Fourth Annual Festival of Legal Learning

Regent University School of Law
1000 Regent University Drive, Virginia Beach, VA 23464
October 7, 2022

Session 2

The Day the Supreme Court of the United States Almost Outlawed Religious Discrimination in Jury Selection

James J. Duane, J.D.

Professor, Regent University School of Law

Program Description: This CLE session will consider certain aspects of American constitutional law governing the exercise of peremptory challenges at a jury trial, as well as the subject of equal protection more generally. The course will trace and review the history of the Supreme Court cases in the line of *Batson v. Kentucky* and its progeny, which have laid down certain constitutional limits on the ability of a lawyer to exercise peremptory challenges, and which forbid the exercise of such challenges on the basis of race or gender. It will also consider the related question of whether the Constitution likewise should be construed to forbid the exercise of peremptory challenges on the basis of the religion of prospective jury members. The CLE will include a discussion of some previously undisclosed materials found by the speaker in his personal examination of the private files of the late Justice Harry Blackmun, now archived in the Library of Congress.

Target Audience: The CLE will be of value and interest to all lawyers, judges, and law students who are or may someday be involved in the trial process or in the litigation of equal protection claims. The topic will be of particular value to anyone with a keen interest in the political and legal topics involved in equal protection, racial discrimination, and religious discrimination. It will also be of practical value to current and future trial lawyers and trial judges who regularly find themselves engaged in disputes over the legality of the attempted exercise of peremptory challenges under circumstances which might arguably give rise to the objection that an attorney is engaging in forbidden forms of discrimination.

Course Objectives:

1. Review the law governing *Batson* challenges to the exercise of peremptory challenges at a jury trial in any civil or criminal case.
2. Develop a detailed and thorough understanding of the legal and practical dimensions of how such objections are argued and should be resolved in civil and criminal litigation.

Brief Outline:

I. A Tale of Two Petitions: *J.E.B. v. Alabama* and *Davis v. Minnesota.*

II. The Briefing and Oral Argument in *J.E.B.*: Does the Equal Protection Clause Forbid Sex Discrimination in Jury Selection – And if it Does, Why Not Religious Discrimination as Well?

III. Behind the Scenes in *J.E.B.*: A Look at the Surprising Developments that Happened Behind Closed Doors After the Oral Argument.

IV. Justice Ginsburg's Unfortunate Confusion in *Davis*: What She Did Not Understand About the Equal Protection Clause.

V. The Missing Paragraphs from Justice Thomas's Dissent in *Davis:* Why He Was Right About the Court's Cowardice, and Too Kind to Disclose A Few Things that Have Never Been Revealed in Public Until Today.

VI. Looking Back 25 Years Later: How the Court's Tragic Refusal Has Served as a Cover for Decades of Racial Discrimination by Unscrupulous Prosecutors in Jury Selection.

VII. Questions

The Day the Supreme Court of the United States Almost Outlawed Religious Discrimination in Jury Selection

James J. Duane*

In 1986, in the landmark decision of *Batson v. Kentucky*, the Supreme Court of the United States held that the Equal Protection Clause of the United States Constitution forbids a trial lawyer from using a peremptory challenge to strike a prospective juror on the basis of the juror's race.[1] A few years later, the Court assumed that the same principles would also forbid discrimination on the basis of a juror's ethnicity, although the Court has never clearly distinguished between those two concepts, and has often treated them as if they were synonymous.[2]

From the very beginning, that case raised many obvious and important questions that the Court has never been willing to answer. As some of the dissenters correctly pointed out in *Batson*, the logic of that case immediately raised the question: if conventional equal protection principles apply to jury selection, would the Constitution also forbid the use of a peremptory challenge to excuse a juror on the basis of sex, or age, or religious affiliation? In a dissenting opinion, Chief Justice Burger raised the obvious and predictable suggestion that, if conventional equal protection principles apply to the use of peremptory challenges, then presumably

---

* Professor, Regent University School of Law. Professor Duane is also a faculty member at the National Trial Advocacy College held each year at the University of Virginia School of Law.

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

[2] In *Hernandez v. New York*, 500 U.S. 352 (1991), the Supreme Court held that *Batson* would forbid the use of peremptory challenges against jurors because they were Hispanic or Latino. In a plurality opinion joined by three other members of the Court, Justice Kennedy described this as an allegation of discrimination based upon the "ethnicity" of the jurors, *id.* at 355, but also stated that such an allegation would be rejected if the prosecutor offered a satisfactory "race-neutral" basis for the challenge. *Id.* Two other members of the Court described the case as involving an allegation of discrimination "against Hispanic jurors on the basis of their *race*." *Id.* at 372 (O'Connor, J., concurring; emphasis added). Not one member of the court expressed any disagreement, however, with Justice Kennedy's assumption that it would also be appropriate to describe this as an alleged case of discrimination based upon "ethnicity," or suggested that there was any significant difference between the two terms. Years later, the Court cited *Hernandez* as having held that a peremptory challenge may not be used against a juror because of his "ethnic origin." United States v. Martinez-Salazar, 528 U.S. 304, 315 (2000); *see also* Rivera v. Illinois, 556 U.S. 148, 153 (2009) (*Batson* and its progeny prohibit the use of "peremptory challenges to exclude jurors on the basis of race, ethnicity, or sex"). But even more recently, Justice Kennedy changed his mind, and concluded that discrimination against someone based on Hispanic identity might be more profitably described as a form of "racial bias" in accordance with "the primary terminology … used in our precedents." Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).

parties could also object to the peremptory exclusion of jurors on the basis of not only race, but other protected categories such as sex, religion, or political affiliation.[3] The suggestion was perfectly natural, because Congress had already declared that no group could ever be categorically excluded from jury service in a federal district court on account of its "race, color, religion, sex, national origin, or economic status."[4] That statute never squarely resolved whether *Batson* should naturally be extended to forbid the use of peremptory challenges on the basis of criteria other than race and ethnicity, but it obviously provides powerful confirmation for the widespread intuition that the victims of religious discrimination during jury selection are equally deserving of constitutional protection. Indeed, two other members of the Supreme Court have more recently expressed their sense that the logic of *Batson* would naturally extend to forbid the use of peremptory challenges to discriminate against jurors on the basis of their religion.[5]

Now, more than 30 years later, the Supreme Court has not yet answered most of those questions, although they continue to constantly bedevil the lower courts that have been charged with the obligation of working out the logical limits of that holding.

This article will detail the extraordinary story of the day the Supreme Court almost outlawed religious discrimination in jury selection. Until now, the details have not been made public. But they came to light through the private papers of Justice Harry Blackmun, who donated a vast collection of his official papers to the Library of Congress.[6]

---

[3] *Batson*, 476 U.S. at 124 (Burger, C.J., dissenting). Chief Justice Burger also listed a number of other categories of discrimination that might be forbidden as well, *id.*, although most of those other categories had never been identified by the court as groups deserving of heightened or special constitutional protection.

[4] 28 U.S.C. § 1862 ("Discrimination prohibited").

[5] Twenty years after *Batson* was decided, in a recent review of what they called "*Batson's* fundamental failings," Justice Breyer and Justice Souter complained that it is sometimes impossible for anyone to "be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial, *religious*, gender-based, or ethnic stereotype." Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring; emphasis added); *see also* Miller-El v. Dretke, 545 U.S. 231, 272 (2005) (Breyer, J., concurring) ("If used to express stereotypical judgments about race, gender, religion, or national origin, peremptory challenges betray the jury's democratic origins and undermine its representative function"). Since the Supreme Court has never squarely decided whether *Batson* should extend to religious discrimination, it is curious that Justice Breyer would so readily assume that the Constitution would make it "impermissible" to rely upon a religious stereotype in the use of peremptory challenges.

[6] The Blackmun Papers are stored and available to public examination in the Library of Congress, and they include "more than half a million items, contained in 1,585 boxes that take up more than six hundred feet on the shelves of the library's Manuscript Division." LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT

I. A TALE OF TWO PETITIONS

In 1993, a pair of certiorari petitions arrived at the Supreme Court. In one of them, *J.E.B. v. Alabama*, James Bowman asked the Court to decide whether it would violate the Constitution to excuse jurors (in that case, male jurors) solely because of their sex. In the other case, *Davis v. Minnesota*, the Court was asked to determine whether the logic of *Batson* would also extend to peremptory challenges based upon the religion of the juror – in that case, a Jehovah's Witness.

According to the Supreme Court, the point behind the *Batson* line of cases is to clarify that "[a]ll persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."[7] Such discrimination, the Court has stated, leads to an "inevitable loss of confidence in our judicial system," as well as a potential for public cynicism on the part of "all those who may later learn of the discriminatory act."[8]

When examined in the context of those constitutional concerns, the two *Batson* petitions received by the Court in 1993 did not present equally compelling grounds for Supreme Court review. Indeed, the question was not even close. By any objective reckoning, the *Davis* case presented an incomparably more vivid example of both the reality and the appearance of state-sanctioned discrimination on the basis of invidious historical stereotypes.

The *J.E.B.* case was a silly trifle, involving a paternity dispute in which DNA evidence had proved with 99.9% certainty that the defendant was indeed the father of the child. Moreover, the *J.E.B.* case did not involve the exclusion of any members of a class that had ever been the subject of widespread discrimination or vilification in American society. On the contrary, the party seeking reversal in *J.E.B.* was complaining about the fact that *men* had been excused from the jury by a lawyer representing the mother, who evidently thought that she stood a better chance of winning if she had more women on the jury. Nobody has ever suggested that there was once a time in American history when men had been the victims of widespread or pernicious sex discrimination.

The *Davis* case, by contrast, presented a far more compelling case for Supreme Court

---

JOURNEY xi (2005).

[7] J.E.B. v. Alabama, 511 U.S. 127, 141-42 (1994).

[8] *Id.* at 140-42.

review, in almost every way. Unlike the *J.E.B.* case, the petitioner in *Davis* was seeking reversal and a retrial under circumstances incomparably more deserving of the Court's time and attention, because of the following important distinctions.

2. Harmless Error. Linda Greenhouse has written that Bowman claimed "that in constructing an all-female jury, the state had violated *his* right to equal protection."[9] Fortunately for Bowman, that was not quite accurate, or he would have lost his appeal. He could not have made out such a claim himself, unless he were able to persuade the Court that his right to a fair trial had been undermined by the exclusion of men from his jury – and that would have been impossible, for two reasons. It would have been unthinkable to the Supreme Court, which ultimately ruled in his favor because the majority concluded that men and women are essentially indistinguishable in the way they evaluate evidence,[10] which would mean that he could not have been prejudiced by the exclusion of either group from the jury.[11] Even more fundamentally, however, any alleged violation of Bowman's rights would surely have been harmless error under the facts of his case and could not have affected the outcome of the jury's deliberations, because the evidence of paternity was overwhelming and incontestable: "the scientific evidence presented at trial established [his] paternity with 99.92% accuracy."[12] As far as Bowman's rights were concerned, as Justice Scalia correctly observed, it was "a case of harmless error if there ever was one."[13]

Davis was a criminal case, where society has always acknowledged the transcendent public value of ensuring that no innocent man is falsely convicted – not merely a civil case, in which the evidence of the defendant's liability was overwhelming.

---

[9] GREENHOUSE, *supra* note __, at 226 ((emphasis added).

[10] *J.E.B.*, 511 U.S. at 137-40.

[11] This is why the Court's opinion, as Justice Scalia observed without contradiction by the majority, supplied the petitioner third-party standing to seek "a remedy because of the wrong done to male jurors." *Id*. at 158-59 (Scalia, J., dissenting). The Court in fact believed that the point behind its ruling was "to provide *jurors* the same protection against gender discrimination as race discrimination." *Id*. at 145 ((emphasis added). The entire majority opinion explained why gender discrimination was in violation of the Equal Protection rights of the excluded jurors, and gave no reason why the alleged constitutional violation may have harmed or injured Bowman or any other party in his position, other than a single conclusory sentence which asserted, rather implausibly and without explanation, that litigants may also be harmed, at least in some cases, "by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings." *Id*. at 140.

[12] *Id*. at 159 (Scalia, J., dissenting).

[13] *Id*.

In *Davis,* the juror who had been challenged was excused because he was a Jehovah's Witness, and was therefore the member of a discrete group that had long been subjected to particularly despicable forms of public vilification and discrimination, including even acts of brutal violence.[14] In *J.E.B.*, by contrast, the supposed victims of sex discrimination were excused from jury service because they were *male*, a group that has never been disfavored in American history by the controlling authorities, to put it mildly. (It is rather difficult to argue with a straight face that one has been the victim of discrimination because he belongs to the same class of citizens that includes every president and vice-president in American history.)

In *Davis*, the party attempting the allegedly forbidden use of a peremptory challenge made an explicit admission that it was indeed because of the religion of the juror. In *J.E.B.*, by contrast, just as in *Batson*, the attorney who had allegedly violated the equal protection clause never made an open and explicit admission in the trial court that he was excusing jurors because of their race or gender, and the evidence to that effect, although substantial, was purely circumstantial.

Most significant of all, perhaps, was the fact that prosecutor in *Davis* who objected to a juror who was a Jehovah's Witness also made an explicit admission in open court that "in my experience Jehovah witnesses are reluctant to exercise authority over their fellow human beings in this court house," and that "I would *never*, if I had a peremptory challenge left, fail to strike a Jehovah's Witness from my jury."[15] In *Batson* and in *J.E.B.*, by contrast, the attorneys exercising the disputed peremptory challenge never said, in effect, that "I *always* use my peremptory challenges to excuse members of certain races or genders in every case, regardless of the facts of that case."

For all these reasons, the *Davis* case clearly presented a much more compelling case for Supreme Court review than the *J.E.B.* case. Unfortunately for Mr. Davis and his lawyers, however, the *J.E.B.* case arrived at the Supreme Court first, and the Court had already granted certiorari and agreed to take the case. Indeed, the certiorari petition filed by Mr. Davis arrived at the Court one day before oral argument was held in the *J.E.B.* case.

II. THE BRIEFING AND ORAL ARGUMENT IN J.E.B.

---

[14] For a detailed account of this nation's shameful history of brutal and despicable acts of organized violence and public vilification directed at Jehovah's Witnesses, *see* SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION (2000).

[15] Petition for Writ of Certiorari, Davis v. Minnesota, No. 93-6577, at 3.

The question presented in *J.E.B.*, strictly speaking, was limited to whether the logic of *Batson* should be extended to peremptory challenges based on sex. Technically, therefore, it was not strictly necessary for the court to decide in that case whether the same would also be true for racial discrimination in jury selection. But that corollary question was not unrelated, and it was raised repeatedly in the briefs and at oral argument.[16]

It is no surprise that the topic of religion would figure prominently in the briefing and oral argument of the *J.E.B.* case. From the very beginning, as even the dissenters point out in *Batson*, the challenge for the court was to decide how far the logic of that ruling should extend. And if the ruling was not limited to racial discrimination, as Chief Justice Burger observed in his dissenting opinion, would it be extended to forbid all forms of discrimination that had ever been the subject of the Supreme Court's equal protection jurisprudence – including discrimination based upon a juror's age, or number of children, or mental capacity, or living arrangements, or employment in a particular industry or profession?[17] Or would it instead be limited to those special categories of citizens who had been the subject of heightened levels of constitutional protection, such as sex and race?

In a remarkable display of unanimity, the three attorneys arguing before the Court in *J.E.B.* – the attorneys for both parties and the Assistant to the United States Solicitor General – were all willing to concede that a decision forbidding gender-based peremptory challenges would logically imply that religious discrimination must be outlawed as well.

Of course, it was no surprise that the state of Alabama would gladly make such a

---

[16] All of the following quotations from the oral argument in *J.E.B.* are taken from the Official Transcript of the Proceedings before the Supreme Court of the United States, J.E.B. v. T.B., No. 92-1239 (Nov. 2, 1993), referred to here as the "Official Transcript." The transcript is available at: https://www.supremecourt.gov/pdfs/transcripts/1993/92-1239_11-02-1993.pdf. The names of the Justices are not recorded in that transcript, but can be found on the edited version of the transcript and their voices can be heard on the audio recording: https://apps.oyez.org/player/#/rehnquist9/oral_argument_audio/20660.

[17] These are the examples given by Chief Justice Burger. *J.E.B.*, 476 U.S. 124. At oral argument, Justice Scalia repeatedly framed this issue by asking whether peremptory challenges could be used against someone merely because he was a "postman." Official Transcript, at 17, 25, 37. Although the suggestion met with laughter at the oral argument, and Justice Scalia appears to have been proposing something he regarded as absurd, a federal prosecutor once insisted that he always used peremptory challenges to strike any juror whose occupation began with the letter *P*, allegedly because of his misfortune in earlier cases with two jurors who were a pharmacist and a postal worker! United States v. Romero-Reyna, 889 F.2d 559, 561 & n.5 (5th Cir. 1989).

concession. Because it was the respondent in that case, and was trying to persuade the Supreme Court to limit *Batson* to race-based peremptory challenges, Alabama argued that its extension to gender-based strikes would ultimately lead to the demise of peremptory challenges.[18] The State argued that if *Batson* were extended to claims of sex discrimination, "then it must be applied to all the classifications entitled to strict scrutiny," including religion.[19] After all, it was settled before *J.E.B.* that the Free Exercise Clause protects religious observers against unequal treatment and requires "the strictest scrutiny" of laws that target any individuals for special disabilities based on their religious status.[20] A government policy that discriminates against citizens solely because of their religion "imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny."[21] That level of scrutiny was even more demanding and rigorous than the level of "intermediate scrutiny" the Court had applied to its review of sex-based distinctions and classifications.[22]

But the state of Alabama was not the only party to argue that there was no logical line to be drawn between allegations of discrimination in jury selection based upon race and sex and religion. From the beginning, the challenge for the petitioner in J.E.B. was to articulate a cogent limiting principle that could plausibly explain why the protections of *Batson* should be extended to the alleged victims of sex discrimination, without opening the door to a potentially unlimited series of similar cases that would eventually entail the virtual abolition of peremptory challenges. Not surprisingly, the petitioner took the position that *Batson* should be extended to all (but only) those groups that had been deemed eligible for the "heightened level of scrutiny" that had been extended to those cognizable groups that "have been subject to historical discriminatory practices."[23] Petitioner urged the court to extend the principles of *Batson* "to classifications protected by the Court's heightened scrutiny, including gender,"[24] and correctly noted: "Such protection has been applied to discrimination against persons because of their race, national origin, alienage,

---

[18] Respondent's Brief on the Merits, J.E.B. v. T.B., No. 92-1239, at 12-13.

[19] *Id.* The State asserted that a lawyer defending a client charged with drunk driving would not be able to strike a member of a church which advocated total abstinence with regard to liquor unless the lawyer could present "a religion-neutral reason" for the strike. *Id.*

[20] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017) (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).

[21] *Id.*

[22] Clark v. Jeter, 486 U.S. 456, 461 (1988) (classifications based on sex are subject to "a level of intermediate scrutiny" which is less demanding than the strict scrutiny applied to "classifications affecting fundamental rights").

[23] Petitioner's Brief on the Merits, J.E.B. v. T.B., No. 92-1239, at 8.

[24] *Id.* at 12.

religion and *gender*."[25]

The same position was also taken by the United States, which appeared in the case as a friend of the court on the side of the petitioner. The Solicitor General argued that the extension of *Batson* to gender would not suggest "that all group-based challenges are incompatible with equal protection principles," because there would be no reason to extend that doctrine "to groups that are not treated as suspect or quasi-suspect classes for equal protection purposes."[26] In the view of the United States, the protections of Batson should be extended to gender simply because gender, like race or national origin, was a group that had been extended the protections of a "heightened level of review."[27]

Even though the certiorari petition in *Davis* had presumably not yet been seen by the members of the Court when they arrived for oral argument the next day in *J.E.B.*, it immediately became obvious that one of the most pressing questions on the minds of the justices was the obvious question that had been left unanswered in *Batson*: If we extend this equal protection analysis to forbid the use of peremptory challenges on the basis of gender, what other categories and classifications would also be eligible for the same protection? In particular, the Court showed a surprisingly keen interest at oral argument in whether the logic of the petitioner's argument would also necessarily require the Court to outlaw religious discrimination in jury selection.

Justice Ginsburg posed the following question to counsel for the petitioner, and received the following reply:

> QUESTION: Your argument is that you want a precedent that applies to race to be extended to sex. How far do you carry it? What other groups? And if – you're saying if race, then sex. Well, how about age, religion, national origin?
>
> MR. PORTER: Justice Ginsburg, in this particular case I think the Court need only go as far as gender. However, I think it would be

---

[25] *Id.* at 8 (emphasis added).

[26] Brief for the United States, J.E.B. v. T.B., No. 92-1239, at 37. The government asserted that *Batson* should not apply to those groups and classes that "are not accorded heightened review," and that as to such groups, "rational basis review applies, and the legitimate government interest, served by the peremptory challenge, of assuring the parties that the jury is impartial suffices to overcome the juror's equal protection interests." *Id.* at 10.

[27] Id. at 36. This would include classifications that have been subject to strict scrutiny, such as race and national origin, and classifications that have been judged according to an intermediate but a heightened level of review, such as gender and illegitimacy – but would not include "the vast majority of group classifications" that were subject only to the "highly deferential rational basis test," such as age, physical disability, or mental retardation. *Id.*

> rational to apply the same principles to heightened scrutiny under the Fourteenth Amendment, which would apply, then, to religion, national origin, and illegitimacy.[28]

Shortly afterwards, Justice Scalia asked a similar question:

> QUESTION: Could I ask, Mr. Porter, what – is that the total list of categories that you want this applied to? What is it, now, sex, religion, what else?
>
> MR. PORTER: National origin and –
>
> QUESTION: National origin.
>
> MR. PORTER: Yes, sir.
>
> QUESTION: Sexual preference?
>
> MR. PORTER: No, sir.
>
> QUESTION: Not – no, not that. Why not?
>
> MR. PORTER: Because sexual preference, like age and disability, have not been raised by this Court to the heightened level of scrutiny under the Fourteenth Amendment.[29]

In response to further questioning from Justice Scalia, counsel for the petitioner showed no desire to back away from his position that *Batson*, if it extended to gender, should logically be extended to all groups subject to a heightened level of judicial scrutiny and protection. Justice Scalia asked whether the defendant in a drunken-driving case could strike a juror "because he's a Methodist and therefore a teetotaler." Counsel replied that a juror could properly be the subject of a peremptory challenge if he "professed to be a teetotaler, and so therefore had an individual conviction

---

[28] Official Transcript, Proceedings before the Supreme Court of the United States, J.EB. v. T.B., No. 92-1239 (Nov. 2, 1993), at 10. The transcript is available at: https://www.supremecourt.gov/pdfs/transcripts/1993/92-1239_11-02-1993.pdf. The names of the Justices are not recorded in the official transcript, but can be found on the edited version of the transcript – and their voices can be heard on the audio recording – available at https://apps.oyez.org/player/#/rehnquist9/oral_argument_audio/20660.

[29] *Id*. at 14. In the next line of the transcript, Justice Scalia added: "Oh. But we could do that, though," which elicited a bit of laughter from the audience. Not many observers of the Supreme Court are aware that Justice Scalia was quite possibly the first member of the Court who ever suggested at oral argument the possibility of extending a heightened level of judicial protection based on sexual preference, even though he evidently did so in jest.

against the consumption of alcohol," but "you could not strike him simply because he was a Methodist."[30]

When the Assistant to the Solicitor General, Michael Dreeben, rose to argue in support of the petitioner, he once again maintained that sex discrimination during jury selection was unconstitutional because discrimination on the basis of gender was "subject to heightened constitutional scrutiny."[31] When Justice O'Connor asked what would then be left of the peremptory challenge system, Mr. Dreeben maintained that peremptory challenges could still be used against members of classes, such as those defined by their occupation, that had not been elevated to heightened review.[32] He expressed no disagreement when Justice O'Connor confronted him with the seeming implication that the adoption of his position would logically mean that "not only gender-based peremptory strikes but those based on ethnic origin, *religion* and so forth, are similarly barred."[33] In response to a suggestion that *Batson* ought not to extended to sex discrimination, he insisted that Scalia's argument was untenable because "the same argument could be made about racially-based stereotypes or ethnically based stereotypes, or stereotypes based on a person's *religion* and nothing more."[34]

When counsel for the state of Alabama rose to argue in opposition, she expressed no disagreement to the suggestion by Justice Scalia that the logic of the petitioner's argument would naturally entail a right "not to be stricken for that citizen's race, *religion*, sex, and whatever."[35]

Throughout the briefs filed by both parties and the United States, as well as the course of the oral argument, it was undisputed that the extension of the principles of *Batson* to gender discrimination should logically entail the application of the same protections to those who might otherwise be the subject of discrimination on the basis of their religion in jury selection. Moreover, that explicit agreement appears to have been tacitly shared – or at least it was not disputed or contested – by virtually every

---

[30] *Id.* at 16-17.

[31] *Id.* at 20.

[32] *Id.* at 22-23. In response to a later question from Justice Kennedy as to where the line should be drawn, Mr. Dreeben once again argued that *Batson* should apply to stereotypes that had been subjected to "heightened constitutional scrutiny because of suspicions about historical misuse." Id. at 26-27.

[33] *Id.* at 22 (emphasis added).

[34] *Id.* at (emphasis added).

[35] *Id.* at 37. Justice Scalia was questioning whether the right might also extend to forbid any peremptory challenge based upon an irrational reason.

member of the Court.[36]

III. Behind the Scenes: After the Oral Argument

Three days after the Court heard oral argument in *J.E.B.*, the Court met in conference and voted to reverse the Alabama Supreme Court, in a landmark opinion that would extend *Batson* to forbid sex discrimination during jury selection.[37] Four days later, Justice Blackmun, the senior member of the majority, decided and announced that he would write the opinion himself. He sent a note to the Chief Justice on November 9, reporting that "I shall try my hand at an opinion for the majority in this case."

Just a few weeks later, on January 7, 1994, the Court met in conference for the first time to consider the certiorari petition filed by Edward Lee Davis, which asked the Court to extend *Batson* to forbid religious discrimination in jury selection. The Court voted to hold the case pending the release of its opinion in *J.E.B.*[38]

On January 19, twelve days after the Court voted to hold the petition filed by Davis, Justice Blackmun distributed to his colleagues the first draft of his proposed opinion for the court. From the very beginning, it was obvious that Justice Blackmun and his law clerk contemplated that the Court should release an opinion that would provide powerful support for the petitioner in *Davis*, and for his argument that Equal Protection forbids religious discrimination in jury selection. In the first draft of his proposed opinion for the Court, Justice Blackmun made the following remarkable statement at the beginning of the final section of his opinion, which would have begun his summary of the Court's holding this way:

> Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law – that all citizens, regardless of race, ethnicity, gender, *or religion*, have the chance to take part directly in our democracy.[39]

---

[36] As noted below, Justice Ginsburg demonstrated surprising resistance to the suggestion that peremptory challenges on the basis of religion necessarily stood in the same position as challenges on the basis of sex. *See infra* Part IV.

[37] According to Justice Blackmun's handwritten notes from the conference, the justices discussed their views on the *J.E.B.* case and voted 6-3 to reverse the case at a conference held on November 5, three days after the case was argued.

[38] The Supreme Court docket in the case of Davis v. Minnesota states that the case was first distributed for conference on January 7, 1994, and then redistributed for four later conferences pending the outcome of the *J.E.B.* case. On his handwritten notes for the docket in this case, Justice Blackmun wrote: "H[old] J.E.B. 92-1239."

[39] Justice Blackmun, First Draft of Opinion for the Court in J.E.B. v. T.B., No. 92-1239, at

It is noteworthy that Justice Blackmun proposed to list four groups of citizens deserving of protection in the jury selection process: those selected for exclusion because of their "race, ethnicity, gender, or religion." That order was not arbitrary. Race and ethnicity, in that order, were the only two categories of discrimination that the Court had already forbidden before his decision in *J.E.B.*[40] If the Court ruled in favor of the petitioners in *J.E.B.* and then later in *Davis*, the Court would have forbidden the use of peremptory challenges on the basis of only four criteria – race, ethnicity, gender, and religion – and would have done so in precisely that order. It is quite probable that Justice Blackmun included this language in his proposed opinion for the specific purpose of dictating the outcome of the *Davis* case, which he already knew the Court was holding until after *J.E.B.* was resolved.

This extraordinary line in Justice Blackmun's draft opinion appeared in four separate drafts of the opinion that he circulated to the other justices.[41] Not one member of the Court proposed a change to this line in the opinion, however, until after the fourth draft was circulated. At that time, shortly before the decision was finally released, Justice Souter sent a memorandum to Justice Blackmun on February 17, 1994.

> Dear Harry:
>
> I join your opinion and wonder if you would comfort me on one point. On page 19, you place religion on par with gender, race and ethnicity as a forbidden basis of classification for present purposes. I'd prefer to leave religion out, for I assume a *Batson* religion case will be coming along.
>
> Yours sincerely,
> David

It is a little difficult understand why Justice Souter would sound so tentative in suggesting that he assumed a *Batson* case involving religious discrimination might

---

18-19 (Distributed to the Conference January 19, 1994) (emphasis added). This language was taken by Justice Blackmun virtually word for word from the draft of the opinion that had been written by his law clerk and sent to him ten days earlier, on January 9, 1994. Her draft was submitted to Justice Blackmun more than one month after the certiorari petition by Edward Davis had been distributed to each of the chambers on December 2, 1993. Justice Blackmun's files contain a preliminary memorandum from a law clerk dated December 27, 1983 discussing whether it might be appropriate to hold the petition from Davis pending the court's decision in *J.E.B.*

[40] *See supra* note __.

[41] The first four drafts of his majority opinion, all containing the same language, were distributed to all the members of the Court on January 19, January 20, January 28, and February 10.

be coming along, since he wrote that note more than a month after the Court had already considered and agreed to hold the *Davis* petition until after the *J.E.B.* case was resolved. (It is also a bit ironic, because Justice Souter later came to be much less fastidious about that topic. More than 20 years later, Justice Souter joined an opinion by Justice Breyer, in which they apparently took it as self-evident that the logic of *Batson* sometimes requires a court to resolve whether a peremptory challenge was exercised on the basis of "an impermissible racial, *religious*, gender-based, or ethnic stereotype."[42])

The same day, Justice Blackmun sent the following reply to Justice Souter:

> Dear David:
>
> Thank you for your note of today and the joinder. I shall be glad to "comfort you" and to eliminate the reference to religion on page 19.
>
> Sincerely,
> Harry

If they are still alive today, I hope that Edward Lee Davis and his attorney never see this article, because I imagine it would break their hearts to know just how close they came to a victory in the Supreme Court. Of course, their hopes for success in the Supreme Court must have been at least slightly elevated when they saw how the Court had obviously taken a number of months to wait before announcing its decision in his case. And they ultimately learned that the Court had not been unanimous in rejecting their petition for certiorari, because Justice Thomas later wrote an opinion, joined by Justice Scalia, dissenting from the denial of certiorari in *Davis*. But it would be especially heartbreaking for them to learn how close the Court came to handing down an opinion in *J.E.B.* that would have given the Minnesota Supreme Court a virtually explicit indication that Mr. Davis was entitled to a new trial.[43]

---

[42] Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (emphasis added). It is tempting to speculate as to why Justice Souter apparently did not ask his colleague to remove the reference here to *religion*, as he had done with Justice Blackmun back in 1994. Perhaps he was a little less concerned about such a reference because Justice Breyer was merely writing a concurring opinion. Or maybe, with the benefit of 20 years of hindsight in dealing with "*Batson*'s fundamental failings," *id*., Justice Souter had also grown less reticent about publicly acknowledging the obvious implications of that line of cases, for better or worse. A third possibility – although it seems less likely – is that he did ask for the reference to be removed, but Justice Breyer declined and would not compromise.

[43] Other writers have noted how the lower courts have been plagued by the confusion surrounding the question the Court declined to decide in *Davis*. But no other writer to my knowledge has pointed out the remarkable back story revealed by Justice Blackmun's files about how close he came to writing an opinion that was clearly intended to dictate the

But even though Justice Souter quietly persuaded his colleague to amend the opinion in *J.E.B.* to remove the reference to religion, all hope was not yet lost for Mr. Davis. The Court still had the option of granting his certiorari petition, vacating the decision of the Minnesota Supreme Court, and remanding the case for reconsideration in light of the holding in *J.E.B.* Even after the word *religion* was removed from the text of that opinion, as Justice Thomas and Justice Scalia later correctly pointed, the very logic and language of that opinion provided powerful confirmation for Mr. Davis's argument. In rejecting his appeal, the Supreme Court of Minnesota had narrowly concluded, by a vote of 4-3, that the logic of *Batson* did not extend to any categories of discrimination outside the special realm of race discrimination – and that was the very assumption that had been explicitly jettisoned by the Supreme Court of the United States in *J.E.B.*[44]

Nevertheless, even though the *J.E.B.* opinion had explicitly overturned the essential premise of the mistaken reasoning adopted by the Supreme Court of Minnesota in *Davis*, Justice Blackmun's law clerk evidently persuaded him to change his opinion of that case. In her draft of his opinion, she had successfully persuaded him that the Court ought to include an explicit indication of disapproval concerning religious discrimination in jury selection. But after Justice Souter requested the removal of that word *religion*, she sent Justice Blackmun a confidential memorandum dated April 15, 1994, which read as follows: "Attached is a draft memo to the conference, recommending that the court deny the only petition held for J.E.B. Although there is some dicta in J.E.B. that might help the petitioner, nothing in the opinion warrants a GVR." Attached to that note was the following draft of her proposed memo to the other justices:

> Davis v. Minnesota, No. 93 – 6577, is the only case we held for J.E.B. The petitioner in Davis argues that the logic of Batson should protect jurors against discrimination on the basis of religion, as well as on the basis of race. During voir dire at petitioner's trial, the state struck an African-American juror peremptorily and gave as its reason for the strike the fact that the juror was a Jehovah's Witness. The trial court rejected petitioner's argument that the Equal Protection Clause prohibits peremptory strikes on the basis of religion and the Minnesota Supreme Court affirmed.
>
> I recommend that we deny the petition for certiorari. J.E.B. does not address peremptory challenges based on religion, and there is no language in the opinion which fairly can be said to govern the issue.

---

outcome of that other case.

[44] Davis v. Minnesota, 511 U.S. 1115 (1994) (Thomas, J., dissenting from denial of certiorari).

Justice Blackmun, who at that point was only a few weeks away from his retirement, demonstrated an absolutely remarkable degree of deference to the recommendations of his law clerk. When she originally suggested that he include language forbidding religious discrimination in jury selection, he went along, obviously persuaded that such a conclusion would be a logical extension of the rationale in that case. But after *one word* was removed from the opinion at the request of Justice Souter, he once again went along with this law clerk when she said that there was now "nothing to see here," and nothing in the opinion that could be of any support to Mr. Davis on remand. Justice Blackmun changed only three words in his law clerk's two-paragraph memo,[45] and then copied the rest of her memo verbatim into a memorandum that he sent to the other justices above his signature, explaining why he had decided he would now vote to deny certiorari in the *Davis* case. The Court accepted his recommendation, and voted to deny that petition at their next conference ten days later.

IV. JUSTICE GINSBURG'S UNFORTUNATE CONFUSION

After the Court denied certiorari in *Davis*, Justice Thomas wrote an incisive and courageous dissent from that denial, joined by Justice Scalia, in which they correctly took the Court to task for its "unwillingness to confront forthrightly the ramifications of the decision in *J.E.B.*," and for its willingness to turn a blind eye to an especially egregious instance of explicit and unapologetic religious discrimination during jury selection by a state prosecutor who admitted that he would never allow any Jehovah's Witness on any of his juries.[46] That willingness by the Court exposed the hypocrisy of the sanctimonious self-righteousness it had demonstrated just a few weeks earlier in *J.E.B.*, when the majority emphatically congratulated itself on its refusal to allow any vestiges of discrimination to be waged during jury selection against any members of the American population.

Because the Court denied certiorari in *Davis*, it did not supply any reason for its decision. But the newest member of the Court, Justice Ruth Ginsburg, wrote and published a strange solitary opinion, concurring in the denial of certiorari, and explaining why she believed that Justice Thomas's "portrayal of the opinion of the Minnesota Supreme Court is incomplete."[47] In a one-paragraph opinion that was not

---

[45] In the final sentence of his law clerk's draft memorandum, Justice Blackmun replaced the words "I recommend that we deny" with "I shall vote to deny" the petition for certiorari in *Davis*. The only other change he made was a trifling modification in the citation to the *Davis* case; he put the docket number before the name of the case.

[46] Davis v. Minnesota, 511 U.S. 1115, ___ (1994) (Thomas, J., dissenting from denial of certiorari).

[47] *Id.* at __ (Ginsburg, J., concurring in the denial of certiorari).

joined by any other member of the Court, Justice Ginsburg insisted that Thomas had omitted "two key observations" that had been made by the lower state court: namely, that religious affiliation is not as self-evident as race or gender, and that inquiry on voir dire into religious affiliation is irrelevant and improper. Her entire concurring opinion was as follows:

> I write only to note that the dissent's portrayal of the opinion of the Minnesota Supreme Court is incomplete. That court made two key observations: (1) "[R]eligious affiliation (or lack thereof) is not as self-evident as race or gender," 504 N.W.2d 767, 771 (Minn.1993); (2) "Ordinarily ..., inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper," *id.,* at 772 (adding that "proper questioning ... should be limited to asking jurors if they knew of any reason why they could not sit, if they would have any difficulty in following the law as given by the court, or if they would have any difficulty in sitting in judgment").[48]

The relevance of these observations by Justice Ginsburg was far from clear. She did not explain why those two observations would possibly undermine Mr. Davis's arguments, or furnish a logical reason for denying his certiorari petition, and the explanation was anything but plain.[49] What possessed Justice Ginsburg to mistakenly imagine that these two observations could logically supply a reason to turn a blind eye to intentional and systematic religious discrimination? Her opinion gives no clue. (Perhaps that is why no other member of the Court was willing to join her concurring opinion.) But the answer becomes unmistakably clear when we look at the questions she posed at oral argument in *J.E.B.*

During the oral argument in *J.E.B.*, all three attorneys and several of her colleagues on the Court seemed inclined to agree that religious discrimination should also naturally be forbidden if the Court struck down sex discrimination in jury selection, and no other member of the Court suggested otherwise or resisted that suggestion.[50] But Justice Ginsburg repeatedly fought against that suggestion, posing a series of leading questions to solicit concessions from the attorneys at oral argument that (1) the religious affiliation of a prospective juror is not ordinarily obvious and cannot usually be discerned without questioning that juror, and (2) it would be unseemly and awkward, if not downright rude, to question a juror about such things in public.

When petitioner's counsel suggested that *Batson* should logically be extended to all

---

[48] *Id.*

[49] The first time I read her concurring opinion many years ago, I read it many times before abandoning any hope of understanding the point she was trying to make.

[50] *See supra* Part ___.

groups that had been deemed eligible for heightened judicial review, including "religion, national origin, and illegitimacy," Justice Ginsburg interrupted:

> QUESTION: But does one inquire of each juror about the legitimacy of the juror's birth?
>
> MR. PORTER: Practically not. I have never seen – in 15 years of practice I've never seen anyone inquire of someone's legitimacy. However, if that were –
>
> QUESTION: Or, indeed, national origin?
>
> MR. PORTER: No, ma'am. I've never seen anybody inquire of national origin. However –
>
> QUESTION: It is perhaps the difference that in race and sexes, you don't have to ask.[51]

Later in the oral argument, Justice Ginsburg returned to the same theme.

> QUESTION: But Mr. Porter, are you going to, in your system where we have these groups, allow the preliminary questioning of the potential jurors. In the colloquy that we just had, you observed that there's something about race and sex that's not like any other class. You don't have to ask.
>
> MR. PORTER: Correct.
>
> QUESTION: But in the suggestions that you're now making, the notion that religion is not written on someone's forehead so we would first have to quiz the potential jurors about that.
>
> MR. PORTER: Yes, ma'am.
>
> QUESTION: Same thing with national origin.
>
> MR. PORTER: Yes, ma'am.
>
> QUESTION: Does that – does not – isn't that just a disturbing thought?[52]

---

[51] *Id.* at 10-11.

[52] *Id.* at 15.

In this exchange, Justice Ginsburg clearly revealed the relevance, as she saw it, of the two points that she later made it her concurring opinion, when she tried to explain her disagreement with Justice Thomas about the denial of certiorari in *Davis*, and why religious discrimination was at least arguably different from sex discrimination in jury selection. The problem, in her view, was that (1) the religious affiliation of a prospective juror is not ordinarily obvious and cannot usually be discerned without questioning that juror, but (2) it would be unseemly and awkward, if not downright rude, to question a juror about such things in public.

But although Justice Ginsburg was right about those two undisputed points, she was absolutely mistaken in her reasoning, for two different reasons.

First, she was not entirely correct to suggest that religion is different because it cannot always be discerned merely by looking at an individual, while (as she twice asserted at oral argument) "you don't have to ask" to know the race and gender of a prospective juror. That is often true, of course, and was perhaps even more often true in those days than today – but it has never been true in every case, which has ironically led to one of the many complications for lower courts charged with the administration of the rulings in *Batson* and *J.E.B.* Indeed, there have been a number of unfortunate cases in which the lower courts have been forced to work their way through the challenges that arise when a *Batson* objection is raised to a juror whose race or ethnicity is uncertain.[53] The same is also true with respect to jurors whose gender is subject to some doubt.[54] One naturally feels a great deal of sympathy for lawyers and trial judges drawn into such unpleasant sidebar conferences, struggling

---

[53] *E.g.*, Davis v. Ayala, 135 S. Ct. 2187, 2194, 2207 (2017) (considering a *Batson* challenge to a juror "whose ethnicity was disputed"; defense counsel claimed the juror was Hispanic, but the prosecutor thought the juror was Greek); Rivera v. Illinois, 556 U.S. 148, 153 (2009) (after defense counsel stated that a juror named Gomez appeared to have "some kind of Hispanic connection given her name," the trial judge interrupted and expressed the view that Ms. Gomez "appears to be an African American"); Hernandez v. New York, 500 U.S. 352, 358, 369-70 (1991) (plurality opinion) (noting that the ethnicity of one challenged juror was "uncertain," and that the trial court properly credited the prosecutor's insistence "that he did not know which jurors were Latinos"); United States v. Girouard, 521 F.3d 110, 117 (1st Cir. 2008) ("*Batson* challenges often highlight uncertainty over the racial identity of venirepersons"); Caldwell v. Maloney, 159 F.3d 639, 645 n.7 (1st Cir. 1998) (noting "some question about whether this juror was indeed African-American"); Brewer v. Marshall, 119 F.3d 993, 996 n.4 (1st Cir. 1997) (noting "some dispute between the court and defense counsel as to whether [a] juror was black or Hispanic").

[54] *E.g.*, Beartusk v. State, 6 P.3d 138, 142 (Wyo. 2000) (observing that "the prosecutor apparently struck a female juror with a gender-ambiguous first name, mistakenly believing the female venireman to be a man; the prosecutor did not tender a gender-neutral explanation for the strike of the female juror"). Does it violate *Batson* to strike a woman because you mistakenly thought she was a man? This is one of the many questions the Supreme Court has not yet resolved about *Batson* and its implementation.

to decide how to proceed in the case of a challenge prospective jurors whose race or gender may be unclear and ambiguous.[55]

But there was a second, much more fundamental, error in Justice Ginsburg's reasoning. Perhaps demonstrating her lack of experience with the trial process and jury selection, she obviously believed that the extension of *Batson* to religious discrimination might be impractical and unworkable and unwise (or at least that it would not be logically required by the holding in *J.E.B.*) because it would be unseemly and intrusive to ask jurors about their religion. The unambiguous implication of her analysis was her assumption that a decision in favor of Mr. Davis, or a ruling that would forbid religious discrimination in jury selection, would somehow require more frequent questioning of prospective jurors during voir dire about their religion, presumably to make sure that nobody was being excluded on that basis. Justice Ginsburg obviously harbored the suspicion that "if we forbid trial lawyers from excusing jurors because of their religion, we will need to start questioning them about their religion to make sure that is not going on." As she asserted at oral argument, it was her view that "religion is not written on someone's forehead so we would first have to quiz the potential jurors about that."[56]

But that is absolutely wrong. If the Supreme Court had ruled in favor of Davis, and had announced that religious discrimination would no longer be tolerated in jury selection, there is no way that such a ruling would possibly lead to more questioning of jurors about their religion or religious beliefs. On the contrary, such a ruling would necessarily lead to a drastic *reduction* in the frequency of such questioning – and perhaps its complete elimination – because a lawyer who is forbidden from exercising a peremptory challenge of the basis of religion will rarely, if ever, be able to explain to a trial judge why he should even be allowed to ask jurors about that topic.

Indeed, after the Supreme Court denied certiorari in *Davis* and has since left the lower courts to struggle on their own for a quarter of a century with that question, the reported cases confirm that lawyers routinely question jurors about their religion, even if only in the hope that such questions might generate a plausible defense to the charge that they are excusing any jurors because of their race or sex.

Consider, for example, the case of Timothy Foster, who was convicted of capital murder and sentenced to death by a Georgia jury in 1987. His attorneys spent nearly 30 years seeking to have his conviction overturned on the grounds that the State had used peremptory strikes against all four of the black prospective jurors, before he

---

[55] For all her vaunted fame as an enlightened voice of progressive wisdom, Justice Ginsburg illustrated a lack of political astuteness in asserting that "you don't have to ask someone" to ascertain their race and gender; imagine the public outrage today if President Trump were to say the same thing.

[56] Transcript of Oral Argument, *supra* note __, at 15.

finally prevailed before the Supreme Court.[57] The Georgia prosecutor tried to "defend" his challenge to one of those prospective black jurors, Mr. Eddie Hood, by insisting that he was not excused because of his race, but rather because (among other reasons) he was a member of the Church of Christ.[58] The prosecutor spent nearly three decades of public post-trial litigation trying to convince the courts that, in his own words, "the bottom line on Eddie Hood is the Church of Christ affiliation," because "the Church of Christ people" were very reluctant to vote to impose a death sentence.[59] The Georgia courts accepted that race-neutral justification as genuine and sincere, although it was ultimately rejected as pretextual by the Supreme Court. Either way, there is something disturbing and unsettling about a body of constitutional law that creates such a powerful incentive for a State's Attorney General to defend the actions of its office with the public explanation that it was excluding someone from jury service in a capital murder trial because of the State's official public misgivings about "the Church of Christ people."

Although she obviously did not understand this point, the observations that were made by Justice Ginsburg concerning the intrusiveness of questioning prospective jurors about their religion, and the fact that religious affiliation cannot be identified without such questioning, actually weighed in *favor* of the position taken by Edward Davis, who was asking the Court to adopt a ruling that would have all but forbidden such questioning in the future.

It is especially ironic that Justice Ginsburg would take it upon herself, without any assistance or encouragement from her colleagues or any of the attorneys in the case, to explain – as she did both at oral argument and in her concurring opinion – why she believed that religious discrimination and sex discrimination in jury selection did not necessarily stand on equal footing, and why a decision to outlaw sex discrimination would not necessarily justify a ban on religious discrimination. That was a strange position for her to stake out so forcefully, when she has claimed that she believes she has been a victim of religious discrimination. Why would she do such a thing? It is most probable that she was striving, at least at oral argument, to do everything she could to persuade her colleagues to join with her in adopting a landmark ruling that would strike down another form of sex discrimination – a cause to which she had devoted almost all of her professional career – and she suspected that she might be more able to recruit a couple of possibly reluctant colleagues to that cause if she threw her fellow victims of religious discrimination under the bus, by dispelling any fears as to whether *J.E.B.* might reach far enough to protect them as well.

---

[57] Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016) (noting "the nearly 30-year history of this litigation").

[58] *Id.* at 1751.

[59] *Id.* at 1752.

It is tragic that counsel for the petitioner did not recognize and take advantage of his opportunity to explain these facts to Justice Ginsburg when he had the chance. After she asked whether it was a "disturbing thought" that his position might require lawyers to ask jurors about their religion, he replied: "It is a somewhat invasion of their privacy. But trial counsel every day inquires of jurors on personal matters. It is important in some cases to make those inquiries."[60] He was correct to observe that jury selection sometimes requires lawyers to undertake questioning on personal matters with great sensitivity and caution. But he was wrong to leave unchallenged her utterly mistaken assumption that the logic of his position, if extended to forbid religious discrimination in jury selection, would lead to the disturbing scenario of jurors being questioned in public about their church membership.

V. THE MISSING PARAGRAPHS FROM JUSTICE THOMAS'S DISSENT

Even though Justices Scalia and Thomas had dissented in *J.E.B.*, they both dissented from the Court's denial of certiorari in *Davis*. In his courageous dissent, Justice Thomas correctly took the Court to task for its "unwillingness to confront forthrightly the ramifications of the decision in *J.E.B.*"[61] Justice Thomas adroitly explained how the reasoning of *J.E.B.* would naturally and almost ineluctably lead to the conclusion that religious discrimination should likewise be outlawed during jury selection. He correctly stated, as both parties and the Solicitor General had all agreed in *J.E.B.*, that "no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause."[62]

Although the logic of Justice Thomas's dissent was unassailable, it could have been even stronger. Because of his discretion and the confidentiality he owed to the memos that had been exchanged between his colleagues in private, Justice Thomas was unfortunately unable to buttress his dissenting opinion by pointing out the curious details surrounding the drafting and revision of Justice Blackmun's opinion for the Court. (And unless he has had the time to browse through Justice Blackmun's files in the Library of Congress, he has probably never yet seen the confidential memoranda exchanged between Justice Blackmun and his law clerk in that case.) But now that Justice Blackmun has waived the confidentiality of those documents by

---

[60] Transcript of Oral Argument, *supra* note __, at 15.

[61] Davis v. Minnesota, 511 U.S. 1115, __ (1994) (Thomas, J., dissenting).

[62] *Id.* Justice Scalia had made a similar observation in J.E.B., when he wrote that the logic of that case would seem to naturally extend to "other classifications subject to heightened scrutiny (which presumably would include religious belief)." J.E.B. v. Alabama, 511 U.S. 127, 161 (1994) (Scalia, J., dissenting) (internal citation omitted). That dissent was joined by ytwo other justices, including Justice Thomas.

making them available to the public, I can take the liberty of sharing the lines that Justice Thomas presumably would have included in his dissenting opinion if he had the chance:

> Justice Blackmun, the author of this Court's opinion in *J.E.B.*, has recently used his influence on the Court to help persuade our colleagues to deny certiorari in this case, and to decline this opportunity to condemn religious discrimination during jury selection. On the advice of his law clerk, Justice Blackmun recently sent a memo to the other members of our Court, written by that same law clerk, in which she has advised us (through him) that "there is no language in [*J.E.B.*] which fairly can be said to govern the issue" of religious discrimination in jury selection. But despite this recent change of heart on their part, the extension of our holding in *J.E.B.* to the case of religious discrimination follows so easily and so naturally that even Justice Blackmun and his law clerk originally circulated a draft opinion which, in its concluding section, would have condemned sex discrimination and religious discrimination in the very same breath.

As I have shown, the impressive and forceful dissent by Justice Thomas is also conspicuous for its failure to acknowledge, much less respond to, the points that Justice Ginsburg was trying to make in her concurring opinion, or to explain why his most junior colleague was completely mistaken in her understanding and analysis. It is impossible to say whether he failed to offer that explanation because he was understandably unable to fathom what she was talking about (her concurrence was by no means self-explanatory), or because he was gracious enough to not wish to cause embarrassment to his newest colleague during her first year on the bench. But because I am not subject to either of those constraints, I can also take the liberty of adding the other paragraph that was missing from his dissent:

> Justice Ginsburg, in her opinion concurring in the denial of certiorari in this case, respectfully insists that our understanding of this case is "incomplete," because it overlooks the fact that religious affiliation is not self-evident, and that inquiry into religious beliefs is ordinarily improper. At oral argument in *J.E.B.*, she suggested that this weighs against the extension of *Batson* to religious discrimination, because she stated that "religion is not written on someone's forehead so we would first have to quiz the potential jurors about that" if we were to forbid religious discrimination in the use of peremptory challenges. With all due respect, that is the opposite of the truth. If this Court were to forbid the use of peremptory challenges on the basis of religious beliefs, as petitioner in this case requests, it will virtually eliminate the tragically common scenario of prosecutors and other trial lawyers routinely questioning jurors about their religious beliefs – the very prospect that Justice Ginsburg called "a disturbing thought" at oral argument. Indeed,

> as long as this Court leaves lower courts in doubt as to whether *Batson* might be limited to race and sex discrimination, it is our own body of constitutional doctrine that will continue to create a powerful incentive for lawyers to ask such "disturbing" questions and to obtain such information about religious beliefs, even if only as a means of defending themselves against any suspicion or accusation (whether true or false) that they were actually excusing a juror on the basis of race or sex. Before our decisions in Batson and J.E.B., there was no such incentive at all, because lawyers were not required to furnish any explanation of the reason for their peremptory challenges.

VI. LOOKING BACK 25 YEARS LATER

It has now been a quarter of a century since the Supreme Court decided *J.E.B.* and denied certiorari in *Davis* – in both cases passing up an opportunity to resolve, once and for all, whether religious discrimination is permissible during jury selection. As a result, the question continues to rage in the lower courts, which have understandably reached inconsistent conclusions.[63] As long as the law remains unsettled, many prosecutors and other trial attorneys will continue to believe that it may be in their best interests to make a point of questioning prospective jurors about their religion, because such information could potentially enable them to persuade the courts that a peremptory challenge against those jurors was not based upon their race or sex, but rather based upon their religion.

The Supreme Court has explained that the entire line of *Batson* cases was grounded in the reality that "[t]he community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."[64] It is difficult to reconcile this statement with the Court's unwillingness to categorically condemn the use of archaic and "invidious group stereotypes" to justify the exclusion of prospective jurors solely based on the assumption that certain individuals, for no reason other than their religion, "are presumed unqualified by state actors to decide important questions upon which reasonable persons could

---

[63] Some lower courts have extended *Batson's* rule to religious affiliation. *E.g., United States v. Brown,* 352 F.3d 654, 668–669 (2d Cir. 2003); *State v. Hodge,* 248 Conn. 207, 244–246, 726 A.2d 531, 553 (1999); *United States v. Stafford,* 136 F.3d 1109, 1114 (7th Cir. 1998) (suggesting same). But others have declined to extend *Batson* to religious affiliation. *Casarez v. State,* 913 S.W.2d 468, 496 (Tex.Crim.App.1994) (en banc); *State v. Davis,* 504 N.W.2d 767, 771 (Minn.1993) (same).

[64] J.E.B. v. Alabama, 511 U.S. 127, 140 (1994).

disagree."[65]

[65] *Id.* at 142.