Helms*, 530 U.S. 639 (2000).

⁹⁶ *Zelman*, 536 U.S. 639.

⁹⁷ *Sherbert*, 374 U.S. at 418, 422-23 (Harlan, J., dissenting).

perhaps with legislative motive. The *Smith* regime, combined with the relaxation of Establishment Clause limitations, greatly reduces the tension between the two clauses. But, of course, if under *Smith* a law is not neutral and generally applicable, or if one of the exceptions applies, then the *Sherbert-Yoder* test will be enforced, so that the problem of tension between the two clauses remains as great as ever.

III. PEREMPTORY CHALLENGES RELATING TO RELIGION

The effect of the Religion Clauses on juror challenges and peremptory challenges in particular must now be assessed. If it is settled that peremptory challenges may not be based upon race or sex, as noted at the start, the Supreme Court has yet to decide whether they may be based upon or affect religion. Before addressing the effect of the Religion Clauses on this question, however, it will be useful to consider the significance of religion from the perspective of the “impartial jury” requirement of the Sixth Amendment. As will be recalled, this constitutional provision includes both a right to have the petty jury selected at random from a fair cross-section of the population and a right not to have present on the jury anyone as to whom there is more than a certain likelihood of misconduct, the misconduct involved including the use of background beliefs about facts or notions of the good other than those possessed by some cognizable group. A cognizable group is a group that has distinctive beliefs and is of substantial size. A religious group may or may not be a Sixth Amendment cognizable group: it is likely to have distinctive beliefs, but it may or may not be of substantial size. Baptists, for example, would certainly be a cognizable group in most American jurisdictions, but Muslims would be only in some. I am assuming here that attention is focused exclusively on the Sixth Amendment and that all other constitutional provisions, including the Equal Protection Clause and the Religion Clauses, are left out of account. When we come to consider the Religion Clauses, size may be irrelevant. Again, if we restrict ourselves to the Sixth Amendment, a group may be a cognizable group for that purpose simply by virtue of its size and its distinctive beliefs whatever the content of those beliefs, whether founded on ideas of the supernatural or limited to secular notions.⁹⁸ When we come to consider other constitutional provisions—the Establishment Clause, for instance—the nature of the beliefs the group embraces

⁹⁸ Cf. *United States v. Hillyard*, 52 F. Supp. 612 (E.D. Wash. 1943) (suggesting compulsory attendance of Jehovah’s Witness necessary if representative character of jury to be met).

may be all-important.

The Supreme Court decisions that developed the standard as to when it is permissible to exclude from the jury in capital cases those who have doubts about capital punishment, decisions earlier referred to, provide an example of pure Sixth Amendment analysis. These decisions held that it is permissible to exclude from the jury for cause persons whose beliefs would substantially impair their ability to apply the law and to limit themselves to the evidence, but that it is impermissible to exclude persons simply because they have doubts about capital punishment. To exclude persons in the former group enforces the idea of an impartial jury by excluding those as to whom there is a significant risk that they will go beyond their assigned role as to facts and values. To exclude those in the latter category would be to exclude representatives of a group in the population of sufficient size and with distinctive beliefs associated with doubts about capital punishment that would constitute a cognizable group for Sixth Amendment purposes. To exclude such persons merely because of some risk that they will go beyond permissible beliefs and act against the intent of the law would be to deprive the defendant of his right to a jury chosen at random from a fair cross-section of the population.

The Supreme Court capital punishment decisions just referred to concerned the question of when a person may be excluded from the jury for cause. It is important for our purposes to note that in another decision the Supreme Court made clear that even though a challenge for cause against a person who is merely doubtful about capital punishment may not be sustained, such a person may be excluded by a peremptory challenge.⁹⁹ We have mentioned before that the Sixth Amendment right to an impartial jury is not considered to be violated by peremptory challenges generally, even though their exercise interferes with the results of random selection from a fair cross-section, and even though they may have the effect of keeping off the jury representatives of cognizable groups as to whom there is not enough risk of misconduct to justify exclusion for cause.¹⁰⁰ That the peremptory is based upon religious considerations would not seem to affect the validity of this proposition.

It is surely the case that many people who are opposed to capital

⁹⁹ See *Gray v. Mississippi*, 481 U.S. 648 (1987); *id.* at 671-72 (Powell, J., concurring); *Brown v. North Carolina*, 479 U.S. 940 (1986) (O'Connor, J., concurring in denial of certiorari).

¹⁰⁰ *Powers v. Ohio*, 499 U.S. 400, 403-04 (1991) (relying on *Holland v. Illinois*, 493 U.S. 474 (1990)).

punishment or who are doubtful about it base their opposition on religious belief. Yet the question of religion was not discussed in the Supreme Court cases just mentioned, which, as stated, were treated as pure Sixth Amendment cases. The decisions were reached without any consideration of the possible effect of the Religion Clauses.¹⁰¹ Criminal defendants who invoked the Sixth Amendment in these cases probably had standing also to invoke the free exercise rights of dismissed jurors, but these rights were not discussed. It will be recalled from the first part of this Article that criminal defendants are allowed to invoke the equal protection rights of excluded jurors.

If a religious group or the entire group of all believers might or might not constitute a cognizable group for Sixth Amendment purposes, so it might or might not be a specially protected class under the Equal Protection Clause, a class entitled to more than simply the requirement of a rational connection between the law in question and a permissible governmental objective. If the whole class of religious believers has never been the object of invidious discrimination in the United States, the same cannot be said of particular religious groups—for instance the Mormons, Jehovah's Witnesses, and the Santerias. Perhaps religious "fundamentalists" or even religious "liberals" have had experiences that would qualify as invidious discrimination. Nonbelievers, of course, have sometimes been the object of persecution. Under the Equal Protection Clause, as contrasted with the Sixth Amendment, the size of the disadvantaged group is irrelevant, except so far as smallness may contribute to the group's being a target of persecution and unable to defend itself through the ordinary political process. Unlike cases of race, however, it cannot be said that most cases of religious classification have been attended by invidiousness, so that whenever there is use of this category, there must be strict or heightened scrutiny under the Equal Protection Clause. Recall that at this point in our analysis we are disregarding the Religion Clauses. To demand strong justification for a religious classification if there is a showing that a particular religious group has been subjected to invidious treatment, might pose unmanageable difficulties for the administration of constitutional law.¹⁰² In any event, although it may

¹⁰¹ In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), however, the jurors who had been unconstitutionally excluded for cause had been removed under a state statute that excluded persons who had "conscientious scruples" against capital punishment.

¹⁰² Investigation into the history and current situation of a multitude of religious groups and attitudes toward them might be required. *But see* Melissa R. Trieman, Note, *Extending Batson v. Kentucky to Religion-Based Peremptory Challenges*, 4 S. CAL. INTERDISC. L.J. 99, 104-05, 115 (1994) (suggesting that such inquiry would not be

be analytically satisfying to determine whether a juror challenge on the basis of religion should be disallowed under the Equal Protection Clause, given that challenges on the basis of race or sex are impermissible, the question is largely academic, because when the Religion Clauses are taken into account, they preempt the field and render an independent discussion of equal protection unnecessary.

When jury challenges are scrutinized under the Sixth Amendment, the interest protected is that of the party who resists the challenge—his interest in trial by an “impartial jury.” When jury challenges are scrutinized under the Equal Protection Clause, it has come to be accepted, as noted earlier, that the interest primarily protected is that of the jurors, an interest in not being excluded from an important public function on account of race or sex. If early decisions under the Equal Protection Clause considered the effect on the parties, on the atmosphere of the trial, and on the public at large,¹⁰³ recent decisions focus primarily on the rights of the jurors.¹⁰⁴ At the same time, as already mentioned, it is settled that the rights of the jurors may be invoked by a party, since otherwise, as a practical matter, those rights would not be vindicated.

Certain preliminaries having been dealt with and necessary distinctions made, the time has come to discuss directly the applicability of the Free Exercise Clause to challenges to jurors, both for cause and peremptory. In the earlier general discussion of the Free Exercise Clause, a distinction was made between those cases that must be dealt with under the rule of the *Smith* case, and those that must be dealt with under the *Sherbert-Yoder* approach. If a law is a neutral law of general applicability, that is the end of the free exercise claim so far as the *Smith* rule is concerned, and no consideration need be paid to the importance of the governmental interest that the law is designed to uphold. On the other hand, if the law is not a neutral law of general applicability, or it falls within one of *Smith's* exceptions, there must be a compelling interest to justify it. It may seem odd in the case of peremptory challenges to speak of a law and to ask whether it is neutral and generally applicable: it would be better, perhaps, to speak of an action or decision taken by a party, which the Supreme Court has chosen to consider governmental action for the purpose of the application of the Bill of Rights and the

required); *cf.* *Chambers v. State*, 724 S.W.2d 440, 442 (Tex. App. 1987) (involving a prosecutor who explained peremptory challenge by saying juror’s religious preference—Church of Christ—was “a little bit away from the main stream”).

¹⁰³ *E.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁰⁴ *E.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

Fourteenth Amendment. In asking whether this action or decision is neutral and generally applicable for free exercise purposes, we are asking, in part at least, whether there is a reason for it other than one concerning religion. This question could be directed to whether the challenge is capable of justification other than on a ground relating to religion, or to whether the lawyer making the challenge is actually motivated by consideration of religion. It would be surprising, perhaps, to discover that actual motivation is intended, for we are accustomed to encountering this concern in connection with the Establishment Clause, not the Free Exercise Clause; even in the case of the Establishment Clause, the relevance of actual motivation is not free from doubt. In the case of objections to challenges to jurors under the Equal Protection Clause on the ground that the challenges are based on race or sex, there does indeed seem to be concern with what actually motivated the challenging lawyer, although a recent Supreme Court decision that directs the trial judge to reject the objection if the challenging lawyer, when called upon to explain the challenge, states what on its face is a nonracial or nonsexual reason, may point in the other direction.¹⁰⁵ But the policy of the *Smith* decision, which concededly can be only dimly perceived, possibly can be upheld by finding that “neutral [and] generally applicable” looks only to whether there is a plausible nonreligious justification for the challenge on its face.

An example of a neutral, generally applicable challenge might be a challenge to a juror who is believed to be opposed to abortion. Persons opposed to abortion, a prosecutor might think, are less likely to sympathize with victims of crime. Such a view might be held regardless of the ideological basis of the opposition to abortion, whether it be religious or nonreligious. The actual motivation of a particular challenging prosecutor might correspond to this view: it makes no difference to him whether the juror is religious or nonreligious; his experience suggests that most persons opposed to abortion, regardless of their ideological orientation, are not reliable jurors for the prosecution. Another prosecutor, to the contrary, might challenge a juror precisely because he believes the juror’s opposition to abortion is religiously based. The same contrast might be found in the capital punishment cases earlier referred to: one prosecutor might challenge all those who have difficulty with capital punishment; another might challenge only those whose scruples are based on religion.¹⁰⁶ But even if subjective motivation makes a

¹⁰⁵ Purkett v. Elem, 514 U.S. 765 (1995).

¹⁰⁶ The Court’s opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,

difference under the Equal Protection Clause, should it affect the classification of a peremptory challenge as neutral and generally applicable for purposes of the Free Exercise Clause and the *Smith* decision?

Even if a challenge to a juror is neutral and generally applicable for *Smith* purposes, it may come within one of the exceptions set forth in *Smith*, so that the *Sherbert-Yoder* test will apply. Might a challenge to a juror on religious grounds come within the hybrid exception? As mentioned before in discussing the *Smith* case itself, it will be rare that the practice of religion does not involve speech and association, so that a colorable claim cannot also be made under a part of the First Amendment other than the Free Exercise Clause. But the exception that seems most likely to be applicable to peremptory challenges is the exception in *Smith* for situations involving “individualized governmental assessment of the reasons for the relevant conduct.”¹⁰⁷ Stating this exception, the Court had immediately in mind determinations of eligibility for unemployment compensation, in order to avoid overruling *Sherbert* and its line of cases. In the earlier general discussion of the Free Exercise Clause, it was suggested that the argument for this individualized assessment exception could be that when there is such an assessment, even though a nonreligious reason perhaps can be stated for the governmental action, there is a significant risk that in practice, perhaps over a series of determinations, religion will be disadvantaged to a degree that conflicts with the fundamental philosophy underlying the Religion Clauses concerning the permissible relative effect of governmental action on religion and nonreligion. Readers familiar with the pre-*Batson* regime of *Swain v. Alabama*,¹⁰⁸ under which the Equal Protection Clause would be violated by a prosecutor’s peremptories only if there was a pattern or practice of racial discrimination over a number of cases, will recognize a similar idea at work here. It may seem strange to attach significance to the possibility of an impermissible disadvantaging of religion by a series of peremptory challenges if the challenges are

508 U.S. 520, 533 (1993), would characterize this action as “targeting religious beliefs.” Brian Galle, Note, *Free Exercise Rights of Capital Jurors*, 101 COLUM. L. REV. 569, 578 nn.43, 44 (2001), appreciates the distinction between why a lawyer challenges a juror—because he is opposed to abortion or because he is opposed to abortion on religious grounds—and what has brought the juror within a challenged category. In other words, the lawyer challenges the juror because he is opposed to abortion, but the juror has been brought to his opposition by religious belief.

¹⁰⁷ 494 U.S. 872, 884 (1990); see Galle, *supra* note 106, at 583 (suggesting that even challenges for cause may come within the individualized exception).

¹⁰⁸ *Swain v. Alabama*, 380 U.S. 202 (1965).

made by lawyers for private parties, but this oddity is the result of the Court's insistence that all peremptory challenges are to be attributed to the state, at least so far as concerns the applicability of the Bill of Rights and the Fourteenth Amendment.

The Court's response in *Smith* to the danger posed by "individualized assessment" of an impermissible disadvantaging of religion is to return to the *Sherbert-Yoder* requirement of a compelling state interest. An example of a case falling within the individualized assessment exception is *Keeler v. Mayor & City Council of Cumberland*,¹⁰⁹ where an historic district commission refused to allow a monastery to be torn down even though church leaders' reasons for wanting it replaced were concededly religious. The court held that the commission's determination did not fall under the *Smith* rule, but under the individualized assessment exception. As in the unemployment compensation cases, there was a possibility that over time, religion would be impermissibly disadvantaged. In addition, the court determined that the state's interest in not having the monastery torn down was not compelling.¹¹⁰

It is difficult to think of a situation that falls more comfortably into the individualized assessment category—if that is an intelligible category—than peremptory challenges. There is no standard that limits the challenger—other than the Constitution. He is entirely free to exercise his judgment on the particulars of the case and the individual juror, and even if one prospective juror is indistinguishable from another, to make opposite decisions regarding whether to challenge. As with the practice of the historic district commission in *Keeler*, the power of peremptory challenges may be used in such a way as to advantage or disadvantage religion over a series of actions.

If the *Smith* rule does not apply to peremptory challenges because they involve individualized assessments, then the fact that a peremptory challenge has a secular purpose, either in the sense that a secular explanation for it can be plausibly suggested or in the sense that the challenge was in fact motivated by a secular reason—see for instance the abortion hypothetical stated above—is not dispositive of

¹⁰⁹ 940 F. Supp. 879 (D. Md. 1996).

¹¹⁰ In *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), the Court held that the creation by special act of the state legislature of a school district in which all the residents were Satmar Hasidic Jews and which was motivated by a desire to help the Satmars to practice their religion, violated the Establishment Clause. This conclusion could be explained by the Court's fear that the use of special acts, rather than general legislation, might lead in practice to favoring one religion over others or to impermissibly favoring religion over nonreligion. See *id.* at 702-05 (1993); see also Julie D. Arp, Note, *The Batson Analysis and Religious Discrimination*, 74 OR. L. REV. 721, 736 (1995).

a free exercise claim. The elimination of the applicability of the *Smith* rule, either because the governmental action is not neutral and of general application or because it involves individualized assessment, returns us to the familiar terrain of *Sherbert-Yoder*, where the questions are whether there is a burden on religion, and if there is, whether there is a compelling state interest to justify it. In the context of peremptory challenges, again employing the abortion hypothetical, the question is not simply whether the purpose of the challenge was to exclude all persons opposed to abortion regardless of the ideological basis for opposition, but whether the exclusion of those whose opposition is in fact based upon religion burdens the practice of their religion, and if it does, whether the burden is justified by a compelling state interest. Even if a challenge was motivated by or is capable of explanation on the basis of a reason that has nothing to do with religion, it may burden the religious juror's practice of his religion, because but for his religious belief he would not find himself in the class to which the peremptory is directed—those opposed to abortion. In this sense the juror's religion causes his exclusion.¹¹¹

There can be no doubt that exclusion from a jury on religious grounds burdens the practice of religion. Jury service is an important governmental function, both an honor and a responsibility. That a person excluded from a particular jury may be selected for another is true: systematic exclusion of members of a religious group from a particular kind of case or from all cases—such as was the practice with Blacks and women in parts of the country until recently—would of course impose a more serious burden. But the Free Exercise Clause is violated if there is any burden, judged from a secular point of view.¹¹² It should be kept in mind that although there may be

¹¹¹ For a case in which the party who challenged the juror did indeed seem to be interested in the ideological basis for the juror's attitude, see *State v. Ball*, 685 P.2d 1055, 1056-57 (Utah 1984). This was a prosecution for driving while drunk, in which jurors who had said they did not drink were not allowed to be asked whether their abstention was for personal or religious reasons. The court held that it was error not to allow this question, that an answer might have given reasons for a peremptory challenge, and by implication that such a challenge would not have violated a state constitutional provision declaring that no one should be considered incompetent to be a juror on account of religious belief. *Id.* at 1060-61.

¹¹² See *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994) (holding that the burden need not be substantial when religion has been targeted); Arp, *supra* note 110, at 738. *But see* *WJM ex rel. KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1050-51 (9th Cir. 1999) (seeming to require substantial burden); *id.* at 1053 (Kleinfeld, J., dissenting) (opining that even a slight burden is sufficient when religion is targeted), *reh'g denied*, 210 F.3d 1098, 1099 (9th Cir.) (O'Scannlain, J., dissenting) (rejecting the idea that a de minimis violation of Free Exercise Clause is

invidious implications in particular instances in which the practice of religion is burdened and the purposes of the Free Exercise Clause no doubt include the elimination of such invidiousness, invidiousness is not a requirement for a violation of the clause.

As has been noted, the Equal Protection Clause is violated only if there is an impermissible governmental purpose, either in the sense of the law's being incapable of justification except on grounds of race or sex or in the sense of actual motivation. It is not enough that the complainant—the excluded juror—has been adversely affected. This is why *Batson* cases are so taken up with the question of what showing there must be of the purpose of the challenge and the challenger's state of mind.¹¹³ Under the Establishment Clause, equally, there is a requirement of purpose, again in either or both of the senses just set forth. A peremptory challenge could violate the Establishment Clause if its purpose was to prefer a particular religion over others or to advantage religion over nonreligion to an impermissible degree. But, as we have seen, under the Free Exercise Clause, assuming *Sherbert-Yoder* applies, what is important is not the purpose of the governmental action, but its effect.

Suppose a peremptory challenge is based on the fact that a

permissible), *cert. denied*, 531 U.S. 1010 (2000). Although the Religious Freedom Restoration Act requires a "substantial burden," 42 U.S.C. § 2000bb-1 (2000), it is not clear that the Supreme Court's interpretations of the Free Exercise Clause itself require it. Although *Yoder* involved possible criminal punishment, *Sherbert* concerned only loss of an economic benefit. In any event, if a substantial burden is required, it seems clear that the burden must not be judged from a religious point of view—either that of the particular religion involved or from any other religious point of view—but from a secular point of view, in order to avoid courts' becoming engaged in efforts to understand religious doctrine.

With the burden of exclusion from a jury may be compared the burden of being compelled to serve on a jury in violation of one's religious beliefs. See *In re Jenison*, 125 N.W.2d 588 (Minn. 1963) (on remand for reconsideration in light of *Sherbert v. Verner*, holding that under the circumstances, there was no compelling state interest to override the free exercise right not to serve); see also *United States v. Hillyard*, 52 F. Supp. 612 (E.D. Wash. 1943) (similar); *State v. Everly*, 146 S.E.2d 705 (W. Va. 1966) (similar). Would a requirement of jury service be a neutral and generally applicable law under *Smith* or would the usual numerous exclusions and exemptions deprive it of that character? Would the requirement fall under either of the exceptions to the *Smith* rule? Justice Story, on circuit, had a case before him involving both the question of whether a juror who had conscientious scruples should be required to serve and the question of whether he should be allowed to serve, and he ruled that the answer to both questions was no, although without referring to any constitutional provisions. *United States v. Cornell*, 25 F. Cas. 650 (C.C.D.R.I. 1820) (No. 14,868).

¹¹³ See, e.g., *Purkett*, 514 U.S. 765; *United States v. Clemmons*, 892 F.2d 1153, 1157 (3d Cir. 1989).

prospective juror is not religious.¹¹⁴ Such a challenge cannot be said to be irrational: a lawyer may have experience that nonbelievers are more likely to engage in misconduct as jurors or are less likely to be favorably disposed to the party he represents than believers. Such a challenge might not violate the Free Exercise Clause— notwithstanding the puzzle of how religion can be freely exercised if the Constitution treats believers more favorably than nonbelievers— but the Establishment Clause might block such a challenge. An objection to the challenge also could be founded, in the federal courts at least, on the provision in Article VI of the original Constitution that prohibits religious tests for office,¹¹⁵ and in state courts on that same provision if it is made applicable to the states by the Fourteenth Amendment.¹¹⁶ However, neither the Establishment Clause nor the religious test provision of Article VI may give to the unbelieving juror the same protection as the Free Exercise Clause gives to believers. A peremptory challenge on the basis that the juror is not religious should be distinguished from one based on the absence of any sense of moral obligation (assuming there is such a thing as nonreligious morality), which probably may be the basis not only for a peremptory challenge, but also for a challenge for cause.¹¹⁷

Now we must come to weighing the interest in religious liberty that would be upheld by forbidding peremptory challenges affecting religion against the interest in allowing such challenges. Although the Court strenuously seeks to avoid such a weighing by the *Smith* rule, the task still must be undertaken if a governmental action is not neutral and of general applicability or falls within one of the *Smith* exceptions.

¹¹⁴ Cf. *Grady v. State*, 730 S.W.2d 191, 195 (Tex. App. 1987), *vacated on other grounds*, 761 S.W.2d 19 (Tex. Crim. App. 1988).

¹¹⁵ U.S. CONST. art. VI.

¹¹⁶ Some state constitutions have no-religious-test provisions and other provisions stating that religious opinions shall not render a person incompetent to be a juror. In *State v. Leuch*, 88 P.2d 440, 441-42 (Wash. 1939), the court held that neither sort of provision prevented excluding for cause in a capital case a juror who was conscientiously opposed to the death penalty in any circumstances. See Justin Dolan, Comment, *Thou Shall Not Strike: Religion-Based Peremptory Challenges under the Washington State Constitution*, 25 SEATTLE U. L. REV. 451 (2001). In *Bader v. State*, 40 S.W.3d 738, 741-43 (Ark.), *cert. denied*, 534 U.S. 826 (2001), the court referred to provisions in federal and state constitutions prohibiting religious tests for office, but the significance for its holding that there was no error in the circumstances of that case in forbidding inquiry into jurors' religion is unclear. See also *People v. Langston*, 641 N.Y.S.2d 513 (Sup. Ct. 1996) (holding state constitutional provision prohibiting discrimination in civil rights because of religion violated by peremptory challenge to Islamic juror).

¹¹⁷ Compare the question of the sense of moral obligation required to make a person competent to be a witness. FED. R. EVID. 601, 603.

In favor of allowing peremptory challenges based on religion are the arguments set forth earlier in favor of peremptory challenges generally: they enable the parties to rid the jury of persons who pose a significant risk of misconduct, although not enough to justify exclusion for cause; they enable the parties to eliminate jurors who, although they pose no risk of misconduct, hold views that are unfavorable to the challenging party—there being nothing wrong with allowing the parties in this context to pursue their own interests and, through their combined peremptory challenges, to narrow the range of views represented on the jury; and, finally, party participation in the formation of the tribunal gives to the proceedings something of the character of arbitration, and so contributes to the parties' and the public's acceptance of the verdict. Even if these considerations do not add up to a constitutional right to peremptory challenges—and it is settled that no such right exists¹¹⁸—they may support the argument that there is a strong state interest in allowing peremptory challenges.

In favor of forbidding peremptory challenges affecting religion is the importance of respecting and not burdening the practice of religion, a value affirmed in *Sherbert*, *Yoder*, and other cases. This value, as noted earlier, is independent of any invidiousness that may or may not attend exclusion by a peremptory. As we have seen, whereas racial discrimination has usually been accompanied by invidiousness, religious discrimination, like sex discrimination, has only sometimes been.

In *J.E.B.*, in support of its decision to forbid sex-based peremptories under the Equal Protection Clause, the Court strongly condemned what it called “stereotypes” regarding the difference between men and women and what they think. This condemnation could be based simply on the ground that these “stereotypes” are incorrect or exaggerated and should not for that reason be reinforced by governmental recognition. But this contradicts the point of peremptories. More likely, as suggested earlier, the Court condemned “stereotypical” thinking about men and women not because it disagreed with the premises, but because in its judgment those premises have led to evil social consequences. But the condemnation of stereotypical thinking about religious differences and their significance for how believers think and act must be viewed from a very different perspective and cannot be invoked as a reason for forbidding religion-based peremptories. Government surely is forbidden by the Establishment Clause—and indirectly there would

¹¹⁸ See *supra* note 49 and accompanying text.

be implications for free exercise as well—from taking and enforcing the view that all religions are essentially the same and that being of a certain religion should not be seen as having much significance for how a person thinks and acts. Even if there are invidious implications in the idea that there are differences and that they matter—for instance that those who adhere to a certain religion are in error and that their views should be condemned—these implications must be accepted for the sake of avoiding the evil effects of a government orthodoxy in regard to the supernatural.

In *J.E.B.*, in determining that sex-based peremptories violated the Equal Protection Clause, the Court attached significance to what it considered the slightness of the predictive value of sex in judging how a person will think and act as a juror.¹¹⁹ The same was true in the Court's decisions regarding peremptories based on race.¹²⁰ The slightness of predictive value, the Court thought in *J.E.B.*, undermined the claim that such peremptories advanced an important state interest. The likelihood that the challenges would keep off the jury a person who would engage in misconduct or who even would be unfavorable to the challenging party seemed to the Court slight. Should such a consideration enter into the determination of whether there is a compelling state interest in the case of religious peremptories? Some have expressed the view that in the case of religion, the predictive value is higher, indeed sufficiently higher to justify finding a constitutional difference between racial and sexual challenges on the one hand and religious challenges on the other.¹²¹ In the case of race and sex, the fact upon which prediction is based, though not entirely free from difficulties, is relatively straightforward: it is a physical fact. To found a prediction on the basis of a person's religion, however, is to make reference to a fact of considerable uncertainty. Thus a person's religion may refer to something about his state of mind, to his relations with other persons or with an institution, to his external behavior, or to his cultural inheritance. Similar uncertainty of reference would attend a peremptory challenge based upon "ethnicity."¹²² Depending on what

¹¹⁹ *J.E.B.*, 511 U.S. at 138 n.9.

¹²⁰ *Batson*, 476 U.S. at 89, 97-98; *id.* at 104-05 (White, J., concurring).

¹²¹ For example, *Casarez v. State*, 913 S.W.2d 468, 492, 495-96 (Tex. Crim. App. 1995) (en banc), which held that *Batson* and *J.E.B.* did not preclude peremptories based on religion—the challenged jurors were members of the Pentecostal Church—relied on the difference in predictive value between race and sex on the one hand and religion on the other and the lack of invidiousness in the case of religion, the court suggesting that the greater predictive value eliminated invidiousness.

¹²² See *Rico v. Leftridge-Byrd*, 340 F.3d 178, 183 (3d Cir. 2003).

is meant by the religion of the juror, the predictive value of the fact could be great or little. Thus, if a person had said that he had a religious belief in a God who saw no value in human law, the probability that the person would ignore the law given to him by the judge would be considerable, whereas if all that can be said is that the juror is a “member” of a particular church, one of whose officials has announced such a view as church doctrine, the probability would be less.¹²³ So if predictive value is to be considered in assessing the strength of the state interest for purposes of *Sherbert-Yoder*, the specific circumstances of each case may have to be considered. In the case of peremptories based on race and sex, the Supreme Court held only that peremptories based exclusively on these relatively straightforward physical facts violated the Equal Protection Clause. It made clear that if any other circumstances were present to support the peremptory—for instance that a particular woman was a member of the National Organization for Women—the peremptory might be permissible.¹²⁴ Therefore, in the case of religion it would have to be

¹²³ In *State v. Purcell*, 18 P.3d 113, 118-22 (Ariz. Ct. App. 2001), the court held that *Batson* extended to religion, so that a peremptory based on religious “membership” or “affiliation” would be unconstitutional. The court held, however, that the peremptory in the litigated case was not of this sort, but was based on the fact that the juror had said she was a Catholic, was opposed to capital punishment although that would not prevent her from judging the case fairly, and was a secretary for the Catholic diocese. In addition, the bishop, the juror’s employer, had recently stated that the Pope was against capital punishment and Catholics should begin to oppose it themselves. The issue for the jury in the case, a first degree murder prosecution, was not whether the death penalty should be imposed, nor even whether the defendant had killed the victim, but whether the defendant intended or premeditated the killing. *State v. Hodge*, 726 A.2d 531, 553-54 (Conn. 1999), is similar: although the court held that a peremptory based on “religious affiliation” would be unconstitutional, the information the prosecutor relied on in making his challenge, which included the juror’s membership in a particular Islamic sect and that he had said he would consult his imam if questions arose, took it out of this category. It would appear that the term “religious affiliation” as used in this decision implies a small likelihood of misconduct, and that certain connections with a religion might constitute more than mere “affiliation.” See also *United States v. DeJesus*, 347 F.3d 500, 510 (3d Cir. 2003) (peremptory challenge based on juror’s “heightened religious involvement” was not unconstitutional, though challenge based simply on denominational affiliation might be); *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998) (pointing to the necessity of distinguishing between “religious affiliation, a religion’s general tenets, and a specific religious belief”); *State v. Fuller*, 812 A.2d 389, 397, 406-09 (N.J. Super. Ct. App. Div. 2002) (finding no violation of state constitutional provision prohibiting discrimination in jury selection on basis of principles where prosecutor’s peremptory challenge was based on inference that juror dressed in black and wearing a skull cap was probably a Muslim and devout, and so likely to be forgiving and defense-oriented; dissent finding violation of both state constitution and Free Exercise Clause, the latter not having been considered by majority).

¹²⁴ See *J.E.B.*, 511 U.S. at 143-46.

decided what about the juror would be equivalent to simply being a woman or being of a particular race with its attendant insufficiency of predictive value as to how the person would think and act as a juror. But perhaps nothing about a juror pertaining to religion would have such slight predictive value as to undermine the importance of the state interest in allowing religion-related peremptories.

If the probability of misconduct or unfavorableness should enter into the calculation of the state's interest in religion-related peremptories, a form of misconduct peculiar to these cases must be attended to. Although it involved exclusion from the legislature and not from a jury and could be seen as analogous to exclusion for cause rather than by peremptory, *McDaniel v. Paty*¹²⁵ brings out this point. In *McDaniel* a state constitution rendered ineligible for office either in the legislature or in state constitutional conventions, ministers of religion. A number of different objectives could have been served by this exclusion. First, it could have been based upon the idea that involvement of ministers in government and politics conflicts with their sacred character and function. The value upheld would be strictly religious. It is clear that such an objective would violate the Establishment Clause: it embraces a particular idea of religion and religious leadership and seeks to protect that idea. A second purpose of the exclusion could have been to create circumstances that would make more likely full-time devotion to the ministry by those who undertake it, the function of a minister being deemed of great importance. This objective does not imply any view of the deleterious effect of mixing religion with politics. An Establishment Clause objection concerning undue support of religion might be answered by also excluding from the legislature persons in other occupations also considered important, for instance police, firemen, and members of the Armed Forces. A third purpose could have been related to the effective working of the legislature itself, rather than to the protection of religion. Experience might suggest that ministers with competing responsibilities and great demands on their time cannot be responsible and effective legislators. But if that is the argument, it needs to be explained why other classes of busy persons, such as doctors and lawyers, do not pose the same danger. Finally—and this is the point in which we are chiefly interested—ministers of religion in the legislature pose a special risk—or at least so the adopters of the state constitutional provision might have thought—of enacting legislation that violates the Establishment Clause, either

¹²⁵ *McDaniel v. Paty*, 435 U.S. 618 (1978). *Purcell*, 18 P.3d at 121, cites *McDaniel* and suggests its relevance to religion-based peremptories.

because it is incapable of justification on a secular ground or because it was subjectively motivated by religious belief.¹²⁶ Laymen also may pose a risk of such an occurrence, but it would be a smaller risk.

In *McDaniel* the Court struck down the exclusion of ministers from the legislature on the ground that it violated the free exercise right of the minister: he must not be required to choose between the ministry and being a legislator; the restriction imposed an impermissible burden on the pursuit of his religious vocation. Although the Court did not mention it, the minister's interest might have been coupled with the interest of his parishioners in having him as their minister, if they had no objection to his also being a legislator. Indeed, they might have thought this combination a perfectly appropriate exercise of his ministry. What is clear from the Supreme Court's decision is that the minister's and perhaps the congregation's interests in religious liberty outweighed the risk of conduct by the minister in the legislature that would violate the Establishment Clause.¹²⁷

As mentioned, *McDaniel* involved what was analogous to some exclusions for cause in the jury context: the minister was excluded by virtue of a *per se* rule addressed to a class of persons. Might the Supreme Court have reached a different result if exclusion followed an individualized determination of the risk posed by a particular person to Establishment Clause values? In any case, two questions are presented of interest to our inquiry: What is the relevance of *McDaniel*'s exclusion from the legislature to exclusion from a jury; and what is the relevance of constitutional limits on challenges for cause to peremptory challenges?

Grounds for disqualification from the legislature must be pertinent to the legislature's distinctive functions: determining social policy and laying down general rules. In gathering information to enable it to discharge these functions, the legislature may proceed in any way it sees fit. Legislators, not being drawn at random from a representative cross-section of the population, are not restricted, as

¹²⁶ See *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

¹²⁷ With exclusion of a minister from the legislature, compare *La Rocca v. Lane*, 338 N.E.2d 606 (N.Y. 1975), in which a prohibition against a Catholic priest-lawyer wearing his clerical collar while representing a client in a criminal jury trial was upheld against a free exercise claim made by the priest-lawyer, who said his priestly vocation required him to wear the collar. The fear was not that the priest-lawyer would act in some way inconsistent with his duties as a lawyer, but that the jurors, seeing the collar, would respond in an improper way. If exclusion of a priest from a jury, simply because he is a priest would violate *McDaniel*, what about forbidding him to wear his collar or tell the other jurors that he is a priest?

jurors are, to background information possessed by some section of the population of substantial size. In regard to matters of value, the legislature may embrace any values it sees fit within constitutional limits. It does not take the law from any other authority. The particular constitutional limit of concern in the present connection, although not mentioned by the Court in *McDaniel*, is the Establishment Clause. In this perspective, the very special nature of the Establishment Clause stands forth. It alone of all constitutional provisions limits the nature of the good that the legislature may pursue: it may not pursue a transcendent or supernatural good. Likewise, legislation may not be premised on factual beliefs about the transcendent or supernatural. As earlier noted, it is not clear whether this means only that legislation that is enacted must be reasonably capable of secular justification, or whether in addition it means that legislation must not have been actually motivated by religious belief.

Exclusion from a jury will be either for cause or as a result of the exercise of a peremptory challenge. Exclusion for cause may be by virtue of a per se rule created by the legislature or developed by the courts, or by the application of a burden of proof rule to the likelihood of misconduct suggested by the information available regarding a particular juror. Misconduct by jurors, the risk of which may justify exclusion for cause, as is the case with legislators, may relate either to beliefs about the good or factual beliefs. As observed earlier, the role of the jury in regard to values is much more limited than that of the legislature: generally, the jury must take the law from the judge. In regard to those few situations in which jurors may apply ideas of the good, they probably must limit themselves to ideas they believe are held by a section of the population of substantial size.¹²⁸ In regard to the facts, the jurors must learn of these through the formal trial process, subject to the Rules of Evidence, or from background information held by a section of the population of substantial size. Thus, the risk of misconduct generally is greater in the case of jurors than legislators, although this may not be so in the case of the particular misconduct of a violation of the Establishment Clause. If the limit of the Establishment Clause is imposed on the

¹²⁸ The distinction between the functions of the legislature and juries, with particular reference to peremptory challenges, was noted by Justice Souter in his dissent in *Bush v. Vera*, 517 U.S. 952, 1051 n.5 (1996) (Souter, J., dissenting). Justice Souter wrote that the legislature is concerned with social values, whereas the jury is concerned to apply law to a set of objectively discovered facts. See Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 148 (1996).

legislature, it is impossible to think why it should not also be imposed on the jury. Both exercise governmental power under the Constitution. Thus the jury in exercising its function must not resort to beliefs about the transcendent or the supernatural, either in regard to the good or the true.

If the foregoing proposition is correct, the decision in *State v. De Mille*¹²⁹ is wrong. In that case, on a motion for a new trial, the trial court refused to receive a juror's affidavit that in the course of jury deliberations, a juror had stated that during closing argument she had prayed for a sign concerning defendant's guilt, had received a revelation that if defense counsel did not make eye-contact with her that would indicate guilt, and that he had not made eye-contact. The appellate court held that there was no error and even suggested that a contrary result might violate a provision in the state constitution protecting the rights of conscience and prohibiting religious tests for office.¹³⁰

Jurors may not bring to bear religious beliefs even though they are confident that the beliefs are held by a group of substantial size in the population, perhaps even by a majority. Thus the fair cross-section standard of the Sixth Amendment is limited by the Establishment Clause.¹³¹ Furthermore, if in the case of the legislature

¹²⁹ 756 P.2d 81 (Utah 1988).

¹³⁰ The court further stated that if "a juror might so abandon his or her judgment to what he or she perceives to be oracular signs as to be unable to fairly consider the evidence and properly apply the law," the case might be different. *Id.* at 84. A different interpretation of the court's decision might be that whether or not it is proper for jurors to be guided by revelations, the rule that jurors' statements will not be admitted to impeach a verdict, UTAH R. EVID. 606(b) and FED. R. EVID. 606(b), precluded evidence of such an event. The dissent was based not on the Establishment Clause, but on the right to jury trial. *See People v. Jenkins*, 997 P.2d 1044, 1105 (Cal. 2000) (holding that neither the First nor Sixth Amendment was violated by excluding for cause a juror who believed that a bubble of light surrounded each person and would protect him, and who also believed that he could not predict the influence of his "inner voice" on his deliberations as a juror; the trial court had a "reasonable concern that the prospective juror's mysticism and other observable characteristics would impair his ability—as an individual—to deliberate rationally"), *modified, reh'g denied*, No. S007522, 2000 Cal. LEXIS 5222 (Cal. June 28, 2000), *cert. denied*, 531 U.S. 1151 (2001); *see also Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2000), *cert. denied*, 534 U.S. 847, 943 (2001) (holding there to be a violation of Establishment Clause for prosecutor in closing argument of penalty phase of capital case to tell jurors that God ordains authority and that in imposing death penalty they would be doing what God says).

¹³¹ In *State v. Rogers*, 825 S.W.2d 49, 51-52 (Mo. Ct. App. 1992), defendant contended that his Sixth and Fourteenth Amendment rights had been violated by the fact the venire was composed from lists of persons with drivers' licenses and that the Amish, a substantial portion of the local population, did not drive. Were the Amish a Sixth Amendment cognizable group? Their religious beliefs could not

it is not enough that the results of its activity be capable of secular justification, but that the activity also must actually be motivated by secular considerations, it is difficult to see why the same requirement would not apply to the jury.

In *McDaniel*, one of the reasons for excluding ministers from the legislature, as already mentioned, could have been extrinsic to the legislative process: to preserve the ministers' sacred function. Other exclusions for extrinsic policy reasons can be found or may be imagined, for instance in the case of members of the Armed Forces or the police. But even if it is permissible to pursue these other objectives through exclusion—and it may not be, considering the voters' interest in having the representatives they want—it is not permissible to pursue the policy implied by the exclusion of ministers because of the Establishment Clause: exclusion would uphold a particular religious idea. If that objective may not be pursued through exclusion from the legislature, neither may it be pursued through exclusion from a jury.

Exclusion in either context for a reason intrinsic to the governmental function involved, namely a risk of a violation of the Establishment Clause, presents a different question, however. But *McDaniel* teaches that this danger is not sufficient to warrant exclusion of ministers from the legislature in the face of the Free Exercise Clause. Even more clearly, exclusion of a wider class, say of all believers, would violate the Free Exercise Clause and perhaps the no-religious-test provision of Article VI, although with the members of this class also there may be a risk of recourse to beliefs in the supernatural. Elimination of the risk does not justify the cost. Exclusion of nonbelievers probably would be blocked by the Establishment Clause and the no-religious-test provision. But in the case of both the legislature and the jury, it is conceivable that there could be a situation in which a class of persons or a particular person could be excluded, because the group or individual held particular religious beliefs that created a great danger of unconstitutional behavior. It will be recalled that the Supreme Court in the *Witherspoon-Witt* line of cases relating to capital punishment,¹³² held

qualify them as such because of the Establishment Clause. Might they be a cognizable group by virtue of their knowledge of farming and related rural activities? But would they know things that non-Amish farmers do not? Might the Amish be a specially protected class under the Equal Protection Clause? Might the free exercise rights of the Amish be violated by the use in forming jury pools of lists of those who engage in activities the Amish religion forbids them to engage in, even though the use of these lists was not for the purpose of excluding them?

¹³² *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon v. Illinois*, 391 U.S. 510

that jurors whose beliefs would substantially impair their ability to consider the evidence and apply the law could be excluded from the jury for cause. Presumably this would include jurors whose opposition was based on religious belief.¹³³ In extreme cases, the Establishment Clause might require, not simply permit, a person or class of persons to be excluded. Thus, in certain situations the ordinary law of exclusion for cause might not measure up to constitutional requirements.

*Miles v. United States*¹³⁴ involved the question of whether Mormons who believed in bigamy could be disqualified for cause in the trial of a prosecution for bigamy. The Supreme Court's decision was handed down shortly after its ruling in the famous case of *Reynolds v. United States*, in which a criminal conviction for practicing bigamy was held not to violate the Free Exercise Clause.¹³⁵ The trial court had disqualified two jurors, one who said he believed that bigamy was an ordinance of God and that persons who practiced it should not be convicted, and another who said he also believed that bigamy was an ordinance of God and that the statute that prohibited it was in conflict with that ordinance, but that Congress had a right to pass such a law and that he would consider it his duty, if satisfied by the evidence, to find the defendant guilty.¹³⁶ The Supreme Court sustained both of the lower court's rulings and did so in sweeping language suggesting that the mere holding of a belief that bigamy was an ordinance of God justified exclusion for cause and that the fact that religious belief was involved was irrelevant.¹³⁷ It seems clear that an expressed intention to use the position of juror to defeat the law warrants exclusion for cause even though the motivation is religious. As to the second juror in *Miles*, who said he believed in polygamy but would do his civic duty nevertheless, there may be more question. Might there be a conflict here with the *Witherspoon-Witt* line of cases, which held that jurors who had some scruples about capital punishment could not be excluded for cause? Of course those decisions addressed the defendant's Sixth Amendment right to random selection from a fair cross-section. In *Miles* it is not clear whether the Court intended to address such a claim. It did, however,

(1968).

¹³³ See *State v. Davis*, 386 S.E.2d 418, 427 (N.C. 1989) (holding exclusion for cause of juror opposed to capital punishment on religious grounds was not violative of free exercise rights); *State v. Bobo*, 727 S.W.2d 945, 949 (Tenn. 1987) (same).

¹³⁴ 103 U.S. 304 (1880).

¹³⁵ *Reynolds v. United States*, 98 U.S. 145 (1878).

¹³⁶ *Miles*, 103 U.S. at 306-07.

¹³⁷ *Id.* at 310.

expressly reject the contention that the free exercise rights of the excluded juror had been violated, even though possibly there was only a modest likelihood that the second juror would engage in misconduct. *Miles*, however, like *Reynolds*, is an old decision, handed down long before the modern development of free exercise jurisprudence, and so without much authority.¹³⁸

Earlier it was said that *McDaniel* suggested two questions pertinent to our subject, first, the relevance of exclusion from the legislature to exclusion from a jury, and second, the relevance of exclusion for cause to exclusion by peremptory challenge. I now address the second question. In the case of challenges for cause, the parties invoke a rule of law based upon the law's judgment of an unacceptable risk of misconduct. The number of challenges for cause that may be upheld is unlimited. In the case of peremptories, there is no rule of law except that the party's decision must be honored. The party makes an entirely discretionary determination, on the basis of the information he has, about what is an unacceptable risk of misconduct or how best his interests will be served. The number of peremptories is limited. Thus peremptory challenges have a different structure and serve different purposes than challenges for cause. Obviously if a challenge for cause would be sustained, a fortiori a peremptory challenge must be. It does not follow, however, that if a challenge for cause would not be sustained, a peremptory is not permissible. As applied to the question of present concern, even if it is settled that under certain circumstances the free exercise rights of the juror would block a challenge for cause, that does not mean that a peremptory challenge must be prohibited.

A return to the *Witherspoon-Witt* line of capital punishment cases provides an opportunity to summarize what has just been said and to situate it in the larger picture. As will be recalled, under *Witherspoon-Witt*, jurors whose attitude toward capital punishment creates a substantial risk that they will not apply the law or heed the evidence may be excluded for cause. Their exclusion does not violate the fair cross-section value of the Sixth Amendment; indeed, it can be argued that it enforces it because of the high probability of misconduct.

¹³⁸ *Reynolds* also involved challenges to jurors, but the challenges were based upon the excluded jurors themselves being polygamists, not simply on their holding opinions about polygamy. *Reynolds*, 98 U.S. at 157. Compare *Miles*, 103 U.S. 304, with *Coleman v. United States*, 379 A.2d 951, 953-54 (D.C. 1977) (in prosecution for robbery of priests in Catholic rectory, holding it was not error to refuse to exclude for cause all Catholics). If "Catholics" could be excluded, who would fall within the excluded class?

These cases did not present a free exercise claim, but even if they had, it probably would have been overridden by the compelling state interest in preventing nullification of the law, even though the interest in the free exercise of religion and the fair cross-section value of the Sixth Amendment may not be of exactly the same weight. On the other hand, under *Witherspoon-Witt*, jurors who are merely doubtful about capital punishment may not be excluded for cause. The risk of misconduct is not sufficient to justify encroachment upon the fair cross-section value. This was the holding of *Witherspoon* itself. Because the decision rested upon the Sixth Amendment, there was no reason to reach a free exercise claim that might have been made by jurors whose doubts had their origins in religious belief.

Although a juror merely doubtful about capital punishment may not be excluded for cause, he may be excluded by a peremptory. The characteristics of the peremptory challenge that have been outlined above, which distinguish it from the challenge for cause, are enough to justify such compromising of the cross-section value as may occur. In making this point, it is assumed that the doubting jurors are a cognizable group for Sixth Amendment purposes. Suppose now, in addition, doubting jurors whose doubts rest upon religious belief invoke their free exercise right with the purpose of preventing their exclusion by peremptories. This right does not require that they represent a cognizable group under the Sixth Amendment. They claim that even though the virtues of a peremptory challenge are enough to outweigh the Sixth Amendment value, these virtues are not enough to outweigh the interest in the free exercise of religion.

It is now necessary to review what has been said and to take a position on the permissibility of religion-based peremptories under the Free Exercise Clause, assuming that the *Sherbert-Yoder* test is applicable. Undoubtedly, exclusion from a jury on account of religion imposes a burden on the practice of religion. The strength of the First Amendment right not to have the practice of religion burdened is indicated by the *Sherbert-Yoder* requirement of a compelling state interest. Do the policies that support the allowance of peremptory challenges constitute such an interest? These policies have already been set forth: eliminating from the jury persons who pose a risk of misconduct, although not a sufficient risk to support a challenge for cause; allowing the parties to excuse a limited number of jurors whom they consider unfavorably disposed towards them; and allowing the parties to participate in the formation of the tribunal, so as to make acceptance of the verdict more likely. That there is no federal constitutional right to any peremptories at all does not mean that if the legislature chooses to allow peremptories, the

reasons for them do not add up to a substantial state interest.

In the case of race, the reasons for peremptories do not add up to a state interest weighty enough to justify excluding a juror on that basis. How then could they be found sufficient to constitute a compelling state interest that would overcome the right to the free exercise of religion? One might argue that a reason for reaching different results in the two situations is not that there is any difference in the policies supporting peremptories, but that the substantive constitutional rights have different importance: the constitutional commitment to abolish racial discrimination is stronger than the commitment to the free exercise of religion.¹³⁹ Put thus baldly, the proposition is impossible to accept.

If it is argued that the effect of *Smith* has been to devalue the right to the free exercise of religion with the consequence that it should be given less protection than the right to be free from racial discrimination, that would implicitly abolish the exceptions to the *Smith* rule, under one of which—individualized consideration—it has been assumed peremptory challenges should be located.

Even if ending racial discrimination is of supreme importance, how can allowing religion-based peremptories be squared with not allowing peremptories based on sex under the Equal Protection Clause? Discrimination based on sex requires not a compelling, but only a very persuasive state interest to justify it. Yet in *J.E.B.*, the Court held that the policies supporting peremptories did not even reach that mark.¹⁴⁰ Surely it will not be argued that though the strength of the policies for peremptories remains the same, the substantive right to be free from sex discrimination is more powerful than the right to the free exercise of religion, a right expressly set forth in the First Amendment. The ideas about sex discrimination in *J.E.B.* are relatively recent developments in equal protection law, whereas the struggle over race discrimination has marked the nation's entire history, and since the Civil War has generated the

¹³⁹ Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

¹⁴⁰ *J.E.B.*, 511 U.S. 127; *id.* at 146-47 (O'Connor, J., concurring) ("The State's proffered justifications for its gender-based peremptory challenges are far from the 'exceedingly persuasive' showing required to sustain a gender-based classification."); *see Casarez*, 913 S.W.2d at 502 (Baird, J., dissenting) (pointing out the difficulty of reconciling the court's decision in that case with *J.E.B.*); *see also Hodge*, 726 A.2d at 552 (finding *J.E.B.* not distinguishable); Angela J. Mason, Note, *Discrimination Based on Religious Affiliation: Another Nail in the Peremptory Challenge's Coffin?*, 29 GA. L. REV. 493, 523-25 (1995) (stating that in view of decisions regarding race and sex, the Court has little choice but to disallow peremptory challenges based on religion); Arp, *supra* note 110, at 738-39 (same). *But see* Chambers, *supra* note 5, at 592-99.

strongest legal condemnations.¹⁴¹

I have already pointed out a feature of peremptory challenges based on religion that distinguishes them from challenges based on race and sex. Whereas it is tolerably clear what is meant by a juror's race or sex, it is not at all clear what is meant by a juror's religion. The significance of this difference lies in its bearing on the predictive value for juror misconduct or unfavorableness of the fact upon which the challenge is premised: organizational affiliation may have little predictive value, but regular attendance at worship or personal statements of belief may have considerable. This consideration does not alter the importance attached to the policies that support peremptories, but it points to circumstances that affect the degree to which those policies will be defeated by the disallowance of a peremptory. If it is assumed, however, that the predictive value of the fact concerning religion is the same as the predictive value of race or sex, how can a peremptory challenge based on sex be disallowed, but a peremptory challenge based on religion allowed, without holding that the right to free exercise is less weighty than the right to be free from sex discrimination?

In the foregoing I have been comparing the importance of the right of free exercise with the rights to be free from racial and sexual discrimination, and asking how the latter can be recognized but not the former. But there is another perspective that must be taken into account before closing, a perspective characteristically associated with the Religion Clauses and which has been referred to already several times in this Article: the standard embodied in the Religion Clauses regarding the permissible relative effect of government action on the positions of religion and nonreligion. It is one thing to consider separately and then compare the strength of the rights to be free from racial and sexual discrimination and the right to religious freedom and to weigh these against the arguments in favor of peremptories. But it has been settled by the Court that the Constitution forbids peremptories based on race and sex. Even assuming that the Free Exercise Clause allows religion-based peremptories in cases where all other peremptories are allowed, since the Court has held that the Equal Protection Clause forbids the use of some nonreligion-based peremptories—race and sex—then

¹⁴¹ See *J.E.B.*, 511 U.S. at 155 (Rehnquist, C.J., dissenting) (distinguishing disallowance of racial from sexual peremptories, in part on ground that "racial equality has proved a more challenging goal to achieve on many fronts than gender equality"); *Davis v. Minnesota*, 511 U.S. 1115 (1994) (Thomas, J., dissenting in denial of certiorari) (contending that the decision in *J.E.B.* requires disallowance of religion-based peremptories).

perhaps the norm embodied in the Religion Clauses, which says that if certain advantages are given to nonreligion they must also be given to religion, requires that religion-based peremptories be disallowed. The Court has given us an equal protection jurisprudence that is not “neutral [and] generally applicable,” with the consequence that the Free Exercise Clause, read against this background, requires that religion be similarly protected.¹⁴²

¹⁴² If religion-based peremptories are held to be constitutionally impermissible, what of those based upon expressions of political opinion or other speech, or upon membership in nonreligious associations? *United States v. Villareal*, 963 F.2d 725, 728-29 (5th Cir. 1992), a pre *J.E.B.* case, refused to disallow such peremptories. (The juror had made statements indicating opposition to capital punishment.) See *Casarez*, 913 S.W.2d at 492, 495; *id.* at 498 (Mansfield, J., concurring) (expressing concern with the implications of disallowing religion-based peremptories for the status of peremptories based on political speech and association); see also Cheryl G. Bader, *Batson Meets the First Amendment: Prohibiting Peremptory Challenges That Violate a Prospective Juror's Speech and Association Rights*, 24 HOFSTRA L. REV. 567 (1996).