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Comment

Jumping on the Ban Wagon: *Minetos v. City University of New York* and the Future of the Peremptory Challenge

*Patricia J. Griffin**

Fior D'Aliza Minetos worked as an office assistant in the Music Department of Hunter College.[1] After ten years, she left her job when the College transferred her against her will.[2] Minetos filed suit against City University of New York, Hunter College, and several music department professors, alleging national origin, accent, and age discrimination.[3] During trial jury selection, the defense used three of its four peremptory challenges to exclude one Hispanic and two African American prospective jurors.[4] Minetos objected, arguing that these peremptory challenges were racially motivated,[5] in violation of the Equal Protection Clause.[6] The trial court agreed,[7] stating that

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1. Minetos v. City University of New York, 925 F. Supp. 177, 179 (S.D.N.Y. 1996).

2. *Id.*; *see also* Minetos v. City University of New York, 875 F. Supp. 1046, 1049 (S.D.N.Y. 1995) (providing more details regarding the facts and denying defendant's motion for summary judgment). Minetos attempted to prove that her resignation was a "constructive discharge," which occurs when employers make working conditions so intolerable a reasonable person in the plaintiff's position would resign. 925 F. Supp. at 186.

3. 925 F. Supp. at 179. Minetos claimed national origin and accent discrimination under Title VII of the Civil Rights Act of 1964 and age discrimination under the Age Discrimination in Employment Act (ADEA). *Id.* Additionally, Minetos alleged tortious interference with contract, a state law claim against the music professors. *Id.*

4. *Id.* at 180.

5. *Id.* at 179-80.

6. Batson v. Kentucky, 476 U.S. 79, 84 (1986).

7. *Minetos*, 925 F. Supp. at 182. The court applied the three-step *Batson* test. *Id.* at 181. Minetos established a prima facie showing raising an inference that the defense used peremptory challenges in a race-based manner. *Id.* The defense claimed that the jurors were struck for various non-

Minetos would be entitled to a new trial if the jury returned a verdict in the defense's favor.[8] Upon a jury verdict for the defendants,[9] however, the trial court denied Minetos a new trial[10] based on its finding that Minetos also used peremptory challenges in a racially discriminatory manner by striking only white male prospective jurors.[11] In addition to denying Minetos a new trial on the basis of the discriminatory use of peremptory challenges,[12] the court used the case as an opportunity to hold that peremptory challenges in general should be banned because they inherently violate equal protection.[13]

Minetos is the first judicial decision to analyze the efficacy of the three-part test devised by the Supreme Court[14] for determining whether peremptory challenges are motivated by racial discrimination.[15] More significantly, the *Minetos* court's holding that peremptory challenges per se violate the Equal Protection Clause[16] is unprecedented. In demanding elimination of peremptory challenges, the court's decision calls for other courts to reexamine the discriminatory implications of the peremptory challenge and join in the call for its abolition.[17]

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discriminatory reasons. *Id.* at 181-82. One potential juror was a substitute teacher in the same school system Minetos worked for after leaving Hunter College. *Id.* at 181. Another stated he did not feel speaking English was "necessarily needed" on the job. *Id.* The third juror was a "blue collar worker" the defense believed might not "understand[] . . . office dynamics." *Id.* at 182. The court noted a pattern of striking exclusively minority jurors and found that the proffered explanations were pretext for discrimination. *Id.* Ultimately, only one minority person, a Hispanic woman, sat on the *Minetos* jury. *Id.* at 180.

8. *Id.*

9. The jury returned a verdict for the defense on the Title VII and ADEA claims. *Id.* The court entered judgment as a matter of law on the state claim of tortious interference with contract. *Id.* Minetos moved for a new trial on all of her claims, or, in the alternative, the state law claims. *Id.*

10. *Id.* at 185.

11. *Id.* at 182. Minetos explained that the white male jurors were perceived as "pro-management." *Id.* The court determined that, because the New York business community is overwhelmingly white, this explanation was pretextual. *Id.*

12. *Id.* at 185.

13. *Id.*

14. *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986) (outlining the three-step test for determining whether peremptory challenges are racially discriminatory and therefore violate the Equal Protection Clause); *see also infra* notes 70-77 and accompanying text (discussing the *Batson* three-step test).

15. *Minetos*, 925 F. Supp. at 181-85.

16. *Id.* at 185.

17. *Id.*

This Comment contends that future courts should join the *Minetos* clarion call for a ban on peremptory challenges. Part I traces the history of jury composition jurisprudence and outlines the current state of the law. Part II discusses the *Minetos* court's holding and reasoning. Part III argues that the *Minetos* holding is more consistent with the intent underlying the Supreme Court's peremptory challenge cases than is the current *Batson* test. Part III further argues that while *Minetos*'s determination that *Batson* provides ineffective protection for litigants, prospective jurors, and the community rests on sound evidence, the court's analysis fails to support its groundbreaking conclusion. This Comment concludes that elimination of the peremptory challenge will end the frustration and confusion plaguing lower courts as well as provide the best protection for prospective jurors, litigants, and the community.

I. THE ISSUE OF RACE IN JURY COMPOSITION JURISPRUDENCE

A. A GENERAL OVERVIEW OF JURY SELECTION AND PEREMPTORY CHALLENGES

Jury selection is a two-part process.[18] First, the state selects a pool of potential jurors from the community[19] and calls them to appear for jury service,[20] making up the jury venire.[21]

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18. Anna M. Scruggs, Note, J.E.B. v. Alabama ex rel. T.B.: *Strike Two for the Peremptory Challenge*, 26 LOY. U. CHI. L.J. 549, 551 (1995); *see also* Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1143-44 (1993) (discussing the jury selection process); James H. Coleman, Jr., *The Evolution of Race in the Jury Selection Process*, 48 RUTGERS L. REV. 1105, 1116 (1996) (discussing the jury selection process in the state court context); Barbara L. Horwitz, Comment, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 U. CIN. L. REV. 1391, 1401-02 (1993) (discussing the jury selection process).

19. States utilize various statutorily derived processes for selecting the jury venire. *See, e.g.*, Coleman, *supra* note 18, at 1115-16 (outlining the New Jersey process for jury selection).

20. *Id.*

21. Scruggs, *supra* note 18, at 551. The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI. The guarantee of an impartial jury requires a jury drawn from a fair cross section of the community. Smith v. Texas, 311 U.S. 128, 131 (1940); *see also* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (stating the Sixth Amendment requires a jury drawn from a "source fairly representative of the community"); Peters v. Kiff, 407

Not all of these potential jurors eventually serve, however.[22] During the second step, the judge and the attorneys question the jury venire in the process of voir dire to determine the existence of biases and suitability for jury service.[23] The remaining jurors comprise the petit jury, which actually hears and decides the case.[24]

During voir dire, an attorney can exclude a juror from the petit jury either for cause or by exercising a peremptory challenge.[25] Peremptory challenges allow an attorney to strike a potential juror without designating a cause for removal,[26] while a challenge for cause requires an attorney to state the reasons why a juror should not be seated, such as bias.[27] Originally transplanted from England into American common law,[28] the peremptory challenge has become an integral part of the American justice system.[29] Commentators, attorneys, and

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U.S. 493, 500 (1972) (stating that the Sixth Amendment comprehends a fair possibility of obtaining a jury drawn from a fair cross section of the community); Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972) (explaining that a jury will be able to complete its functions as long as it is drawn from a fair cross section of the community); Williams v. Florida, 399 U.S. 78, 100 (1970) (holding a six-person jury constitutional as long as it is drawn from a fair cross section of the community).

22. *See* Scruggs, *supra* note 18, at 551 (indicating how potential jurors are removed).

23. *Id.*

24. Coleman, *supra* note 18, at 1116; Scruggs, *supra* note 18, at 552.

25. Coleman, *supra* note 18, at 1116; Scruggs, *supra* note 18, at 551.

26. BLACK'S LAW DICTIONARY 1136 (6th ed. 1990). Traditionally, the peremptory challenge's "essential nature" requires it be exercised without reason, inquiry, or court control. Pointer v. United States, 151 U.S. 396, 408 (1894); *see also* Horwitz, *supra* note 18, at 1392-93 (discussing the nature and purpose of the peremptory challenge).

27. BLACK'S LAW DICTIONARY, *supra* note 26, at 856.

28. *See* Batson v. Kentucky, 476 U.S. 79, 119 (1986) (Burger, C.J., dissenting) (noting that the British Crown initially had an unlimited number of challenges); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished,* 65 Temp. L. Rev. 369, 371-74 (reviewing the history of the peremptory challenge in England); Horwitz, *supra* note 18, at 1396 (reviewing the history of peremptory challenges); Joshua E. Swift, Note, Batson's *Invidious Legacy: Discriminatory Jury Exclusion and the "Intuitive" Peremptory Challenge,* 78 CORNELL L. REV. 336, 339 (1993) (reviewing the history of the peremptory challenge). Although peremptory challenges were conferred by statute in England, American courts initially accepted the defendant's peremptory challenges as part of the common law. Broderick, *supra,* at 374. The prosecution's peremptory challenges were conferred by federal and state statute. *Id.* at 374-75.

29. *See* Broderick, *supra* note 28, at 371-78 (reviewing the history of the peremptory challenge and analyzing its role in the American judicial system prior to the Fourteenth Amendment); *see also* Horwitz, *supra* note 18, at

judges argue that peremptory challenges ensure an impartial jury[30] by allowing attorneys on both sides to exclude jurors be-

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1397-98 (reviewing the history and role of peremptory challenges in the American judicial system); Swift, *supra* note 28, at 340 (same).

30. Babcock, *supra* note 18, at 1143. The Supreme Court has stated that the sole function of the peremptory challenge is assisting the government in selecting an impartial jury. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).

One difficulty in abolishing the peremptory challenge in criminal trials may be the Sixth Amendment right to an impartial jury, which presupposes the right to remove partial influences. Horwitz, *supra* note 18, at 1395. "[The] right to strike jurors [a party] perceives as unable to try his case solely on the evidence is among the most important of the means designed to ensure him an impartial jury." *Id.* The peremptory challenge process, in which both sides seek to strike those jurors perceived as biased, which the other side likely views as ideal, results in an impartial jury. Judith H. Germano, Note, *Preserving Peremptories: A Practitioner's Prerogative*, 10 ST. JOHN'S J. LEGAL COMMENT. 431, 436-37 (1995). This makes the peremptory challenge vital to the formation of an impartial jury. *Id.* Justice Scalia also argues that the peremptory challenge may be compelled by the Sixth Amendment. *See* Holland v. Illinois, 493 U.S. 474, 481-82 (1990) ("One could plausibly argue . . . that the requirement of an 'impartial jury' impliedly compels peremptory challenges, but in no way could it be interpreted directly or indirectly to prohibit them.").

Others argue the Sixth Amendment does not require peremptory challenges and, in fact, peremptory challenges may prevent the formation of an impartial jury. *See id.* at 482 (noting that in Stilson v. United States, 250 U.S. 583, 586 (1919), the Court stated that peremptory challenges are not compelled by the Sixth Amendment); Broderick, *supra* note 28, at 407 ("Rather than promote fair trials, there is every reason to conclude that the peremptory undermines them."); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 731 (1992) (noting that the argument that peremptory challenges allow formation of impartial juries necessarily attributes views and biases to jurors on the basis of race). For example, to claim that removing all blacks from a jury will prevent their bias in favor of the black defendant from having an impact on the verdict necessarily requires attributing racial bias against that defendant to the remaining white jurors. *Id.* at 730. The right of an accused to be tried by a jury selected in a nondiscriminatory manner is irreconcilable with the "peremptory challenge which serves to effectuate every conceivable discriminatory classification." Broderick, *supra* note 28, at 407. Broderick also argues that empirical studies show that impartial juries and peremptory challenges are inconsistent. *Id.* at 413. He points to an English survey showing a seven percent increase in conviction rates when defense attorneys exercise peremptories. *Id.* Another study indicated that there is "little benefit" to gain through the use of peremptory challenges because erratic performance by attorneys indicate that counsel is unable to identify prejudiced jurors. *Id.* Melilli argues that the value of the jury system lies in its representation of various group beliefs, which then diminish the impact of unfair biases. Kenneth J. Melilli, Batson *in Practice: What Have We Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 500 (1996). The peremptory challenge distorts the formation of the impartial jury because it allows removal of some of these group beliefs. *Id.*; *see also supra* note 21 and

longing to groups they believe would favor the other side,[31] particularly when the attorney believes that the voir dire process failed to uncover potential juror biases.[32] Other commentators contend, however, that such challenges instead ensure a partial jury because attorneys try to select jurors favoring their own client while attempting to exclude those believed to favor the other side.[33] Indeed, many commentators have noted that the arbitrary nature of peremptory challenges increases the potential for abuse, including the use of peremptory challenges to mask discrimination.[34]

B. CASE LAW: A FOCUS ON JURY COMPOSITION

The Supreme Court's jury composition cases focus on the impact of invidious discrimination on the criminal defendant, the juror, and the community. The Court sought to protect the

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accompanying text (discussing the Sixth Amendment fair cross section requirement).

It may be argued that the Sixth Amendment fair cross section cases and the equal protection cases are irreconcilable. The equal protection peremptory challenge cases "reject race or gender stereotyping," while the "fair cross section cases are riddled with [the very] assumptions and stereotypes" the equal protection cases reject. Scruggs, *supra* note 18, at 572. The *Batson* three-step test for peremptory challenges focuses on equal protection concerns. *Id.* at 572-73. However, in its Sixth Amendment analysis of the peremptory challenge issue, the Court reiterated that only a representative venire is required. *Holland*, 493 U.S. at 478. The necessary presumption of *Holland* that certain groups "may be partial to a certain class of individuals" is a "nagging discrepanc[y]." Scruggs, *supra* note 18, at 576.

31. *See* Germano, *supra* note 30, at 431 (noting that attorneys use peremptory challenges to remove jurors they perceive as favoring their opponent).

32. Babcock, *supra* note 18, at 1146.

33. *See* Germano, *supra* note 30, at 431 (quoting JOAN M. BROVINS & THOMAS OEHMKE, THE TRIAL PRACTICE GUIDE: STRATEGIES, SYSTEMS, AND PROCEDURES FOR THE ATTORNEY 80 (1992) as stating, "In your eyes, jurors should be biased in favor of your client . . . ."); *see also id.* at 436 (noting that attorneys "prefer jurors who are partial toward their case's theory"); Melilli, *supra* note 30, at 453 ("In the exercise of peremptory challenges, the lawyers, of course, seek not an impartial jury, but rather jurors most favorable to their client's interests.").

34. *See* Broderick, *supra* note 28, at 370 ("The peremptory challenge is habitually employed to discriminate against citizens on the basis of invidious and atavistic classifications."); Jonathan Mintz, Note, Batson v. Kentucky: *A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1026 (1987) ("[C]ouched within the traditions of . . . selection techniques lie intractable patterns of invidious discrimination."); Swift, *supra* note 28, at 337 (noting the Court's acknowledgment of the peremptory challenge's potential to mask discrimination in the courtroom).

right of any criminal defendant to be tried by a jury chosen in a nondiscriminatory manner.[35] It further sought vindication and protection of the prospective juror's right to serve[36] because the constitutional right to serve on a jury provides one of the primary means of citizen participation in a democratic society.[37] State violation of these rights perpetuates discrimination by perpetuating racial prejudice.[38] The right of a prospective juror and criminal defendant not to be subjected to invidious discrimination is thus central to the antidiscrimination jurisprudence of the Court when dealing with the issue of jury composition and selection.[39]

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35. *See* Strauder v. West Virginia, 100 U.S. 303, 309 (1879) (noting that denying an African American the right to a jury chosen without racial discrimination while providing that right to white defendants violates equal protection).

36. *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1427-28 (1994) (noting that all members of the community called for jury service have the right not to be subjected to discrimination); Georgia v. McCollum, 505 U.S. 42, 49 (1992) (noting that discriminatory peremptory challenges expose the juror to open and public discrimination); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618-19 (1991) (noting that the juror in the civil context is no less harmed by discriminatory jury selection); Powers v. Ohio, 499 U.S. 400, 409-10 (1991) (noting a potential juror has the right not to be excluded on the basis of race); Batson v. Kentucky, 476 U.S. 79, 87 (1986) (noting that a person's race has no impact on fitness to serve as a juror); Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (discussing the harms of allowing discriminatory juror exclusion); *see also* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.").

37. *See Powers*, 499 U.S. at 407 (noting that, other than voting, jury service provides the best opportunity for citizens to participate in democratic government); Keith A. Ward, Comment, *The Only Thing in the Middle of the Road Is a Dead Skunk and a Yellow Stripe: Peremptory Challenges—Take 'Em or Leave 'Em*, 26 TEX. TECH. L. REV. 1361, 1361-62 (1995) (discussing the importance of the American jury system as a vehicle for citizen participation in democratic government).

38. *Strauder*, 100 U.S. at 308.

39. *See Batson*, 476 U.S. at 87-88 (noting the dangers of racially discriminatory jury selection extend beyond the defendant and juror to the entire community); *see also J.E.B.*, 114 S. Ct. at 1427-28 (discussing the importance of protecting potential jurors from discriminatory jury selection techniques); *McCollum*, 505 U.S. at 48-50 (discussing the importance of eliminating discriminatory jury selection practices); *Edmonson*, 500 U.S. at 618-19 (discussing the need to protect potential jurors from discrimination); *Powers*, 499 U.S. at 409-10 (noting the importance of jury service as a reason for eliminating discrimination in jury selection).

1. *Strauder v. West Virginia*: Equal Protection in Jury Composition

The Supreme Court first addressed concerns about racially discriminatory jury selection processes in the years following the passage of the Fourteenth Amendment. In *Strauder v. West Virginia*,[40] the Court held that enforcement of a statute excluding African Americans from jury service[41] denied equal protection to an African American defendant because the jury pool selection process discriminated on the basis of race.[42] The Court also concluded that denying African Americans the right to serve on a jury violated the equal protection rights of the potential jurors.[43] The *Strauder* Court believed that to deny the African American citizen the right to participate as a juror on the basis of race branded him inferior and encouraged racial prejudice.[44] The Court stressed that the composition of the selected jury is an "essential part" of the right to trial by jury.[45] The Court further reasoned that if a white man is entitled to a jury chosen without discrimination as to race, denial of the same right to a black criminal defendant is clearly a violation of the guarantee of equal protection of the laws.[46]

After *Strauder*, criminal defendants continued to challenge discriminatory jury selection practices,[47] including the poten-

40. *Strauder*, 100 U.S. 303.

41. *Id.* at 310. The statute at issue specifically stated that only white males were allowed to serve on juries. *Id.* at 304. Strauder was indicted and tried by all-white juries. *Id.* He argued that he could not receive the full benefit of the law if tried by an all-white jury. Ward, *supra* note 37, at 1364. The trial court overruled his motions for a new venire, new petit jury, and new trial, all of which he based on his constitutional challenge to the West Virginia statute. *Strauder*, 100 U.S. at 304-05.

42. *Strauder*, 100 U.S. at 309.

43. *Id.* at 308.

44. *Id.*

45. *Id.*

46. *Id.* at 309.

47. Many of the cases after *Strauder* focused on the Sixth Amendment Impartial Jury Clause. *See* cases cited *supra* note 21 (discussing the Sixth Amendment fair cross section of the community standard). During these years, however, the Court did not ignore equal protection analysis. Particularly after 1935, the Court examined the jury venire for equal protection violations. The Court rejected state officials' claims that there were no suitable blacks available for jury service as an explanation for why no blacks had served on a grand or petit jury "in the history of the county." Norris v. Alabama, 294 U.S. 587, 591-97 (1935). The unwillingness of the Court to accept "without question the self-serving statements by officials that racial discrimination was not responsible for the total elimination of blacks from the venire"

tially discriminatory nature of the peremptory challenge and the effect of its use on jury composition.[48] Following suit, the Supreme Court turned to the doctrinal underpinnings of *Strauder* to analyze discriminatory jury selection processes in the context of the peremptory challenge.[49]

2. *Swain v. Alabama*: Equal Protection and the Peremptory Challenge

Although Supreme Court cases such as *Strauder* prohibited states from excluding African Americans from jury pools, states still allowed racially discriminatory peremptory challenges to exclude African Americans from petit juries.[50] Despite the increasing federalization of civil rights and liberties throughout the 1960s,[51] the Supreme Court refused to expand federal equal protection to prohibit racially discriminatory peremptory challenges in state courts.[52] In *Swain v. Alabama*,[53] the Court hailed the "old credentials" of the peremptory challenge,[54] including its function in ensuring impartial juries,[55] and characterized the peremptory challenge as an "essential" feature of the justice system.[56] The Court found that, in general, peremptory challenges exercised to remove minority veniremen in a particular case do not violate equal protection as long as selection of the jury pool itself is nondiscriminatory.[57] According to the Court, because all veniremen are subject to removal without cause, they receive equal treatment during the petit

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was an important step forward. Broderick, *supra* note 28, at 384. As the Court became more vocal in preventing the exclusion of blacks from the venire, peremptories became the tool of choice for removing them from the petit jury. *Id.* at 385.

48. Swain v. Alabama, 380 U.S. 202, 216 n.19 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

49. *See* Coleman, *supra* note 18, at 1120 (discussing Swain v. Alabama, 380 U.S. 202 (1965)).

50. *Id.*

51. *Id.*

52. *Id.*

53. 380 U.S. 202 (1965). The Court reiterated that "purposeful or deliberate denial" of the right to jury service to blacks violates equal protection. *Id.* at 203-04.

54. *Id.* at 212-19.

55. *Id.* at 219.

56. *Id.* at 219-20.

57. *Id.* at 220-21.

jury selection process.[58] Yet, the Court did not reject the notion that peremptory challenges might violate equal protection in practice.[59] The Court allowed the criminal defendant to overcome a presumption[60] that the prosecution used its peremptory challenges to achieve a fair and impartial jury by proving "systematic" discriminatory abuse of peremptory challenges over a period of time,[61] which required a defendant to gather evidence from outside the scope of his own trial.[62]

The *Swain* decision drew criticism from commentators, academics, and attorneys who criticized the insurmountable burden *Swain* placed on the criminal defendant alleging discrimination.[63] Many called for complete abolition of peremptory challenges,[64] while others insisted that retention of the peremptory challenge was necessary to administer justice[65]

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58. "In the quest for an impartial and qualified jury, Negro and white, Protestant, and Catholic are subject to being challenged without cause." *Id.* at 221.

59. *Id.* at 222-24. On the other hand, the *Swain* Court did endorse the use of peremptory challenges on the basis of "race, religion, nationality, occupation, or affiliations" of potential jurors if the state allowed. *Id.* at 220.

60. *Id.* at 223-24.

61. *Id.*

62. *Id.* at 227.

63. *See* Coleman, *supra* note 18, at 1122 (noting that the author's research failed to uncover a single instance of a successful challenge under the *Swain* test); Scruggs, *supra* note 18, at 555 (noting that rebuttal of the presumption of legitimate prosecutorial action "proved almost impossible"); Swift, *supra* note 28, at 344-45 (discussing the actions criminal defendants needed to take to meet the Court's burden of proof).

64. *See* Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 233-34 (1978) (arguing that prosecutorial abuse of peremptories mandates abolition unless courts can effectively intervene to prevent abuse); George Bundy Smith, Swain v. Alabama: *The Use of Peremptory Challenges to Strike Blacks from Juries*, 27 HOW. L.J. 1571, 1591-95 (1984) (asserting that discriminatory use of peremptories must be stopped); Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 244-46 (1986) (arguing for abolition of peremptory challenges).

65. *See* Babcock, *supra* note 18, at 1175 ("[T]otal elimination of the peremptory challenge is ill-advised as it would focus jury selection entirely on the challenge for cause."). The result is that the judge alone would shape the jury composition in a series of "practically unreviewable decisions." *Id.* Jury trials are guaranteed precisely to prevent such unilateral actions by judges. *Id.* Further, elimination of the peremptory challenge would make it difficult for attorneys to make challenges for cause because vigorous questioning in voir dire might antagonize jurors. *Id.* at 1176. The peremptory challenge makes vigorous questioning possible. *Id.*; *see also* Germano, *supra* note 30, at 436-38 (asserting that the peremptory challenge is crucial to formation of impartial

and could be reconciled with the dictates of equal protection.[66] Nevertheless, an increase in the number of minority members summoned for jury service during the twenty-one years following *Swain* highlighted the potential for abuse of peremptory challenges.[67] Some states prohibited discriminatory peremptory challenges under their state constitutions.[68] Not surpris-

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juries); Underwood, *supra* note 30, at 761 (arguing for modification of the peremptory challenge as opposed to abolition). Underwood argues that the antidiscrimination principles are more important than peremptory challenges but that the two are not irreconcilable. *Id.* Modified peremptory challenges are worth preserving because they allow exclusion of jurors who evidence possible bias, but not to the level justifying a challenge for cause. *Id.* at 762. So-called "arbitrary" peremptory challenges are not a concern because attorneys and litigants normally have reasons for their actions, and courts are more than capable of disallowing those that are wholly arbitrary. *Id.* at 763-64; *see also* Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 563 (1975) (claiming that the voir dire system should be expanded to allow better use of peremptory challenges necessary to effectuate justice); Steven M. Puiszis, Edmonson v. Leesville Concrete Co.: *Will the Peremptory Challenge Survive Its Battle with the Equal Protection Clause?*, 25 J. MARSHALL L. REV. 37, 80 (1991) (discussing the vital role peremptory challenges play in the justice system and approving the Court's seeming unwillingness to eliminate the peremptory challenge).

66. *See* Babcock, *supra* note 18, at 1174-79 (arguing for retention of the peremptory challenge by reworking the jury selection process by broadening the jury pool, statutorily forbidding race and gender discrimination in the exercise of challenges, reducing the number of peremptories allowed in relation to the size of the petit jury, improving voir dire techniques, and using affirmative selection techniques). Babcock argues that the Supreme Court's intervention into jury selection in *Batson* creates an opportunity to call on legislatures to pass modern statutes to effectuate the antidiscrimination principles of *Batson*. *Id.* at 1176; *see also* Germano, *supra* note 30, at 449-50 (arguing for improvement of voir dire techniques focusing on "psychographic, rather than demographic, characteristics of prospective jurors" to prevent dependence on stereotypes that are often erroneous); Swift, *supra* note 28, at 337-38 (arguing for adoption of a pretext test distinguishing "hard-data" explanations for a peremptory challenge, which are generally verifiable and should be allowed, from "soft-data" explanations, which are frequently based on "intuition" and should not be accepted). Affirmative selection means, after the initial voir dire and challenges for cause, each side prepares a list of 12 preferred jurors in order of preference. Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781, 806 (1986). Judges first select mutual choices, then alternate between the two lists in descending order until 12 jurors are seated. *Id.*

67. For a discussion of the changes in the justice system that resulted in increased numbers of minorities summoned for jury service, see Babcock, *supra* note 18, at 1147-49.

68. State v. Super. Ct., 760 P.2d 541, 546 (Ariz. 1988) (en banc); People v. Wheeler, 22 Cal. 3d 258, 276-78 (Cal. 1978); Riley v. State, 496 A.2d 997, 1012 (Del. 1985); State v. Neil, 457 So. 2d 481, 486-87 (Fla. 1984); Commonwealth v. Soares, 387 N.E.2d 499, 516-17 (Mass. 1979); State v. Crespin, 612 P.2d 716, 718 (N.M. Ct. App. 1980). Additionally, two Courts of Appeals followed

ingly, the Supreme Court decided to reexamine the discriminatory use of peremptory challenges.

C. *BATSON V. KENTUCKY* AND ITS PROGENY: REDEFINING "PEREMPTORY"

In 1986, the Supreme Court revisited the issue of race and peremptory challenges in *Batson v. Kentucky*.[69] The *Batson* Court set out a three-step test to determine if racial prejudice impermissibly motivated a peremptory challenge or series of challenges.[70] First, the criminal defendant must establish a prima facie case of purposeful discrimination[71] by showing that he or she is a member of a cognizable racial group,[72] that peremptory challenges permit discrimination,[73] and that these facts and other "relevant circumstances" raise an inference of purposeful discrimination.[74] Once the defendant makes the prima facie showing, the burden shifts under the second step to the prosecution to provide a neutral explanation for the chal-

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this trend, holding that the use of peremptory challenges to strike black jurors might violate the Sixth Amendment. Batson v. Kentucky, 476 U.S. 79, 82 n.1 (1986) (citing Broker v. Jabe, 775 F.2d 762 (6th Cir. 1985); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984)).

69. 476 U.S. 79 (1986). The *Batson* Court faced a dilemma: the precedent of *Swain* made rejection of the equal protection argument probable. *See supra* notes 53-62 (discussing the holding and reasoning of *Swain*). Accordingly, the appellant did not raise the equal protection issue, arguing instead that his Sixth Amendment rights were violated. Scruggs, *supra* note 18, at 560. In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Court specifically rejected application of the Sixth Amendment to the petit jury as unworkable. Babcock, *supra* note 18, at 1153. In order to place limits on discriminatory peremptory challenges, the Court necessarily had to review and overturn precedent. *See Batson*, 476 U.S. at 84 n.4 (noting that the Court agreed with the state that Batson's claim implicated the Fourteenth rather than the Sixth Amendment). "We . . . express no view on the merits of any of petitioner's Sixth Amendment arguments." *Id.* at 85 n.4.

70. *Batson*, 476 U.S. at 96-98.

71. *Id.* at 96.

72. *Id.* (citing Castenada v. Partida, 430 U.S. 482, 494 (1977)).

73. *Id.* (citing Avery v. Georgia, 345 U.S. 559, 562 (1953)).

74. *Id.* at 96-97. Although the Court gave two examples of "relevant circumstances," it relied on the trial courts to develop criteria for establishing a prima facie case. *Id.* at 97. The Court's examples are a pattern of strikes against black jurors and prosecutor statements and questions during both voir dire and the challenge process. *Id.* The defendant could now draw on the facts of his own case and trial, *id.*, eliminating *Swain's* "systematic use" prong. "Batson gave no specific direction as to the measure of a prima facie case." Melilli, *supra* note 30, at 470. "[I]n most cases, the task for the court is to determine what constitutes a 'pattern' of strikes against the targeted group . . . ." *Id.* at 471.

lenges.[75] The neutral explanation should be related to the circumstances of the case.[76] Under *Batson's* final step, the trial court determines whether the prosecution's neutral explanation sufficiently rebuts the defendant's inference of purposeful discrimination.[77] The burden of persuasion as to the presence of purposeful discrimination remains on the defendant.[78] Although the Court did not specifically address the remedy for a *Batson* violation,[79] the trial court may recall the excluded jurors or dismiss all the jurors and start the jury selection process over.[80] The remedy applied by appellate courts has been reversal and a new trial.[81]

The *Batson* Court sought to eliminate discrimination in jury selection to protect three specific groups. First, the Court intended *Batson* to protect the criminal defendant's right to a

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75. *Batson*, 476 U.S. at 97. The Court stated that the explanation need not "rise to the level justifying ... a challenge for cause," but that simply stating his or her assumptions or intuition that a challenged juror would be partial to one of his or her own race is insufficient. *Id.* Nor is a mere denial of discriminatory motive sufficient to rebut the prima facie case. *Id.* at 98. The neutral explanation should be related to the facts of the case. *Id.*

Attorneys naturally developed expertise at proffering neutral explanations. Attorneys "can so easily rebut a prima facie case that the Court's equal protection guarantees are illusory." Mintz, *supra* note 34, at 1036. "Facially neutral reasons for striking a juror are easy to assert and difficult to second guess." Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 33 (1993). This was Justice Marshall's argument for banning peremptories in his *Batson* concurrence. *Batson*, 476 U.S. at 102-08 (Marshall, J., concurring); *see infra* note 93 and accompanying text (discussing Justice Marshall's *Batson* concurrence).

76. *Batson*, 476 U.S. at 98. "The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried." *Id.*

77. The Court went no further in providing guidance to the lower courts on determining the presence of purposeful discrimination. "The Supreme Court leaves the translation of large edicts like those in the *Batson* line to the offices and officers of the courts below." Babcock, *supra* note 18, at 1174. This left the courts with the problem of "enforcing a standard without a clear perimeter" because the Court failed to provide lower courts with practical guidance for analyzing the various reasons an attorney might submit as race neutral. Swift, *supra* note 28, at 361. For a discussion of the various methods courts developed to examine neutral explanations and their effectiveness, see Melilli, *supra* note 30, at 478-83.

78. "The trial court then will have the duty to determine if the *defendant* has established purposeful discrimination." *Batson*, 476 U.S. at 98 (emphasis added).

79. Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 94-95 (1996).

80. *Id.*

81. *Id.* at 95.

fair jury chosen without discrimination,[82] as was also true of the Court in *Strauder*.[83] Another primary concern of the *Batson* Court, again like *Strauder*, was protection of the right of the prospective juror to serve. Finally, because discriminatory jury selection practices can render jury verdicts suspect in the eyes of the general public[84] as well as promote continuing discrimination and prejudice in society at large,[85] elimination of

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82. *Batson*, 476 U.S. at 85-87. "Purposeful discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Id.* at 86.

83. *See supra* notes 40-46 and accompanying text (discussing the *Strauder* holding and reasoning).

84. *Batson*, 476 U.S. at 87. "The harm . . . extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in our system of justice." *Id.* "[T]he American public envisions a proper jury as representative of the community . . . ." Scruggs, *supra* note 18, at 580. "Discriminatory jury selection undermines [public] confidence in the jury's neutrality, its ability to adhere to the law, and the fairness of the verdict it determines." *Id.* at 581. Media commonly report on the gender and racial make up of juries. *Id.* at 582. This is particularly true in high profile cases. For example, questioning the initial venire in the O.J. Simpson wrongful death civil case resulted in a jury composed of nine whites, one African American, one Latino, and one person of mixed race. *Eight Alternate Jurors Set for Simpson Civil Trial*, SACRAMENTO BEE, Oct. 22, 1996, at A3. The panel of eight alternate jurors (five male, three female) included five whites, one Asian, and one Latino. *Id.*

The failure to attain a jury the public can regard as fair has had tragic consequences in the recent past. In the first trial of white police officers accused of beating motorist Rodney King, the defense used its peremptory challenges to shape a jury that "looked racially like the defendants." Babcock, *supra* note 18, at 1140. The result of the negative image created by the King trial and verdict "spilled out into the Los Angeles streets." *Id.*; *see also* Michael J. Desmond, *Limiting a Defendant's Peremptory Challenges:* Georgia v. McCollum *and the Problematic Extension of Equal Protection*, 42 CATH. U. L. REV. 389, 390 (1993) (noting that the result of the Rodney King trial makes clear the "far-reaching impact of appearances of impropriety in jury composition and selection").

The Court acknowledges the continued importance of public opinion and perceptions of the jury system. One of the primary reasons the Court chose to extend *Batson*'s requirements to the defendant's use of peremptory challenges was the fear that discrimination by either party undermines public confidence in the jury system. Georgia v. McCollum, 505 U.S. 42, 49-50, 59 (1992). Similarly, in extending *Batson* to prohibit gender-based peremptory challenges, the Court stated that the "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." J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1427 (1994).

85. *Batson*, 476 U.S. at 87.

discrimination in the courtroom increases public confidence in the jury system.[86]

In the years following *Batson*, the Supreme Court's focus on the equal protection rights of the prospective juror became more explicit.[87] In addition, the Court frequently expanded the reach of *Batson*. First, the Court eliminated the requirement that the challenging defendant be a member of the same race as the excluded juror.[88] The Court then applied *Batson* to civil litigants.[89] Next, criminal defendants became subject to the

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86. *Id.*

87. Even in *Batson*, the Court implicitly focused on the rights of the excluded juror. "The fact is that *Batson* only makes analytical sense if one recognizes that it has shifted the primary focus from the rights of the litigants to the rights of prospective jurors." Melilli, *supra* note 30, at 453. "Batson and its progeny gradually set the stage for *J.E.B.* by shifting the focus away from the defendant to the excluded juror." Scruggs, *supra* note 18, at 572. Such a focus on the excluded juror is appropriate because the use of peremptories in a discriminatory manner, sanctioned by the court, places a "judicial imprimatur on discrimination." Broderick, *supra* note 28, at 400. The state's interest, regardless of how compelling it might be, cannot be advanced by a peremptory challenge because the challenge, by its nature, has no objective basis. *Id.* at 401. The line of cases following *Batson* "privileged the jury's appearance over preservation of the peremptory challenge . . . and over the peculiar needs of the criminally accused." Babcock, *supra* note 18, at 1157. That the right of the citizen to participate overcomes the right of the litigant to remove jurors without cause, particularly when the reason is discriminatory, was made explicit in *Edmonson*. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991).

88. Powers v. Ohio, 499 U.S. 400, 415 (1991). The Court decided that the defendant had standing to raise the rights of the excluded juror because the relationship between litigant and juror is sufficiently close to convey third party standing. *Id.* at 413-15. Further, the two have a common interest in eliminating discrimination from the courtroom. *Id.* at 413. The practical reality that an excluded juror will not challenge his or her own exclusion makes allowing the litigant to do so acceptable. *Id.* at 413-16.

89. *Edmonson*, 500 U.S. at 629 (1991). Application of *Batson* in a civil context required classifying litigants as state actors, for which the Court utilized the test from *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936-37 (1982). *Edmonson*, 500 U.S. at 620-21. First, peremptory challenges clearly have their source in state authority because their sole purpose is to permit the litigant to assist the government in selecting an impartial jury. *Id.* Peremptory challenges exist because the government allows them. *Id.* The private litigant can be considered a state actor when exercising the peremptory challenge. *Id.* at 621-22. The extensive use of state procedures and the "overt, significant participation" of the government justifies the characterization of peremptory challenges as state action. *Id.* Extensive involvement of the judge implicates the judicial system in the state action. *Id.* at 623-34. The Court stated if race discrimination is the price to be paid *for the perception of a fair jury*, the price is too high. *Id.* at 630 (emphasis added). Advancement of this multiracial society requires recognition that "automatic invocation of

same antidiscriminationory peremptory challenge rules prosecutors must follow.[90] Finally, the Court extended impermissible bases for peremptory challenges to national origin[91] and gender.[92] These expansions of *Batson* have led commentators

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race stereotypes retards . . . progress and causes continued hurt and injury." *Id.* at 630-31.

90. Georgia v. McCollum, 505 U.S. 42, 58-59 (1992). Of primary concern to the *McCollum* Court was public perception of fairness in jury selection. *Id.* at 49-50. The Court utilized the same analysis underpinning *Edmonson* in characterizing the criminal defendant as a state actor when utilizing peremptory challenges. *Id.* at 51-55.

91. Hernandez v. New York, 500 U.S. 352, 355 (1991). According to the Court, had the state exercised its peremptory challenges to exclude Latinos because of their ethnicity, it would have violated the Equal Protection Clause. *Id.*

While the extension of *Batson* to national origin and ethnicity was a necessary but implicit holding of *Hernandez*, it is arguable that the case signaled the beginning of a retreat. The statement that a pattern striking only minorities is not sufficient to make out a prima facie case of discrimination directly conflicted with *Batson*'s statement that a pattern of strikes against black jurors is a relevant circumstance that can establish a prima facie case. Batson v. Kentucky, 476 U.S. 79, 97 (1986); *see also* text accompanying *supra* notes 71-74 (discussing the *Batson* prima facie case and noting that the courts must try to determine whether a pattern of strikes exists). However, the Court failed in *Hernandez* to apply the *Batson* test appropriately. It accepted that there was a prima facie case of discrimination, but then failed to look beyond the facial neutrality of the proffered explanation, choosing instead to defer to the findings of the trial court. *Hernandez*, 500 U.S. at 364. The Court explained that this was necessary because decisions as to whether neutral explanations are pretextual usually depend on the credibility of the attorney offering the explanation, which the trial court is necessarily in a better position to judge. *Id.* at 365; *see also* Swift, *supra* note 28, at 356 (asserting that the Court skipped steps in *Hernandez*). Swift notes that the *Hernandez* Court based its decision on an incorrect assumption—that the prosecutor had asked each excluded juror the questions the answers to which he later used as neutral explanations. *Id.* Swift concludes that the failure to apply *Batson*'s third step to examine the proffered explanation reduces *Batson* to a "superficial check" for only the "most egregious forms of discrimination." *Id.* The result is an unsuccessful struggle in lower courts to apply this "amorphous and confusing test." *Id.* at 357.

92. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1421 (1994). *J.E.B.* dealt with a paternity suit in which the state of Alabama was challenged for removing all the males from the petit jury with peremptory challenges. *Id.* at 1421-22. Justice Blackmun reviewed the history of discrimination against women in determining that gender-based peremptory challenges violate equal protection principles. *Id.* at 1422-24, 1430. The State argued that it perceived men as more sympathetic to the defendant's position, but the Court stated it would not "accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'" *Id.* at 1426 (quoting *Powers*, 499 U.S. at 410).

to anticipate either further limits on permissible use of peremptory challenges or total abolition of the practice.[93]

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93. Some concerns have been raised as to the limits of *Batson*-type analysis in light of the *J.E.B.* result, at least partially because race and gender "coexist with all of the other demographic classifications that most, if not all, litigators at least consider during voir dire." Germano, *supra* note 30, at 442. "[T]he Court's decisions on the constitutionality of the peremptory challenge forecast its elimination." Jason Hochberg, *Peremptory Challenge: An American Relic Like the Model-T Ford and the $2 Bill, Its Time Has Passed*, 10 CRIM. JUST. 10, 52 (1996). Further, in the absence of "any demonstrable countervailing government interest furthered by the concededly arbitrary and impressionistic exercise of authority represented by the peremptory results in the inevitable conclusion that it cannot survive any level of equal protection scrutiny, no matter how lenient." Broderick, *supra* note 28, at 401. *But see J.E.B.*, 114 S. Ct. at 1429 ("Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges."); Germano, *supra* note 30, at 434 (arguing that denial of certiorari in Davis v. Minnesota, 504 N.W.2d 767 (Minn. 1993), effectively eliminates application of *Batson* to religion-based peremptories and makes further extensions unlikely); Scruggs, *supra* note 18, at 583-84 (asserting that the Court will continue to refuse to extend *Batson*).

Justice Marshall's *Batson* concurrence specifically called for the abolition of the practice. Batson v. Kentucky, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring). He argued that *Batson*'s limitations were clear from the results in states that already restricted discriminatory peremptory challenges. *Id.* at 103. "The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely . . . ." *Id.* at 107. *Batson*, he predicted, would leave prosecutors "free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level." *Id.* at 105.

Marshall argued that attorneys make discriminatory racial challenges without awareness of their own motives and that the same unconscious racism may lead judges to accept pretextual explanations as true. *Id.* at 106. The Court did not respond to this argument because they could not do so and retain the peremptory. Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1023 (1988). "Social scientists would tell us that Marshall is right . . . ." *Id.*

Part of the reason commentators have called for the elimination of the peremptory altogether is that Justice Marshall's prediction proved correct. For a description of the ease with which lawyers side-step the requirements of *Batson*, see Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson's *Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 632-36 (1994); *see also* Swift, *supra* note 28, at 358-61 (noting the inconsistent results among lower courts). For example, proffered neutral explanations such as residence, age, prosecutorial intuition, body language, and prior involvement with the law are considered pretextual in some jurisdictions and unimpeachable in others. *Id.* at 359. There is no consensus "about the validity of these reasons or how to analyze them." *Id.*

The real issue in the abolition argument is "whether attorneys or their clients, with imperfect knowledge and in spite of their own prejudices, should

Lower court application of the three-step *Batson* test has yielded mixed results at best. On the one hand, application of the *Batson* three-step test has refocused attention on the rights of citizens called to jury service.[94] Moreover, the debate over *Batson* caused the legal system to acknowledge that there is a difference between the constitutionally-guaranteed impartial jury and a partial jury, for which there is no right.[95] On the other hand, there are wide variations in administration of the three-step test itself.[96] In some states, the establishment of the prima facie case of discrimination under *Batson*'s first step is a huge obstacle,[97] while other states require very little to shift the burden to the party who must provide a neutral explanation under step two.[98] Significantly, courts have also struggled

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have the prerogative of using peremptory challenges to deny persons the constitutional right to be jurors in order to accomplish their objective of obtaining, not an impartial jury, but a jury which would be partial." Broderick, *supra* note 28, at 411; *see also* Mintz, *supra* note 34, at 1038 ("The only effective way to protect against discriminatory jury challenges is to eliminate peremptory challenges completely."). *But see* Germano, *supra* note 30, at 442-43 (arguing that the combination of overlap between characteristics legally allowed as challenges and race and gender and the specific support the Court has given the peremptory challenge make abolition unlikely); Horwitz, *supra* note 18, at 1437-39 (arguing that the "unique and essential" function of the peremptory challenge mandates its retention); Scruggs, *supra* note 18, at 578 (stating that the rights of jurors are not "threatened to the point" where elimination of the peremptory challenge is necessary).

One argument for retention that clearly fails is any claim of diminished use of prejudice and stereotypes in jury selection. *See* Broderick, *supra* note 28, at 399 (noting that even its defenders acknowledge that erroneous stereotypes drive peremptory challenges); Germano, *supra* note 30, at 436-38 (noting that litigators seek "ideal juror[s]" favorable to their case and use stereotypes based on demographics that are not dispositive and result in "erroneous generalizations and discrimination"); Horwitz, *supra* note 18, at 1403 (noting that the inability to discern bias through voir dire questioning leads to inclinations to rely on perceived group characteristics, many of which are stereotypical).

94. Melilli, *supra* note 30, at 503.

95. *Id.*

96. *See id.* at 470-78 (discussing the results of the author's empirical study of all reported cased in which there was a *Batson* challenge).

97. *Id.* at 466. Melilli cites Louisiana as an example and shows that claimants successfully established a prima facie case only 32.7% of the time. *Id.* at 466-67. Success rates in establishing a prima facie case vary from 0% to 100%. *Id.* at 467.

98. *Id.* at 466-67. Melilli cites Alabama, California, Florida, New York, and Texas as examples and shows that *Batson* claimants successfully establish the prima facie case 65.2%, 70.8%, 91.3%, 74.5%, and 84.4% of the time, respectively. *Id.* Melilli identifies eight methods by which courts examine claims to determine the existence of the prima facie case. *Id.* at 471-72. He concludes that courts using these methods "bungled the task of defining a

to produce consistent results in the evaluation of the neutral explanations under *Batson*'s third step.[99] One empirical study,[100] examining all published federal and state court decisions in which *Batson* challenges occurred, concluded that this inconsistency and the additional burdens of increased litigation, time, and cost added to the judicial system by the *Batson* three-step test render *Batson* a resounding failure.[101]

D. *PURKETT V. ELEM*: A RETREAT FROM *BATSON*?

Whether intentional or not, the Supreme Court's most recent peremptory challenge decision, *Purkett v. Elem*,[102] re-

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'pattern' of unlawful strikes." *Id.* at 474. For a complete discussion of these methods and their attendant flaws, see *id.* at 471-78.

99. *Batson* challenges are raised almost exclusively in the context of criminal trials and almost exclusively by defendants. *Id.* at 458. Success in a *Batson* challenge is rare, with a success rate of only about 18% overall (as of 1995). *Id.* at 459.

> [O]ne has to wonder why, for example, over 68% of the *Batson* complainants ultimately prevailed in Florida while only two of sixty-eight *Batson* complainants ultimately prevailed in Louisiana .... At the very least, the data suggests that the criteria used by courts in measuring both the existence of a prima facie case and the adequacy of proffered explanations is by no means uniform.

Id. at 470. Criminal defense attorneys appear relatively unselective about raising *Batson* challenges and are disproportionately unsuccessful. *Id.* at 459. Conversely, prosecutors are more selective and have the highest rate of success in rebutting the prima facie case. *Id.* Virtually all *Batson* challenges are brought on claims of racial discrimination, with a substantial majority aimed at excluding African Americans. *Id.* at 462. The lowest rate of successful *Batson* claims occur when an attorney strikes an African American or a Hispanic. *Id.*

Melilli outlines 11 classifications of neutral explanations as proffered by *Batson* respondents. *Id.* at 479. Explanations that are considered inherently inadequate in one jurisdiction are routinely accepted in others. *Id.* at 481. Courts have struggled to find some middle ground between preserving the traditional nature of the peremptory challenge and providing the consistent scrutiny *Batson* requires. *Id.* at 483. "[A]n inherent difficulty lies in requiring acceptable reasons in circumstances in which, because the persons struck are not subject to challenges for cause, there cannot be truly persuasive reasons for their removal." *Id.* "In the final analysis, the courts have struggled with evaluating proffered neutral explanations, producing no more consistency ... than they have produced in the prima facie case arena." *Id.* For a further discussion of the problems federal courts have encountered applying *Batson*, see Swift, *supra* note 28, at 357-61.

100. *See* Swift, *supra* note 28.

101. *Id.* at 503. Based on the survey, application of *Batson* proves that preserving the "essential nature" of the peremptory challenge is impossible when trying to prevent discriminatory jury selection at the same time. *Id.*

102. 115 S. Ct. 1769 (1995) (per curiam). Elem, an African American on trial for second-degree robbery, challenged the peremptory strikes made

ignited the debate over the constitutionality of the peremptory challenge. The Court ostensibly reaffirmed *Batson*,[103] but rearticulated the second step of the *Batson* test.[104] Noting that the lower court erred in collapsing the second and third *Batson* steps,[105] the per curiam opinion held that the proffered neutral explanation for the challenge need not be persuasive or plausible to satisfy the second step as long as it is race-neutral.[106] The Court characterized the *Batson* requirement that the explanation be related to the case being tried as a warning to prosecutors that the burden of production under the second step could not be satisfied with a mere denial of discriminatory motive.[107] The Court stated that the third step of the *Batson* test is the point at which the persuasiveness of the explanation becomes relevant.[108] Further, the opinion noted that courts would likely find "silly or superstitious" explanations to be pretextual.[109] Justice Stevens, joined by Justice Breyer, vigorously dissented,[110] objecting to the elimination of the requirement that the neutral explanation be related to the circumstances of the case.[111] According to the dissent, lower courts will interpret the decision to allow any neutral explanation to rebut a prima

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against two of the three African Americans on the jury venire. *Id.* at 1770. The prosecutor volunteered that he struck one juror because he had long hair, a mustache, and a goatee-type beard. *Id.* The trial court overruled Elem's objections. *Id.*

103. *Id.* at 1770-71.

104. *Id.* at 1771.

105. *Id.*

106. *Id.*

107. *Id.* "What it means . . . is not a reason that makes sense, but a reason that does not deny equal protection." *Id.*

108. "It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Id.* (emphasis added). Termination of the inquiry at step two violates the "principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Id.*

109. *Id.*

110. *Id.* at 1772 (Stevens, J., dissenting).

111. *Cf.* Purkett v. Elem, 115 S. Ct. 1769, 1770 (1995); Batson v. Kentucky, 476 U.S. 79, 96 (1986). The dissent stated, "It is not too much to ask that a prosecutor's explanation for his strikes be race neutral, reasonably specific, *and* trial related. Nothing less will serve to rebut the inference of race-based discrimination that arises when the defendant has made out a prima facie case." *Purkett*, 115 S. Ct. at 1774 (Stevens, J., dissenting).

facie case of discrimination, even if the neutral explanation is "implausible or fantastic," or "silly or superstitious."[112]

The fallout from the *Purkett* decision is as yet unknown, but there are indications that some state courts may not follow its dictates.[113] One judge, however, stated categorically that *Purkett* changes nothing.[114] Other commentators insist that the decision makes defeating a *Batson* challenge easier.[115] Re-

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112. *Purkett*, 115 S. Ct. at 1774 (Stevens, J., dissenting); *see also An Explanation Is Necessary, but It Doesn't Have to Make Sense*, 10 FED. LITIGATOR 150, 150 (1995) (noting that, pursuant to *Purkett*, it is not good enough to simply deny a discriminatory motive, but the reason offered need not make sense).

113. In Alabama, one supreme court judge spoke to the reliance of a lower court on *Purkett* and *Hernandez*. *Ex parte* Bruner, 681 So. 2d 173, 173 (Ala. 1996) (per curiam) (Cook, J., concurring specially), *quashing cert. granted to* Bruner v. Cawthon, 681 So. 2d 161 (Ala. Civ. App. 1995). This judge stated that the state's peremptory challenge procedure is not a matter of federal law. *Id.* at 174. The Alabama Constitution requires the use of peremptory challenges to be tested under a rule similar to that in *Batson*. *Id.* at 176.

> The absence [in other Alabama peremptory challenge decisions] of a reference . . . to *Batson* or any other federal authority was *conspicuous and intentional*, for the Court sought to reinforce the idea—if it needed any reinforcement—that peremptory strikes in Alabama were to be subject to review based on adequate and independent state law.

Id. at 177. *Hernandez* and *Purkett* abrogated any correlation between the federal standard and the standard of the state of Alabama. *Id.* at 181-82. *But see id.* at 182-85 (Maddox, J., concurring in the result) (refuting Judge Cook's claim that there is an independent state law ground for *Batson* challenges).

In California, a potential split developed in the appellate courts when the Second District rejected *Purkett* as a basis for its decision. Stephanie Stone, *California Appeal Court Says Juror's "Lack of Eye Contact" Insufficient Explanation for Peremptory Challenge*, WEST'S LEGAL NEWS, March 19, 1996, *available in* 1996 WL 259133. The court called *Purkett* "a digression from prior federal law." *Id.* Furthermore, the court noted that California courts are required to follow *People v. Wheeler*, 583 P.2d 748, 757-58 (Cal. 1978). *Id.* *Wheeler* held that discriminatory peremptory challenges violate the right to trial by jury drawn from a representative cross section of the community. *Id.* This right is guaranteed under the California Constitution. *Id.*

114. *Bruner*, 681 So. 2d at 185-86 (Maddox, J., concurring in the result). The judge argued that *Purkett* did not back away from the basic assumption of *Batson*, which is that the assumption that a racial group cannot serve as impartial jurors is not acceptable. *Id.*

115. *See Peremptory Challenge Decision Is Modified: Justices Divide 7-2 Over Type of Reason Sufficient to Justify Exclusion of Jurors*, N.Y.L.J., May 16, 1995, at 1 (stating that the Court made it easier to defend against accusations of discrimination); Richard Carelli, *It May Be Easier to Find Excuses to Exclude Jurors*, SEATTLE TIMES, May 15, 1995, at A5 (arguing that the *Purkett* Court made it easier for prosecutors to fight off accusations that they excluded jurors on the basis of race); *see also* Joan Biskupic, *Court Acts in Housing Bias Dispute: Zoning Can't Be Used to Exclude Group Homes for Disabled, Jus-*

actions among practicing attorneys vary.[116] In light of these various opinions, the Supreme Court will most likely have to revisit this subject again.[117]

II. *MINETOS V. CITY UNIVERSITY OF NEW YORK*

Minetos brought claims of national origin, accent, and age discrimination to trial before a jury in late 1995.[118] Following a jury verdict in favor of the defendants, Minetos moved for a new trial on the grounds that the defendants' use of peremptory challenges was racially motivated.[119] Minetos had appropriately raised this issue during jury selection, and at that time, the court concluded that the defendants' peremptory challenges were discriminatory under *Batson*.[120] The court reasoned that the defendants' proffered neutral explanations hid discriminatory intent, because in striking one Hispanic and two African American jurors, the defendants created the "unmistakable pattern" *Batson* intended to eliminate.[121] While the court denied Minetos's request that it recall the excluded jurors for service, the court did state that Minetos would be entitled to a new trial if the jury returned a verdict for the defendants.[122]

Yet, when the jury found in the defendants' favor and Minetos moved for a new trial,[123] the court denied the motion.[124]

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tices Say, WASH. POST, May 16, 1995, at A3 (stating that the Court "enhanced" the ability of prosecutors to defend against charges of discrimination).

116. *See* Carter, *supra* note 115 (noting that reactions ranged from a lack of concern to several lawyers' acknowledgments of the biased bases for many challenges and their concern for the effect of the decision on justice).

117. At least one commentator expresses the opinion that *Purkett* may be a preliminary step in eliminating peremptory challenges. *See* Joan E. Imbriani, Survey, *Prosecution's Explanation for Exercising Peremptory Challenge Need Only Be Race Neutral, Not Persuasive or Plausible, Where Intentional Racial Discrimination Is Alleged*—Purkett v. Elem, *115 S. Ct. 1769 (1995) (per curiam)*, 6 SETON HALL CONST. L.J. 911, 915-16 (1996) (arguing that if the Court sees unjust results and practices in the cases following *Purkett*, it may follow Justice Marshall's advice and ban the peremptory challenge completely).

118. Minetos v. City University of New York, 925 F. Supp. 177, 179 (S.D.N.Y. 1996).

119. *Id.* at 180.

120. *Id.* at 179-80. Minetos argued that the defendants removed one Hispanic and two African American jurors, and that these removals were based on discriminatory motives. *Id.* at 180.

121. *Id.* at 182.

122. *Id.* at 180.

123. *Id.*

124. *Id.* at 185.

The court at that time revisited defense objections that were noted during the jury selection process. The defense argued that Minetos herself used all of her peremptory challenges to strike white men from the jury.[125] Again applying the three-step *Batson* analysis,[126] the court determined that the neutral reasons Minetos proffered for these challenges were a cover for discriminatory motives.[127] Accordingly, the court ruled that Minetos's "unclean hands" justified reversal of its earlier decision and denial of Minetos's motion for a new trial.[128]

Having effectively relied on *Batson* to unmask invidious discrimination, the *Minetos* court nonetheless denied the effectiveness of the test and excoriated the peremptory challenge.[129] The court reasoned that the nature of the peremptory challenge invites corruption of the judicial system[130] because it allows attorneys, deliberately or unconsciously, to utilize pretextual neutral explanations as a mask for discrimination.[131] In addition, the court noted that attempts to make *Batson* workable by delineating explanations courts should presume pretextual,[132] serve more as a guide to those seeking to defeat a

125. *Id.* at 180.

126. *Id.* at 182. The defense established its prima facie case of discrimination under *Batson*'s first step, noting that the plaintiff struck only white male jurors. *Id.* The plaintiff stated that she removed these jurors because the plaintiff viewed them as pro-management. *Id.*

127. The court, analyzing Minetos's neutral explanation under the third *Batson* step, noted that the New York business community is "overwhelmingly and disproportionately white." *Id.* The credibility of the plaintiff's explanation was thus suspect as a cover for discriminatory motive. *Id.* Further, under New York appellate court guidelines, using peremptory challenges based on employment is "explicitly *presumed pretextual*." *Id.*

128. The court stated:

> [P]laintiff's discriminatory use of her peremptory challenges defies the only reason for having them and violates each excluded juror's rights, irrespective of the final racial makeup of the jury. Plaintiff's 'unclean hands' in this regard leave her poorly situated to complain about unfair treatment at trial and counsels strongly against the grant of a new one.

Id. at 183.

129. *Id.* at 183-85.

130. *Id.* at 183.

131. *Id.* at 184-85.

132. Judge Motley pointed to guidelines drawn up by the New York appellate courts "to help trial courts apply *Batson*'s second step" as an example of such failure. *Id.* The guidelines list those reasons that should be presumed pretextual and those that should be presumed legitimate. *Id.* at 184.

Batson challenge.[133] The new standard articulated in *Purkett*, according the *Minetos* court, can only make matters worse because it is unclear what neutral explanations would not satisfy its second step.[134] The court argued that *Purkett* likely will result in even more vexatious litigation.[135]

The *Minetos* court further reasoned that judicial experience shows that *Batson* fails to uncover discrimination and protect the juror's right to serve because attorneys simply generate neutral reasons for challenges that courts are ill-equipped to second guess.[136] In support of this reasoning, the court cited inconsistent lower court applications of the *Batson* three-step test.[137] The court determined that inability to find a workable test renders the protections of *Batson* and *Purkett* "illusory."[138] The *Minetos* court then decided that peremptory challenges per se violate equal protection and concluded that completely banning the practice is the only answer to ending discrimination in the courtroom.[139]

III. *MINETOS*: CHALLENGING THE FUTURE OF THE PEREMPTORY CHALLENGE

Future courts should join *Minetos* in calling for an end to peremptory challenges. *Minetos* correctly recognizes that lower court confusion and inconsistent application of the three-step *Batson* test frustrate the intent of *Batson* and its progeny. In addition, although a departure from precedent, the solution proposed in *Minetos* is more consistent with equal protection principles than the current Supreme Court test. Finally, elimination of the peremptory challenge is sound policy because nondiscriminatory jury selection processes increase public confidence in the jury system and the verdicts it renders.

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133. *Id.* Judge Motley referred to the guidelines as a "how-to guide for defeating *Batson* challenges." *Id.*

134. *Id.* at 181.

135. *Id.* at 183.

136. *Id.* at 183-84.

137. *Id.* The court noted that neutral explanations found pretextual in one case are accepted to rebut the prima facie case in others. *Id.*

138. *Id.* at 185. "In short, lawyers can easily generate facially neutral reasons for striking jurors and trial courts are hard pressed to second-guess them, rendering *Batson* and *Purkett*'s protections illusory." *Id.*

139. *Id.*

A. *MINETOS* CORRECTLY RECOGNIZES THAT *BATSON* PROVIDES INCONSISTENT PROTECTION TO LITIGANTS AND POTENTIAL JURORS

1. *Batson*: A Lack of Guidance and Resulting Inconsistency Diminishes Protection of Litigants and Prospective Jurors

The *Minetos* court correctly noted that a major problem with the *Batson* test is its failure to provide lower courts with guidance in its application. Although the *Batson* Court stated that the necessary "relevant circumstances" may include a pattern of strikes against a given racial group and the questions asked in voir dire,[140] the Court left development of specific criteria for establishing a prima facie case to the lower courts.[141] The result is that litigants making *Batson* challenges face differing standards in different courts.[142] Some courts, including state courts in New York, Alabama, Texas, and California, require only minimal levels of proof to move the inquiry to the second step.[143] Other courts, including Louisiana state courts, make establishment of the prima facie case virtually impossible,[144] rendering the rest of the *Batson* test and its protections moot. Differing standards mean that prospective jurors face inconsistent levels of protection for their right to serve on a jury and litigants face inconsistent protection for their right to an impartial jury chosen in a nondiscriminatory manner.

The *Minetos* court also correctly recognized that the *Batson* Court did not provide guidance to lower courts in applying the third step of the test. Under *Batson*, mere denials of discriminatory motive, intuition, or assumptions of partiality are not acceptable explanations, but the proffered explanation need not rise to the level of a challenge for cause.[145] Problems arise because attorneys are experts at developing facially neutral explanations for peremptory challenges, true or not, and

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140. Batson v. Kentucky, 476 U.S. 79, 80 (1986).

141. *See supra* notes 71-74 (discussing the *Batson* prima facie case criteria).

142. *See supra* notes 96-99 and accompanying text (noting inconsistent application of the *Batson* test by state courts).

143. *See supra* note 98 and accompanying text (noting that minimal evidence is required to move the *Batson* inquiry to the second step in some states).

144. *See supra* note 97 and accompanying text (noting that establishment of a prima facie case is a huge obstacle in some states).

145. Batson v. Kentucky, 476 U.S. 19, 97-99; *see supra* note 75 (discussing *Batson*'s third step analysis).

courts are required to determine if those reasons are pretexts for discrimination.[146] Courts attempting to second guess attorney motives often face not only this expertise but also their own unconscious racism.[147] In applying the third step of the *Batson* analysis and examining virtually the same proffered explanations in similar circumstances, lower courts have reached opposing results.[148] The Supreme Court itself has failed to properly apply the *Batson* test,[149] demonstrating the difficulty inherent in applying *Batson* and providing a mixed message to lower courts. Furthermore, lower court attempts to develop guidelines for determining that a proffered neutral explanation is pretextual have produced levels of inconsistency similar to that found in the context of the prima facie case.[150] The protection courts provide for the prospective juror's right to serve and the litigant's right to a fair jury chosen without discrimination are thus also inconsistent.

2. The Unworkable Test Frustrates *Batson*'s Intent to Protect Jurors

The *Minetos* court specifically noted the lack of lower court consistency as evidence that *Batson* provides an unworkable test.[151] Despite the fact that inexplicable stereotypes and prejudice remain prevalent in society and in the courts,[152] a successful *Batson* challenge remains a rarity.[153] Consequently, the potential juror's exposure to discriminatory peremptory challenges continues virtually unabated while courts continue to struggle within an unworkable framework.

Minetos further demonstrates one way in which the specific intent of *Batson* to protect prospective jurors is frustrated.

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146. *See supra* text accompanying note 75 (describing the expertise of attorneys at developing neutral explanations to rebut the inference of purposeful discrimination and the courts' role in evaluating those neutral explanations).

147. *See supra* note 91 (discussing the effect of unconscious racism on *Batson* results).

148. *See supra* note 93 (discussing the inconsistent results of *Batson* in application).

149. *See supra* note 91 (critiquing the Court's *Hernandez* analysis).

150. *See supra* notes 97-98 (reviewing the results of Melilli's study of *Batson* in application and the resulting inconsistency in lower courts).

151. Minetos v. City University of New York, 925 F. Supp 177, 183-84 (S.D.N.Y. 1996).

152. *See supra* note 93 (noting that stereotypes and prejudice remain prevalent in society).

153. *See* Melilli, *supra* note 30, at 459 (noting *Batson* successes are rare).

Although it correctly applied the *Batson* test twice,[154] the *Minetos* court faced the unenviable position of choosing between rewarding a party it found discriminated against jurors by granting a new trial or not addressing the injury to the excluded jurors at all. While the appropriate application of *Batson*'s three-step test kept this plaintiff from being rewarded for practicing discrimination, the opposing parties, equally guilty of violating *Batson*,[155] received no sanction whatsoever. More significantly, several jurors lost the opportunity to serve on the *Minetos* jury for discriminatory reasons, and the court was unable to prevent or remedy this injury. While the *Minetos* court could have prevented this result by recalling all of the excluded jurors at the time the parties raised the original *Batson* challenges,[156] appellate courts examining *Batson* challenges on appeal do not have the option of preventing the injury to the excluded juror[157] because the trial is already over and the juror has been excluded and injured. Jurors continue to be excluded for discriminatory reasons, and *Batson*, as currently applied, provides little hope of preventing this injury.

3. *Purkett*: A Weaker Test and Weaker Protection

The *Minetos* court also implicitly acknowledged that when the Supreme Court ostensibly reaffirmed *Batson* in *Purkett*, it left unaddressed most of the problems *Batson* created. Except for noting that it would likely increase problems in applying *Batson*, however, the *Minetos* court effectively sidestepped *Purkett*. Had it applied *Batson* as re-articulated in *Purkett*, the *Minetos* court could have demonstrated the potential for that decision to increase lower court confusion in the application of *Batson*.

The *Purkett* Court correctly recognized that lower courts frequently collapse the second and third steps of the *Batson* test and may have sought to strengthen it by reiterating the need for third-step analysis.[158] Yet, lessening the burden on

154. *See supra* notes 120-128 and accompanying text (reviewing the *Minetos* court's application of *Batson*).

155. Minetos v. City University of New York, 925 F. Supp. 177, 179-80 (S.D.N.Y. 1996).

156. *See supra* text accompanying notes 79-80 (noting that trial courts have the option of recalling excluded jurors or starting the selection process over).

157. *See supra* text accompanying note 81 (noting that the remedy for *Batson* violations uncovered at the appellate level is reversal and a new trial).

158. Purkett v. Elem, 115 S. Ct. 1769, 1771 (1995) (per curiam).

the party rebutting the prima facie case of discrimination[159] provides no guidance to lower courts on the issue whether the proffered neutral explanation is pretext. Given the demonstrated inability of lower courts to properly apply the third step of *Batson*,[160] it is likely that lower courts will continue to struggle with the same confusion and frustration that preceded the decision,[161] resulting in persistent discrimination, violating the equal protection rights of both the litigants and prospective jurors.

Purkett also frustrates the specific intent of *Batson* to protect prospective jurors. As noted, courts routinely collapse the second and third steps of the *Batson* test.[162] Despite the Court's admonition to proceed to the third step of the *Batson* analysis, lower courts may well read *Purkett* as allowing nonsensical explanations to rebut prima facie cases of discrimination as long as that explanation is neutral on its face.[163] This is particularly true in light of the Supreme Court's demonstrated application of *Batson*, in which it sidestepped the third step.[164] As the *Minetos* court realized, this type of analysis threatens to deny both litigants and potential jurors all protection.

B. THE *MINETOS* COURT ERRED IN NOT EXAMINING POTENTIAL BENEFITS OF PEREMPTORY CHALLENGES

Despite the *Minetos* court's pioneering role in calling for the abolition of the peremptory challenge,[165] the approach the court took has shortcomings that weaken its potential impact.

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159. *See supra* text accompanying note 105 (noting the *Purkett* Court's rearticulation of *Batson*'s step two). *Compare supra* note 76 and accompanying text (noting that *Batson* states there must be a relationship between the neutral explanation and the circumstances of the trial), *with supra* note 106 and accompanying text (noting that the *Purkett* Court denied that this was a requirement under *Batson* in rebutting the dissent's accusation that they changed the law).

160. *See supra* text accompanying note 77 (discussing the expertise of attorneys at providing facially neutral explanations); *supra* note 93 (discussing the difficulty judges have in discerning pretextual explanations); *supra* note 99 (discussing the inconsistent results of applying *Batson*'s step three).

161. This is the point the *Minetos* decision sought to make. Minetos v. City University of New York, 925 F. Supp. 177, 181 (S.D.N.Y. 1996).

162. *See, e.g.*, Purkett v. Elem, 115 S. Ct. 1769, 1771 (1995) (per curiam) (noting the lower court erred in collapsing the second and third *Batson* steps).

163. *See supra* notes 113-117 (noting the diverse reactions to and interpretations of *Purkett*).

164. *See supra* note 91 (critiquing the Court's *Hernandez* analysis).

165. *Minetos*, 925 F. Supp. at 183-84.

The court rested its decision on the failure of the *Batson* test to unmask all instances of invidious discrimination,[166] concluding that peremptory challenges necessarily violate equal protection.[167] The *Minetos* court could have reached the same result without such a declaration. In making this broad assertion, the court failed to take account of the fact that not all peremptory challenges are based on impermissible classifications.[168] Had it examined the potential interests in retention of peremptory challenges, the *Minetos* court could have shown that the arguments in favor of retention are greatly outweighed by the antidiscrimination principles the peremptory challenge cases promote.

1. The Pretext Problem

Proponents of retention correctly point out that not every characteristic used to justify a peremptory challenge implicates an impermissible classification.[169] The existence of such characteristics seriously undermines the *Minetos* court's holding that peremptory challenges per se violate equal protection. For example, if a plaintiff teacher uses a peremptory challenge to exclude a school administrator in an employment discrimination case, it is likely a reasonable challenge. Many allowed characteristics, however, overlap the classifications *Batson* and its progeny identify as impermissible for use in excluding potential jurors.[170] The school administrator might also be African American or female. The overlap allows permissible characteristics to serve as pretexts for masking prohibited discrimination because attorneys can easily sidestep the requirements of *Batson* by citing such characteristics as neutral explanations.[171]

166. *See supra* notes 129-139 and accompanying text (discussing the *Minetos* decision's reasoning and conclusions).

167. *See* Minetos v. City University of New York, 925 F. Supp. 177, 185 (S.D.N.Y. 1996).

168. *See supra* note 93 (noting that impermissible motives such as race and gender coexist with all of the legal reasons for using peremptory challenges).

169. *See supra* note 93 (noting that not all peremptory challenges are based on impermissible classifications).

170. *See supra* note 93 (noting the overlap between permissible and impermissible classifications in making peremptory challenges).

171. *See supra* note 75 (noting attorney expertise at developing neutral explanations); *supra* note 93 (discussing the ease of attorneys sidestepping *Batson*).

The third step of *Batson* is meant to unmask such pretexts.[172] As noted, however, the test provides no guidance on how lower courts should approach this analysis,[173] producing inconsistent and unpredictable results.[174] Further, as the *Minetos* court pointed out, attempts to aid courts in identifying those explanations that should be presumed pretextual instead provide attorneys with a guide to masking discriminatory animus.[175] The inconsistent protection of the rights of litigants and jurors as well as the open invitation to attorneys to deliberately or unconsciously corrupt the judicial process strongly cuts against retention of the peremptory challenge, even considering that not all peremptory challenges are discriminatory. The *Minetos* court could have argued that its ban is a better solution to eradicating discrimination than relying on courts to second guess potentially pretextual explanations.

2. The Fallacy of an Impartial Jury: The Interest in Retention

Proponents of retention also argue that the peremptory challenge is a necessary component of the jury trial system because it ensures impaneling an impartial jury, guaranteed under the Sixth Amendment. The Supreme Court has in fact stated that ensuring an impartial jury is the sole purpose of the peremptory challenge.[176] Yet, supporters of retention provide no empirical evidence that peremptory challenges indeed

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172. *See supra* text accompanying note 77 (discussing the third step of the *Batson* analysis).

173. *See supra* note 77 and accompanying text (discussing *Batson*'s lack of guidelines to lower courts).

174. *See supra* notes 93 (discussing inconsistent application of *Batson*); *supra* note 99 (discussing lack of consistency in applying *Batson*). In the example given, one of two results could occur. The attorney might state that the reason for the peremptory challenge is the job held by the administrator. Applying *Batson*, the court could conclude that this reason is not pretextual when the job is held by the administrator, or that it is pretextual when it is not. Either of these results frustrates the intent of *Batson* to unmask and prevent invidious discrimination. In the first instance, a juror is excluded for discriminatory reasons. In the second, there is no invidious discrimination to uncover, but the challenging party is punished anyway.

175. *See* Minetos v. City University of New York, 925, F. Supp. 177, 184-85 (S.D.N.Y. 1996) (stating that guidelines for evaluating neutral explanations serve as a guide to defeating a *Batson* challenge); *supra* note 93 (noting that certain explanations are presumed to be pretextual in some jurisdictions but unimpeachable in others).

176. *See supra* note 30 (noting that the sole purpose of the peremptory challenge is seating an impartial jury).

ensure or are necessary for seating an impartial jury.[177] Further, even the most vehement supporters of the peremptory challenge admit that it is the *appearance* or *perception* of an impartial jury that peremptory challenges preserve.[178] The Supreme Court has explicitly stated that eliminating discrimination from the courtroom is more important than a mere perception or appearance of impartiality.[179] Allowing the challenges may also create the perception of a partial jury when the attorney utilizes peremptory challenges to strike minorities for discriminatory reasons and the court fails to detect the discrimination. There is no constitutional right to a partial jury.[180] In a straightforward balancing of these interests, any *de minimus* interest in apparent or perceived impartiality fails to support retention of peremptory challenges in light of the discrimination they perpetuate.

C. BANNING PEREMPTORY CHALLENGES: A SOUND SOLUTION TO DISCRIMINATION

Despite the failure of the *Minetos* court to sufficiently support its holding that peremptory challenges per se violate equal protection, the ban it proposes is a sound solution to the discrimination problems peremptory challenges perpetuate. The *Minetos* court could have further supported their proposed ban by showing that alternative solutions fail to provide the consistent, predictable protection for litigants, jurors, and the community that *Batson* and its progeny sought. Inclusion of such a discussion would have diminished susceptibility to arguments that *Batson* simply needs to be retooled to preserve rather than abolish peremptory challenges. Further support for banning peremptory challenges could have been found in noting the strong public policy advantage found in completely eliminating discrimination from jury selection.

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177. *See supra* note 30 and accompanying text (presenting one argument that there are reasons to believe that peremptory challenges undermine fair trials, and the counterargument that peremptory challenges ensure impartial juries).

178. *See supra* note 30 (noting that attorneys seek to strike jurors perceived as biased); *supra* note 89 (noting that the *Edmonson* Court referred to a "perception of a fair jury," not an impartial jury).

179. *See supra* note 89 (noting that the Court favors elimination of discrimination over a perception of an impartial jury).

180. Melilli, *supra* note 30, at 503.

1. Other Solutions Fail to Protect Litigants and Jurors from Victimization in the Courtroom

The Supreme Court intended that *Batson* and its progeny eradicate discriminatory jury selection processes.[181] Preventing such victimization in the courtroom requires a solution that consistently protects every litigant and potential juror from discrimination. Those attempting to reconcile peremptory challenges with the dictates of the Equal Protection Clause sometimes propose alternatives to an absolute ban.[182] None of the proposed solutions, however, provide protection for litigants and potential jurors that is as reliable and predictable as the ban proposed by the *Minetos* court.

One proposed solution is to allow the legislature to statutorily define those classifications and characteristics that are impermissible as bases for peremptory challenges.[183] This solution, however, still leaves courts in the position of determining when violations occur. The problem of pretext is completely unaddressed. Under such a scheme, courts remain in the untenable and unworkable position of second-guessing the attorney's motives for making a challenge. Moreover, appeals courts are still unable to remedy the injuries to improperly excluded jurors.[184]

Affirmative jury selection is a second proposed solution. This a process in which attorneys submit a list of the jurors they desire to the judge after voir dire.[185] The judge first chooses the jurors on both lists, then alternates between the two lists until the entire jury is seated.[186] Affirmative jury selection may well result in juries that both sides find acceptable and impartial, either in fact or appearance. These techniques, however, fail to prevent attorneys from making their selections based on impermissible classifications because the attorney may refuse to include jurors on his list for discriminatory rea-

181. *See supra* notes 82-93 and accompanying text (discussing the purposes of *Batson* and its progeny).

182. *See supra* notes 65-66 (discussing proposed solutions to the *Batson* dilemma without abolishing peremptory challenges).

183. Babcock, *supra* note 18, at 1174-79.

184. *See supra* text accompanying note 81 (noting the appellate court remedy for *Batson* violations); *see also supra* notes 155-157 and accompanying text (noting the inability of the *Minetos* and appellate courts to remedy the injury to the excluded jurors)

185. *See supra* note 65 (discussing proposed solutions to *Batson* problems without abolishing peremptory challenges).

186. *See supra* note 66 (discussing affirmative selection techniques).

sons. Further, because the actual decisions as to which jurors the attorney chooses are hidden from view, there is no way to know that such discrimination has occurred.

Another proposed alternative is decreasing the number of peremptory challenges allowed.[187] While this alternative might decrease the ability of attorneys to remove all members of a protected class, this alternative does not ultimately address the discriminatory use of the remaining peremptory challenges. Expanding the jury pool to include a greater number of jurors in "protected" classes[188] would have a similar effect. In addition, it would increase the number of jurors potentially exposed to discriminatory exclusion. Consequently, a complete ban on the use of peremptory challenges is the only option that consistently protects both the litigant and the juror.

2. Ban Provides for Public Confidence and a Nondiscriminatory Jury System

The Supreme Court based the holdings of *Batson* and its progeny in part on the need to maintain public confidence in the jury system.[189] The *Minetos* court's argument for banning peremptory challenges would have been stronger had it noted the benefit to the community in providing a jury selection system that unquestionably prohibits discrimination. The demonstrated inability of courts to eliminate discrimination in jury selection under the current law undermines public confidence because the jury's neutrality and ability to render a fair verdict is called into question.[190] Increased media attention to jury selection processes and composition and the relationship of these factors to verdicts exposes the justice system to great scrutiny and criticism.[191] Past public perceptions of discriminatory jury selection and resulting jury bias has had tragic consequences.[192] Because nondiscriminatory jury selection communicates to the public an understanding that a chosen

187. *See supra* note 65 (discussing proposed solutions to *Batson* problems).

188. *See supra* note 65 (discussing alternatives to the abolition of peremptory challenges).

189. *See supra* note 84 (noting the *Batson* purpose in protecting the community).

190. *See supra* note 84 (discussing the effect of discriminatory jury selection processes on public perceptions of the justice system).

191. *See supra* note 84 (discussing the increase in media attention to jury selection processes).

192. *See supra* note 84 (discussing the impact perceptions of biased juries has had in past cases).

jury is unbiased and validates the jury's verdict in the public mind,[193] increased public scrutiny supports the elimination of the peremptory challenge.

CONCLUSION

Despite years of precedent in which the Supreme Court protected the peremptory challenge, the *Minetos* court boldly ruled that they are a per se violation of the Equal Protection Clause and called for a complete ban. The *Minetos* court correctly exposed the shortcomings of *Batson* as an unworkable standard. Although the *Minetos* court's reasoning was incomplete, its solution to the problem of discriminatory jury selection techniques is sound. Banning the peremptory challenge provides results more predictable and consistent with the antidiscrimination principles of *Batson* and its progeny than does the current test because it most consistently protects the litigant and the prospective juror. Eliminating peremptory challenges is also desirable for maintenance of public confidence in the jury system. Future courts should reexamine the peremptory challenge system and join the *Minetos* clarion call for abolition of the peremptory challenge.

193. *See supra* note 84 (discussing the importance of jury selection in validating the jury's verdict).