NOTE

STRIKING THE PEREMPTORY STRIKE: WHY THERE IS NO FREESTANDING CONSTITUTIONAL ENTITLEMENT TO PEREMPTORY CHALLENGES

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The peremptory challenge—used by parties to remove prospective jurors without the need to provide a reason—has become one of the most controversial features of the modern American jury system. Despite Batson v. Kentucky*'s promise to prohibit parties from using peremptory challenges to exclude jurors from serving because of their race, lawyers have learned to adjust their explanations so as to avoid violating the commands of* Batson*. States have begun to reform their systems of challenging jurors peremptorily in response. While some states have fashioned a list of presumptively invalid race-neutral justifications for exercising peremptory challenges, one state—Arizona—went the furthest by abolishing peremptory challenges altogether. This prompted Professor Richard Jolly to write an article arguing that the complete abolition of the peremptory challenge is unconstitutional. From his review of common law history, early American practice, and the text of the Sixth Amendment, Jolly concludes that peremptory challenges are implicit in the Sixth Amendment's guarantee of an "impartial jury." This Note is a direct response to Jolly's article. It examines over a century of court precedent as well as common law history, early American practice, and the text of the Sixth Amendment to determine if there is a freestanding constitutional entitlement to peremptory challenges. The analysis in this Note reaches the opposite conclusion: the peremptory challenge is unequivocally* not *required by the Constitution and, as such, Arizona*

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and any other state that decides to abolish the peremptory challenge would not violate the Sixth Amendment.

INTRODUCTION

Once hailed by William Blackstone as "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous,"[1] peremptory challenges have been deemed by modern critics as "the most undemocratic feature of our democratic trial system,"[2] the "[l]ast [b]est [t]ool of Jim Crow,"[3] and "an instrument that undermines society's evolving attempts to ensure that juries fairly represent the judgment of the community."[4] Prospective jurors can be struck from the

[1] 4 William Blackstone, Commentaries *353.

[2] Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 156 (1989).

[3] Morris B. Hoffman, Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective, 64 U. Chi. L. Rev. 809, 827 (1997).

[4] Raymond J. Broderick, Why the Peremptory Challenge Should Be Abolished, 65 Temp. L. Rev. 369, 399 (1992).

jury venire through two methods: challenges for cause and peremptory challenges. Challenges for cause allow for rejection of venire members "on a narrowly specified, provable and legally cognizable basis of partiality."[5] Peremptory challenges, on the other hand, are exercised "without a reason stated, without inquiry and without being subject to the court's control."[6] An unlimited number of potential jurors can be challenged for cause, while only a limited number of potential jurors, as specified by statute, may be challenged peremptorily.[7] And while a judge must find that a potential juror is indeed biased before approving a challenge for cause, peremptory strikes receive no such scrutiny unless subject to a *Batson* challenge.[8] In an ideal world, the process will end with a right "fundamental to the American scheme of justice"[9]: an impartial jury.

Because peremptory challenges can be employed at the complete discretion of parties and because they do not require a judge's approval, parties frequently use them to strike potential jurors based on stereotypes that may go beyond their ability to decide a case impartially.[10] While each party is required under *Batson v. Kentucky* to provide a race-neutral explanation for a peremptory strike if the opponent of the strike makes out a prima facie case of racial discrimination, lawyers have learned to adjust their reasons so as not to violate the commands of *Batson*.[11] As one

[5] Swain v. Alabama, 380 U.S. 202, 220 (1965).

[6] Id.

[7] See Thomas Ward Frampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 Mich. L. Rev. 785, 788 (2020).

[8] See id. In *Batson v. Kentucky*, the Supreme Court held that the Equal Protection Clause prohibits parties from using peremptory strikes to exclude jurors from serving because of their race. 476 U.S. 79 (1986).

[9] Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

[10] One study found that prosecutors in North Carolina used sixty percent of their peremptory challenges against Black jurors, who constituted only thirty-two percent of the venire, while defense attorneys used eighty-seven percent of their strikes against white jurors, who constituted sixty-eight percent of the venire. Mary R. Rose, The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data From One County, 23 Law & Hum. Behav. 695, 697–99 (1999). Another study that examined strikes in 390 jury trials in Jefferson Parish, Louisiana, found that prosecutors struck Black prospective jurors at over three times the rate they struck white prospective jurors. Richard Bourke, Joe Hingston & Joel Devine, La. Crisis Assistance Ctr., Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's Office 4, 7 (2003).

[11] See Nancy S. Marder, Justice Stevens, the Peremptory Challenge, and the Jury, 74 Fordham L. Rev. 1683, 1706 (2006) ("Although *Batson* was an earnest attempt to root out discriminatory peremptories, *Batson* is so easy to circumvent that it allows a charade in the

judge noted, "Surely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'"[12] Such race-neutral explanations can include, and have included, clothing, body language, lack of eye contact, and the way a potential juror wears their hair.[13] The ease with which parties are able to avoid *Batson* violations led Justice Breyer to remark that "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before."[14]

The problems prompted by peremptory challenges have led scholars and practitioners alike to call for reform[15] or the complete elimination of peremptory challenges,[16] with some scholars even going so far as to suggest that peremptory challenges are unconstitutional.[17] States have

courtroom. Instead of giving race or gender as a reason for excluding jurors, lawyers can give any other reason no matter how 'silly or superstitious.'" (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam))).

[12] People v. Randall, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996).

[13] See Marder, supra note 11, at 1706.

[14] Miller-El v. Dretke, 545 U.S. 231, 270 (2005) (Breyer, J., concurring); see also Hoffman, supra note 3, at 829 ("From Reconstruction through the civil rights movement, the peremptory challenge was an incredibly efficient final racial filter."); Equal Just. Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy 4 (2010) ("[T]here is perhaps no arena of public life . . . where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries.").

[15] See, e.g., Charles J. Ogletree, Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges, 31 Am. Crim. L. Rev. 1099 (1994); Annie Sloan, "What to Do About *Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection, 108 Calif. L. Rev. 233 (2020); Robert T. Prior, The Peremptory Challenge: A Lost Cause?, 44 Mercer L. Rev. 579 (1993); Joshua Revesz, Comment, Ideological Imbalance and the Peremptory Challenge, 125 Yale L.J. 2535 (2016); 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 (1994); Alafair S. Burke, Prosecutors and Peremptories, 97 Iowa L. Rev. 1467 (2012); Jeffrey Bellin & Junichi P. Semitsu, Widening *Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney, 96 Cornell L. Rev. 1075 (2011).

[16] E.g., Hoffman, supra note 3, at 810; Marder, supra note 11, at 1684; LaCrisha L.A. McAllister, Closing the Loophole: A Critical Analysis of the Peremptory Challenge and Why It Should Be Abolished, 48 S.U. L. Rev. 303, 304 (2021); Brent J. Gurney, Note, The Case for Abolishing Peremptory Challenges in Criminal Trials, 21 Harv. C.R.-C.L. L. Rev. 227, 230 (1986); Kenneth J. Melilli, *Batson* in Practice: What We Have Learned About *Batson* and Peremptory Challenges, 71 Notre Dame L. Rev. 447, 503 (1996); Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

[17] See, e.g., Broderick, supra note 4, at 399 (suggesting that peremptory challenges contravene the Equal Protection Clause, the Thirteenth Amendment, and the Sixth Amendment).

taken heed. In the span of just a few years, various states have reformed their approach to peremptory strikes to attempt to counter discrimination in the selection of juries. The reforms generally fall into two camps.

The first approach is modeled after Washington's General Rule 37 ("GR 37").[18] GR 37 identifies seven facially race-neutral justifications for a peremptory strike that have been "historically . . . associated with improper discrimination in jury selection" and makes them "presumptively invalid."[19] Such "presumptively invalid" justifications include, inter alia, "having prior contact with law enforcement officers" and "having a close relationship with people who have been . . . arrested."[20] GR 37 differs from *Batson* in other key respects. For example, GR 37 does not impose an initial burden of production on one who challenges a peremptory strike,[21] it places restrictions on the invocation of "[c]onduct" to justify a strike,[22] and it does not require that the challenger prove "purposeful discrimination."[23] Other states, including California,[24] New Jersey,[25] and Connecticut,[26] have followed Washington's lead and adopted rules similar to GR 37.

The second approach to reform has been led by Arizona. The state considered two proposals for reform: one similar to Washington's GR 37 and one that would eliminate peremptory strikes altogether.[27] On January 1, 2022, Arizona eliminated peremptory strikes entirely,[28] in part because of a widespread perception that the Washington-style reform was "too

[18] Wash. Ct. GR 37.
[19] Wash. Ct. GR 37(h).
[20] Wash. Ct. GR 37(h).
[21] See Wash. Ct. GR 37(c)–(d).
[22] Wash. Ct. GR 37(i).
[23] Wash. Ct. GR 37(f).
[24] Cal. Civ. Proc. Code § 231.7 (West 2025).
[25] N.J. Stat. Ann § 1:8-3A (West 2025).
[26] Connecticut Practice Book § 5.12 (2025).
[27] See Thomas Ward Frampton & Brandon Charles Osowski, The End of *Batson*? Rulemaking, Race, and Criminal Procedure Reform, 124 Colum. L. Rev. 1, 39–41 (2024).
[28] See Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, In re Petition to Amend Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure, No. R-21-0020 (Ariz. Aug. 30, 2021), https://www.azcourts.gov/Portals/0/20/2021%20Rules/R-21-0020%20Final%20Rules%20Order.pdf?ver=2021-08-31-105653-157 [https://perma.cc/R4XA-CKFH]; Ariz. Rev. Stat. Ann. § 18.4–.5 (2025).

woke."[29] Those involved in the decision also noted multiple advantages, many of which were realized by judges in Arizona during the COVID-19 pandemic when the Arizona Supreme Court sharply limited peremptory challenges by emergency administrative order.[30] First, they stated that the abolition of peremptory strikes would significantly increase judicial efficiency.[31] Voir dire can consume more time than the trial itself, often adding significant time and expense to trials and providing a significant advantage to wealthier parties.[32] Second, they argued that it would eliminate the awkward "'guesswork' inherent in" judges' determinations of lawyers' motives for exercising strikes.[33] Third, they noted that the abolition of peremptory strikes would eliminate other forms of discrimination outside of just racial discrimination.[34] And fourth, they believed it would dispense with the concern that the GR 37 model would create a double standard, whereby defense counsel could use discriminatory strikes against white prospective jurors.[35]

In response to Arizona's change in jury selection procedure, Professor Richard Jolly published an article in the *Vanderbilt Law Review* arguing that the complete abolition of the peremptory challenge is unconstitutional.[36] Despite the fact that the Supreme Court has "long recognized that peremptory challenges are not of constitutional dimension,"[37] Jolly argues that "there is overwhelming textual, historical, and traditional evidence that peremptory challenges are of federal

[29] See Frampton & Osowski, supra note 27, at 44 (quoting Telephone Interview by Thomas Ward Frampton & Brandon Charles Osowski with Kevin D. Heade, Chair, Cent. Ariz. Nat'l Laws. Guild (Sept. 22, 2022)).

[30] Id. at 37–38.

[31] Id. at 43.

[32] April J. Anderson, Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals, 16 Stan. J. C.R. & C.L. 1, 5–6 (2020).

[33] See Frampton & Osowski, supra note 27, at 43 (quoting Charles W. Gurtler, Jr., Comment of the Committee on Superior Court at 3, In re Petition to Amend Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure, No. R-21-0020 (Ariz. Apr. 12, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9457 [https://perma.cc/EP8P-3NEE]).

[34] Id. at 43–45.

[35] Id. at 46.

[36] Richard Lorren Jolly, The Constitutional Right to Peremptory Challenges in Jury Selection, 77 Vand. L. Rev. 1529 (2024).

[37] Ross v. Oklahoma, 487 U.S. 81, 88 (1988).

constitutional dimension."[38] From his review of such evidence, Jolly concludes that peremptory challenges are implicit in the Sixth Amendment's guarantee of an "impartial jury."[39] He goes on to argue that the right to challenge peremptorily is "unquestionably secure" in the context of capital offenses and "likely extends" to all criminal cases in which the jury trial right attaches.[40]

Jolly's argument has massive implications for the future of jury selection. Today, nearly one-fifth of the country lives in a jurisdiction where the *Batson* framework does not govern peremptory strikes,[41] and at least eleven other states are currently considering reform.[42] If Jolly's argument is correct, then Arizona and any other state that follows its lead in abolishing the peremptory challenge would be in violation of the Constitution. Given the many calls to eliminate peremptory challenges, the question of whether such challenges are required by the Constitution is one that, as Jolly correctly states, "cannot be ignored."[43]

This Note is a direct response to Jolly's article. Like his article, this Note examines common law history, early American practice, and the text of the Sixth Amendment to determine if there is a freestanding constitutional entitlement to peremptory challenges. It also examines over a century of case law. The analysis in this Note reaches the opposite conclusion: the peremptory challenge is unequivocally *not* required by the Constitution and, as such, Arizona and any other state that decides to abolish the peremptory challenge would not violate the Sixth Amendment in doing so.

To make the argument, this Note proceeds in four parts. Part I provides a history of the peremptory challenge both at common law and in early American practice. Part II presents over a century of case law demonstrating that an impartial jury protects against the existence of

[38] Jolly, supra note 36, at 1535–36.

[39] Id. at 1537–38 (quoting U.S. Const. amend. VI).

[40] Id. at 1555. While Jolly concludes that peremptory challenges are also likely secured by the Seventh Amendment in civil trials, this Note is limited to analyzing the constitutional requirements of the Sixth Amendment.

[41] Frampton & Osowski, supra note 27, at 3.

[42] See Batson Reform: State by State, Berkeley L. Death Penalty Clinic, https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/ [https://perma.cc/5LQF-MLA6] (last visited Sept. 28, 2025) (showing that states considering reform include Colorado, Iowa, Kansas, Massachusetts, Mississippi, Missouri, Montana, New York, North Carolina, Oregon, and Utah).

[43] Jolly, supra note 36, at 1554.

actual bias on the petit jury. Because peremptory challenges minimize the *perception of bias* as opposed to *actual bias*, such challenges fall outside the ambit of the Sixth Amendment's safeguards. Despite clear precedent from the Supreme Court that the peremptory challenge is not of federal constitutional dimension, Jolly argues that the Court has never fully analyzed its common law history, early American practice, and the text of the Sixth Amendment. Part III does just that. It first argues that peremptory challenges cannot be considered essential to an impartial jury because although criminal defendants had a right to use peremptory challenges in capital cases at common law and in early American practice,[44] no such right existed in noncapital cases.[45] While Jolly attempts to employ a textualist argument to claim that peremptory challenges are nevertheless secured in noncapital cases as well as capital cases, his argument ultimately fails for both textualist and logical reasons. Part III goes on to demonstrate that the modern conception of the relationship between peremptory challenges and the impartial jury requirement is historically incongruous with the original purpose, use, and procedure of the peremptory challenge. Lastly, Part IV briefly discusses the implications of freezing practice at the time of the ratification of the Sixth Amendment to determine what rights are included in the guarantee of an impartial jury, warning that such a jurisprudential approach may actually undermine the safeguards of the Sixth Amendment. Taken together, the case law, as well as historical, practical, and textual evidence, provides overwhelming proof that there is not a freestanding constitutional entitlement to peremptory challenges.

I. HISTORICAL OVERVIEW OF PEREMPTORY CHALLENGES

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[46] While the Sixth Amendment affords assurances beyond those given by the Article III, Section 2, Clause 3 right to a jury, such as rights to speed, publicity, and impartiality, the Supreme Court has stressed that the Sixth Amendment prescribes no specific tests to determine the means by which an impartial jury should be obtained.[47] In fact, the Court has

[44] See infra notes 63, 68–72 and accompanying text.
[45] See infra notes 161–66 and accompanying text.
[46] U.S. Const. amend. VI.
[47] United States v. Wood, 299 U.S. 123, 133 (1936).

emphasized, "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests[,] and procedure is not chained to any ancient and artificial formula."[48]

With that said, the Supreme Court has provided hints for how to determine what is required by the jury trial right. When it comes to criminal procedure and, more specifically, jury procedure, the Court has shown an increasing propensity to engage in originalist methodology.[49] For example, in *Ramos v. Louisiana*, the Court looked at the common law, early American state constitutions, the ratification of the U.S. Constitution, and post-adoption legal treatises to determine that the Sixth Amendment requires that guilty verdicts be unanimous in criminal trials.[50] In his opinion, Justice Gorsuch explicitly criticized past decisions that "spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right."[51] After all, the Supreme Court has emphasized that "a trial by jury as understood and applied at common law, and [which] includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question."[52] As Jolly suggests, it is therefore necessary to look to the history of the peremptory challenge at common law and at the time of ratification of the Sixth Amendment to determine if such challenges were essential at the time.

A. In England

The earliest English juries were effectively handpicked by the Crown, and jurors were expected to have knowledge of the dispute.[53] Because they were selected from the propertied class, they were expected to favor the Crown's case.[54] It was in this context, in the thirteenth century, that

[48] Id. at 145–46.

[49] See Joan L. Larsen, Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury, 71 Ohio St. L.J. 959, 959–60 (2010) ("Gone are the days of unbounded balancing; recent adjudication of criminal procedure cases has begun, as has most other constitutional adjudication, with text and history.").

[50] 140 S. Ct. 1390, 1395–96 (2020).

[51] Id. at 1405.

[52] Patton v. United States, 281 U.S. 276, 288 (1930).

[53] Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 141, 147 (1977).

[54] Id. at 141.

the concept of the peremptory challenge first arose.[55] The Crown was granted an unlimited number of peremptory challenges.[56] If the Crown decided to strike a prospective juror, the juror was presumed to have some bias that required his removal, and no further inquiry was required.[57]

Concerned with the degree to which this system favored the government, Parliament passed a statute in 1305 that removed the Crown's right to peremptory challenges and allowed the Crown to remove prospective jurors for a "cause certain."[58] Parliament's intent was quickly circumvented by the judicially created doctrine of "standing jurors aside."[59] Under this system, the Crown could raise challenges for "cause" against prospective jurors without providing any justification for the challenge.[60] The judge would then direct those jurors to "stand aside."[61] If a panel of twelve unchallenged jurors could be seated, the judge would dismiss the prospective jurors who were asked to "stand aside" without any inquiry into their ability to be impartial.[62]

By the turn of the fourteenth century, criminal defendants received thirty-five peremptory challenges in all capital cases.[63] But as some commentators have suggested, the early English peremptory challenge may have actually been a hybrid of the modern peremptory challenge and challenge for cause.[64] Because early English juries were drawn from small villages wherein prospective jurors would often know the defendants, the peremptory challenge may have been a shorthand way to, in today's terms, remove the prospective juror for cause.[65] When a defendant alleged a personal bias against a prospective juror, the court may have accepted the defendant's challenge as conclusive and removed the juror.[66] In that sense, "the early peremptory challenge manifested no faith in the

[55] See Hoffman, supra note 3, at 819.
[56] Id.
[57] See Van Dyke, supra note 53, at 148 ("[T]he English judges have assumed that cause existed whenever the crown want[ed] to challenge a juror.").
[58] See id. at 147–48 (citation omitted); see also Blackstone, supra note 1, at *347 ("[This] privilege, of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4. which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court.")
[59] See Van Dyke, supra note 53, at 148.
[60] See id.
[61] See id.
[62] See id.
[63] See Hoffman, supra note 3, at 819–20.
[64] Alschuler, supra note 2, at 165 n.51.
[65] See id.
[66] Id.

defendant's ability to detect biased jurors through hunch or intuition; the peremptory challenge was simply an economical means of accomplishing objectives that we now pursue by permitting challenges for cause."[67]

B. In the United States

Early colonial courts in North America accepted the defendant's right to exercise peremptory challenges as part of the received common law.[68] The colonies, however, disagreed on the government's authority to excuse jurors without reason, whether it be through peremptory challenges or "standing aside."[69] While some colonies authorized "standing aside," others either denied the prosecution any peremptory challenges or severely limited the number of such challenges given to the government.[70] Early American courts, however, were consistent in restricting the right to challenge peremptorily to capital cases.[71]

In 1790, the first U.S. Congress passed a law granting defendants thirty-five peremptory challenges in cases of treason and twenty in other capital cases.[72] While states followed suit in codifying the common law and granting defendants peremptory challenges in cases of treason and other capital cases, the exact number of peremptory challenges differed across states.[73] Interestingly, in some states, if a defendant challenged above the number of statutorily granted peremptory challenges for certain felonies, he would, by default, be adjudged a felon and put to death.[74] In

[67] Id.

[68] Van Dyke, supra note 53, at 148.

[69] See id. at 148–49.

[70] Id.

[71] See infra notes 161–66 and accompanying text.

[72] Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119.

[73] Compare Act of Feb. 16, 1787, ch. 29, 1787 N.Y. Laws 402, 403 ("That no person or persons whomsoever, shall be indicted, tried or attainted of treason, or of mispris[i]on of such treason . . . unless the party indicted and arraigned, or tried, shall willingly, without violence, in open court, confess the same, or in case of treason, shall peremptorily challenge above the number of thirty five of the jury . . . ."), with Act of Dec. 9, 1789, ch. 30, § 4, 1789 Va. Acts 17, 18 ("No person arraigned for treason, shall be admitted to a peremptory challenge, above the number of twenty-four, nor shall any person arraigned for murder or felony, be admitted to a peremptory challenge above the number of twenty.").

[74] E.g., Act of Dec. 26, 1792, ch. 109, § 1, *reprinted in* A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force 215, 215–16 (Richmond, Augustine Davis 1794) ("That all and every person and persons, that shall at any time, either in the night or the day, maliciously, unlawfully and willingly, burn any house or houses whatsoever . . . [and] shall peremptorily challenge above the number of

other states, courts would simply proceed to trial after disallowing any peremptory challenges above the number of statutorily granted challenges for certain crimes.[75]

While early American laws granted defendants peremptory challenges in capital cases, there is no explicit mention of the peremptory challenge in the Constitution. Article III, Section 2 of the Constitution, which provides for the right to a jury in all federal criminal trials, makes no reference to the peremptory challenge.[76] There is no record of any discussion of the peremptory challenge in the ratification debates over Article III, Section 2.[77] Nor is there any reference to the peremptory challenge in the Sixth Amendment.[78] However, unlike in the context of Article III, Section 2, there is evidence that the Framers debated the explicit inclusion of juror challenges in the Sixth Amendment.

The select committee chosen by the House of Representatives included the following language in the first draft of the proposed amendments to the Constitution: "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the *right of challenge* and other accustomed requisites . . . ."[79] The Senate returned the proposed amendments, striking the language about unanimity, the right of challenge, and other accustomed

twenty persons returned to be of the jury, shall be adjudged a felon, and shall suffer death as in case of felony, and shall not have the benefit of his, her, or their clergy.").

[75] See, e.g., Act of Jan. 6, 1810, ch. 138, § 13, 1809 Md. Laws 88, 94 ("That in all capital cases . . . the person indicted shall be allowed the right of peremptory challenge, but in no case shall the accused be admitted to challenge more than twenty jurors, without assigning cause; and if any person so indicted shall peremptorily challenge above the number of twenty persons of the jury, the court, in such case, shall notwithstanding proceed to the trial of the person so challenging, as if he or she had pleaded not guilty, and put himself or herself upon the country, and render judgment thereon accordingly.").

[76] U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

[77] Hoffman, supra note 3, at 823.

[78] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

[79] House Committee Report (July 28, 1789), *reprinted in* 4 Documentary History of the First Federal Congress of the United States of America: Legislative Histories, Amendments to the Constitution Through Foreign Officers Bill [HR-116], at 27, 30 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) (emphasis added) (footnotes omitted).

requisites.[80] This prompted some Framers, such as George Mason[81] and Patrick Henry,[82] to complain specifically about the failure of the Constitution to secure the right of challenge. James Madison, on the other hand, felt that an explicit reference to the right of challenge was unnecessary because the challenge was implicit in the concept of an impartial jury.[83] He remarked, "[W]here a technical word [("trial by jury")] was used, all the incidents belonging to it necessarily attended it. The right of challenging is incident to the trial by jury, and therefore, as one is secured, so is the other."[84]

Others were less convinced that the right to challenge would be secured without an explicit reference in the Constitution, prompting Virginia and North Carolina to submit identical proposed amendments to the Constitution that explicitly secured the right: "[I]n criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury."[85]

Whether the Senate deleted the language because it considered such language surplusage given the promise of an impartial jury or because it intended to leave such rights to Congress and the states, we may never know. It is also unclear if the Framers' debate over "challenges" was in reference to peremptory challenges, challenges for cause, or perhaps both.[86] As Justice Gorsuch recently noted in *Ramos v. Louisiana*, "The truth is that we have little contemporaneous evidence shedding light on

[80] S. Mac Gutman, The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right, 39 Brook. L. Rev. 290, 297 (1972).

[81] Convention of Virginia, *reprinted in* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 521, 528 (Jonathan Elliot ed., Washington, 2d ed. 1836) (statement of George Mason) [hereinafter Debates in the Several State Conventions] ("In the government of Virginia, we have secured an impartial jury of the vicinage. We can except to jurors, and peremptorily challenge them in criminal trials. If I be tried in the federal court for a crime which may affect my life, have I a right of challenging or excepting to the jury? Have not the best men suffered by weak and partial juries?").

[82] Id. at 541–42 (statement of Patrick Henry) ("If [the people] dare oppose the hands of tyrannical power, you will see what has been practi[c]ed elsewhere. They may be tried by the most partial powers, by their most implacable enemies, and be sentenced and put to death, with all the forms of a fair trial. I would rather be left to the judges. An abandoned juror would not dread the loss of character like a judge. From these, and a thousand other considerations, I would rather the trial by jury were struck out altogether. There is no right of challenging partial jurors. There is no common law of America . . . nor constitution . . . . [T]here can be no right to challenge partial jurors. Yet the right is as valuable as the trial by jury itself.").

[83] See id. at 531 (statement of James Madison).

[84] Id.

[85] 2 Bernard Schwartz, The Bill of Rights: A Documentary History 844, 970 (1971).

[86] See Hoffman, supra note 3, at 824 n.80.

why the Senate acted as it did. So rather than dwelling on text left on the cutting room floor, we are much better served by interpreting the language Congress retained and the States ratified."[87] Therefore, whether there is indeed a freestanding constitutional entitlement to peremptory challenges depends upon whether such challenges are implicit in the guarantee of an impartial jury. For the reasons explained below, they are assuredly not.

II. ACTUAL BIAS, NOT PERCEIVED BIAS, IS THE TOUCHSTONE FOR SIXTH AMENDMENT IMPARTIAL JURY VIOLATIONS

A. Actual Bias Versus Perceived Bias

The Supreme Court has called the trial by jury "the most priceless" "safeguard[] for [the] preservation" of "individual liberty and of the dignity and worth of every man."[88] Inextricably intertwined with the right to a trial by jury is the constitutional guarantee of a panel of impartial jurors. The critical question, then, is what constitutes a violation of the guarantee of an impartial jury? Jolly argues that the peremptory challenge is implied in the right to an impartial jury, in part because it creates a perception of impartiality, which he says is critical to the Sixth Amendment's guarantee.[89] However, as demonstrated below, the question of impartiality has always been, and continues to be, about *actual bias*, not the *perception of bias*.

This premise is exemplified in *United States v. Wood*.[90] The petitioner, Wood, was charged with petit larceny in the District of Columbia.[91] Although Wood challenged for cause prospective jurors who worked for the United States government given their potential bias in favor of the prosecution, the judge denied the challenges, and Wood was ultimately convicted.[92] Wood argued that the Act of August 22, 1935, which permitted federal and District employees to serve on the trial jury, violated his constitutional right to an impartial jury as guaranteed by the

[87] 140 S. Ct. 1390, 1400 (2020) (footnote omitted).

[88] Irvin v. Dowd, 366 U.S. 717, 721 (1961).

[89] Jolly, supra note 36, at 1537, 1543 ("Again, the right to peremptory challenges is not for the purpose of securing an impartial jury in fact, but rather for securing the subjective perception of such a jury.").

[90] 299 U.S. 123 (1936).

[91] Id. at 130.

[92] Id. at 130–31.

Sixth Amendment because such jurors were likely to favor the government.[93]

The Supreme Court held that the seating of governmental employees as jurors in criminal cases does not violate the guarantee of an impartial jury.[94] In reaching that conclusion, the Court noted that to determine if there has been a Sixth Amendment violation, courts must ask "whether a prospective juror . . . has any *bias in fact* which would prevent his serving as an impartial juror."[95] Here, however, the Court concluded that there was no "actual bias" in the seating of governmental employees on a trial jury and, as such, there was no Sixth Amendment violation.[96] Chief Justice Hughes wrote, "We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation."[97] Absent evidence of actual bias, all that exists is an implied or perceived bias on the part of the defendant. Such a bias is, according to Chief Justice Hughes, "an elusive condition of the mind" that would require "extreme and fanciful tests" to determine whether there exists any bias in fact.[98] The Chief Justice shut down any such possibility of judicial mindreading.[99]

The Court has consistently applied the actual bias test—and has consequently rejected constitutional challenges involving implied or perceived bias—in cases alleging juror partiality. For example, in *Dennis v. United States*, Dennis made a similar claim to Wood, arguing that the jury that convicted him for failure to appear before the Committee on Un-American Activities of the House of Representatives was inherently biased because it was composed primarily of employees of the United States government.[100] The Court concluded, "A holding of implied bias to disqualify jurors because of their relationship with the Government is

[93] See id. at 131–33.
[94] Id. at 149–50.
[95] Id. at 134 (emphasis added).
[96] Id.
[97] Id. at 149.
[98] Id. at 150.
[99] Id. ("To impute bias as [a] matter of law to the jurors in question here would be no more sensible than to impute bias to all storeowners and householders in cases of larceny or burglary.").
[100] 339 U.S. 162, 164–65, 168–69 (1950).

no longer permissible. . . . Preservation of the opportunity to prove *actual bias* is a guarantee of a defendant's right to an impartial jury."[101]

In *Remmer v. United States*, a juror in a criminal trial was offered money in exchange for a favorable verdict.[102] Despite characterizing the attempted bribe as "presumptively prejudicial,"[103] the Court instructed the trial judge to "determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a hearing with all interested parties permitted to participate."[104] Similarly, in *Chandler v. Florida*, a case in which the appellants argued that televising courtroom proceedings had unduly influenced the jurors, the Court refused to find a Sixth Amendment violation because the appellants "ha[d] not attempted to show with any specificity that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them."[105]

The Court's consistent analysis demonstrates that the touchstone for a Sixth Amendment impartial jury violation is actual bias. Indeed, the Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove *actual bias*."[106] Because challenges for cause require a "provable and legally cognizable basis of partiality,"[107] any juror whom one can successfully challenge for cause will, by definition, harbor actual bias. It is for this reason that the seating of a juror who should have been dismissed for cause requires reversal.[108] This stands in stark contrast to the peremptory challenge. Peremptory challenges do not eliminate actual bias. As shown below, peremptory challenges help mitigate exactly what the Supreme Court has consistently held does not violate the guarantee of an impartial jury: implied or perceived bias.

[101] Id. at 171–72 (emphasis added).
[102] 347 U.S. 227, 228 (1954).
[103] Id. at 229.
[104] Id. at 230.
[105] 449 U.S. 560, 581 (1981).
[106] Smith v. Phillips, 455 U.S. 209, 215 (1982) (emphasis added).
[107] Swain v. Alabama, 380 U.S. 202, 220 (1965).
[108] United States v. Martinez-Salazar, 528 U.S. 304, 316 (2000); see also Ross v. Oklahoma, 487 U.S. 81, 85 (1988) (explaining that if a juror who should have been dismissed for cause "sat on the jury[,] . . . the sentence would have to be overturned").

B. The Peremptory Challenge: A Safeguard for Implied—Not Actual—Bias

Because peremptory challenges are exercised after challenges for cause during voir dire, they exclude prospective jurors who have already been deemed qualified to serve fairly and impartially on the jury.[109] Recognizing that peremptory challenges, by definition, do not eliminate bias in fact, William Blackstone offers an alternative justification for the "arbitrary and capricious species of challenge."[110] Blackstone notes,

> As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.[111]

On Blackstone's view, peremptory challenges safeguard a defendant's *conception* of an impartial jury as opposed to impartiality in fact. Jolly does not dispute that understanding of the peremptory challenge. In his view, "peremptories purport to increase judicial legitimacy by allowing parties an unchecked power to shape who will decide their dispute and thus minimizing *perceived* bias."[112]

The irony is that peremptory challenges are employed to achieve exactly what the Sixth Amendment protects against: partial juries. Litigants strike prospective jurors based on arbitrary characteristics, such as age, education, cultural habits, socioeconomic status, and political opinion, in hopes of crafting a jury that will be more sympathetic to their cause.[113] As the Supreme Court explained in *Swain v. Alabama*, "the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be."[114] The result is that peremptory

[109] Cheryl G. Bader, *Batson* Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror's Speech and Association Rights, 24 Hofstra L. Rev. 567, 575–76 (1996).

[110] Blackstone, supra note 1, at *353.

[111] Id.

[112] Jolly, supra note 36, at 1534 (citing Barbara Allen Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545, 551 (1975)).

[113] See Anderson, supra note 32, at 5.

[114] 380 U.S. 202, 220–21 (1965).

challenges skew the demographic characteristics represented on petit juries.[115] Their value, therefore, is not in creating impartial or representative juries; their value is instead in ensuring that the accused "feel[s] confident in the proceedings."[116] In this sense, "the peremptory satisfies the rule that 'to perform its high function in the best way "justice must satisfy the appearance of justice."'"[117]

The notion that peremptory challenges do not typically increase actual impartiality has been confirmed empirically. One study noted in Jolly's article asked peremptorily excused jurors to remain as shadow jurors in the courtroom.[118] At the end of the trial, they were asked how they would have voted.[119] The excused jurors and the real jurors produced virtually the same proportion of guilty votes.[120] Another study found that approximately eighty percent of peremptory challenges that are exercised are "guesses," defined as a "weak basis of personal intuition not shared by others to support the need for a challenge."[121] And one study that reviewed empirical evaluations of the accuracy of attorneys' judgments during voir dire "reject[ed] the conclusion that attorneys, even those aided by 'scientific' selection methods, effectively identify jurors who will favor one side of the case."[122]

C. The Supreme Court's Long-Held View That Peremptory Challenges Are Not of Constitutional Dimension

As shown, there can be little doubt that the peremptory challenge protects against the *perception of bias*, not *actual bias*. And, as explained, the seating of a juror who harbors actual bias violates the Sixth Amendment's guarantee of an impartial jury, while the seating of a juror with an implicit or perceived bias does not.[123] Taken together, this means

[115] See Revesz, supra note 15, at 2536–37.

[116] Jolly, supra note 36, at 1543.

[117] *Swain*, 380 U.S. at 219 (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

[118] Jolly, supra note 36, at 1552; Hans Zeisel & Shari Seidman Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, 30 Stan. L. Rev. 491, 492 (1978).

[119] Zeisel & Diamond, supra note 118, at 492.

[120] Id. at 513.

[121] Michael O. Finkelstein & Bruce Levin, Clear Choices and Guesswork in Peremptory Challenges in Federal Criminal Trials, 160 J. Royal Stat. Soc'y Series A 275, 277, 282 (1997).

[122] Reid Hastie, Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?, 40 Am. U. L. Rev. 703, 721 (1991).

[123] See supra Section II.A.

that peremptory challenges provide a benefit beyond what is constitutionally required by the Sixth Amendment. It is for this reason that the Supreme Court has long held that "[p]eremptory challenges are not of constitutional origin."[124] And while Jolly contends that the Court has never engaged in a complete analysis of peremptory challenges in relation to the Sixth Amendment,[125] it is precisely because peremptories do not eliminate actual bias that the Court has correctly held that such challenges are purely statutory creations.

The analysis in *Ross v. Oklahoma*[126] is illustrative of this point. In that case, Ross, a criminal defendant on trial for capital murder in Oklahoma, exercised a peremptory challenge to rectify the trial court's erroneous denial of a challenge for cause, leaving him with one less peremptory challenge.[127] The Court rejected the position that "the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury."[128] The reasoning was both clear and explicit. The Court noted that, "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."[129] In this case, Ross never challenged any of the twelve jurors that sat for cause, nor did he claim that any of them were biased.[130] So, because there was no claim that the final jury was partial, there was no constitutional violation. The Court concluded the opinion by noting that "[t]he Constitution entitles a criminal defendant to a fair trial, not a perfect one."[131]

The Court has been consistent in holding that without a finding of actual partiality, the mere loss of a peremptory challenge does not constitute a violation of the Sixth Amendment's guarantee of an impartial

[124] Gray v. Mississippi, 481 U.S. 648, 663 (1987); see also Batson v. Kentucky, 476 U.S. 79, 91 (1986) ("[T]he Constitution does not confer a right to peremptory challenges . . . ."); Swain v. Alabama, 380 U.S. 202, 219 (1965) ("[T]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges . . . ." (second alteration in original) (quoting Stilson v. United States, 250 U.S. 583, 586 (1919))); Rivera v. Illinois, 556 U.S. 148, 152 (2009) ("This Court has 'long recognized' that 'peremptory challenges are not of federal constitutional dimension.'" (quoting United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000))).

[125] Jolly, supra note 36, at 1555.

[126] 487 U.S. 81 (1988).

[127] Id. at 83.

[128] Id. at 88.

[129] Id.

[130] Id. at 86.

[131] Id. at 91 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

jury. For example, a situation similar to *Ross* arose in federal court in *United States v. Martinez-Salazar*, in which the defendant used one of his peremptory challenges to cure the trial court's erroneous denial of a for-cause challenge.[132] The Court noted that, had the juror who should have been dismissed for cause actually sat on the final jury, the defendant's sentence would have had to have been overturned.[133] But because Martinez-Salazar elected to cure the errors by exercising a peremptory challenge, he was convicted "by a jury on which no biased juror sat," and he "received precisely what federal law provided."[134] The Court in *Rivera v. Illinois* came to the same conclusion, holding that the mistaken denial of a peremptory challenge does not, without more, violate the Constitution.[135] The Court wrote, "If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern."[136] Consistent with *Ross* and *Martinez-Salazar*, the Court found no constitutional violation in this case because no member of the defendant's jury was removable for cause.[137] Rivera received "precisely" what the Constitution requires: "a fair trial before an impartial and properly instructed jury."[138]

It is therefore unsurprising that, in modern jurisprudence, the Court has never strayed from the understanding that peremptory challenges are not of constitutional dimension.[139] Even in the nineteenth century, when the Court stressed the importance of peremptory challenges to the trial process, it stopped short of characterizing them as constitutionally required. In 1892, the Supreme Court held that the process of challenging jurors, which includes "challenge to the array, challenges for cause, and peremptory challenges,"[140] is "an essential part of the trial,"[141] but it never indicated if any or all of the challenges were of constitutional dimension.[142] Two years later, the Court, after referring to the peremptory

[132] 528 U.S. 304, 309 (2000).
[133] Id. at 316.
[134] Id. at 307, 317.
[135] 556 U.S. 148, 152 (2009).
[136] Id. at 149.
[137] Id. at 159.
[138] Id. at 162.
[139] See supra note 124 and accompanying text.
[140] Lewis v. United States, 146 U.S. 370, 383 (1892) (Brewer, J., dissenting).
[141] Id. at 376 (majority opinion).
[142] See id.

challenge as "one of the most important of the rights secured to the accused," declared that "[a]ny system for the empanelling of a jury that [prevents] or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned."[143] Again, however, the Court stopped short of recognizing that any remedy for a violation of the right to exercise peremptory challenges, which was notably secured to the defendant by statute, was constitutionally required.[144]

In fact, some states in the nineteenth century explicitly recognized the difference in constitutional dimension between challenges for cause and peremptory challenges. For example, the Circuit Court for the District of Massachusetts wrote in 1859, "Challenge for cause is doubtless a constitutional right, as without its exercise the prisoner might be deprived of an impartial jury, but the peremptory challenge is a privilege conferred by law, which may be enlarged, abridged, or annulled by the legislative authority."[145] The idea that the peremptory challenge confers a "privilege" beyond what is guaranteed by the Constitution has been retained in modern jurisprudence. The peremptory challenge has been referred to as "an opportunity beyond the minimum requirements of fair selection,"[146] "a means to achieve the end of an impartial jury,"[147] and "auxiliary" to any constitutional right.[148] However the Court refers to peremptory challenges, the bottom line is that, today, they are "not 'indispensable to a fair trial.'"[149]

Because the peremptory challenge is not of federal constitutional dimension, the challenge is said to be "a creature of statute."[150] In other words, since the Constitution does not prescribe the means by which an impartial jury should be obtained, it is within the power of the legislature to prescribe such means, so long as the accused has the right to a trial by

[143] Pointer v. United States, 151 U.S. 396, 408 (1894).

[144] Id. at 407–08.

[145] United States v. Plumer, 27 F. Cas. 561, 575–76 (C.C.D. Mass. 1859) (No. 16,056).

[146] Frazier v. United States, 335 U.S. 497, 506 (1948). In *Frazier*, the defendant, on trial for federal narcotics charges, exercised peremptory challenges against all nongovernment employees so that his jury was composed entirely of government employees. Id. at 498, 501 n.4. The Court held that because the defendant did not show "actual bias" on the part of any juror, he was not deprived of an impartial jury as guaranteed by the Sixth Amendment. Id. at 510–11, 513–14.

[147] Ross v. Oklahoma, 487 U.S. 81, 88 (1988).

[148] United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000).

[149] Rivera v. Illinois, 556 U.S. 148, 155 (2009) (quoting People v. Rivera, 879 N.E.2d 876, 885 (Ill. 2007)).

[150] *Ross*, 487 U.S. at 89.

an impartial jury.[151] The same is true at the state level. States retain discretion to design and implement their own systems for peremptory challenges.[152] And as the Court has repeatedly explained, states may withhold peremptory challenges "altogether without impairing the constitutional guarantee of an impartial jury."[153] So, if a state such as Arizona abolished peremptory challenges altogether, it would not be unconstitutional.

Imagine if a state decided to implement a lottery system for jury selection where the twelve "winners" of the lottery would be seated on the jury. Surely, such a system would violate the Sixth Amendment since there would be no way of ensuring that the seated jurors were, in fact, impartial. By eliminating the opportunity to challenge jurors for cause, the state would be denying defendants the opportunity to eliminate *actual* bias from the jury. Abolishing peremptory challenges is a far cry from such a system. The jurors who sit on a jury in a state where there are no peremptory challenges have already been deemed impartial—if they were not, they would have been struck for cause. And because the touchstone for Sixth Amendment impartial jury violations is actual bias, not having an opportunity to challenge jurors peremptorily poses no constitutional issue.

Despite the Supreme Court's consistent analysis of the constitutional right to peremptory challenges, Jolly argues that the Court has never "engaged . . . with the common law history, early American practice, or the text and original meaning of the Sixth Amendment" in dismissing peremptory challenges as purely statutory creations.[154] Before addressing this claim specifically, it is worth noting that for even the staunchest originalists, precedent matters. Indeed, Justice Scalia once observed,

> Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew. It is of no more consequence at this point whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment than it is whether *Marbury v. Madison* was decided correctly. Where originalism will make a difference is not in the rolling back of accepted old

[151] United States v. Wood, 299 U.S. 123, 145–46 (1936).
[152] *Ross*, 487 U.S. at 89.
[153] Georgia v. McCollum, 505 U.S. 42, 57 (1992).
[154] Jolly, supra note 36, at 1555.

> principles of constitutional law but in the rejection of usurpatious new ones.[155]

The Supreme Court has long held that there is not a freestanding constitutional entitlement to peremptory challenges. And the mere fact that the Court has not engaged in an explicitly originalist analysis in so holding does not permit it to depart from the principles of stare decisis.[156]

Nevertheless, as the next Part demonstrates, an originalist analysis of the question of whether there exists a constitutional right to peremptory challenges undercuts, not supports, Jolly's claim. The following Part is a direct response to Jolly's argument. It analyzes common law history, early American practice, and the text of the Sixth Amendment, and it comes to the same conclusion that the Supreme Court has arrived at consistently over time: there is no constitutional right to peremptory challenges.

III. HISTORY, EARLY PRACTICE, AND THE TEXT OF THE SIXTH AMENDMENT UNDERMINE A FREESTANDING CONSTITUTIONAL ENTITLEMENT TO PEREMPTORY CHALLENGES

A. The Peremptory Challenge and Noncapital Offenses

To make the argument that peremptory challenges are secured by the Sixth Amendment's guarantee of an impartial jury, Jolly applies the Supreme Court's modern formalist approach to the Sixth Amendment by tracing the history of the peremptory challenge from English common law to early American practice and beyond.[157] His historical analysis provides convincing evidence that the right to peremptory challenges was firmly established both at common law and at the Founding, at least when it came to capital cases. Indeed, criminal defendants were granted the right to peremptory challenges in all capital cases in England by the turn of the fourteenth century,[158] colonial courts in North America granted defendants the right to exercise peremptory challenges in capital cases as

[155] Antonin Scalia, Response, *in* A Matter of Interpretation: Federal Courts and the Law 129, 138–39 (Amy Gutmann ed., 1997).

[156] Then-Professor Amy Coney Barrett wrote, "Originalism does not obligate a justice to reconsider nonoriginalist precedent *sua sponte*, and if reversal would cause harm, a Justice would be foolhardy to go looking for trouble." Amy Coney Barrett, Originalism and Stare Decisis, 92 Notre Dame L. Rev. 1921, 1931 (2017).

[157] Jolly, supra note 36, at 1539–45.

[158] See Hoffman, supra note 3, at 819–20.

part of the received common law,[159] and the First Congress statutorily codified the right to challenge peremptorily in capital cases.[160] The history shows that the right to exercise peremptory challenges has been consistently secured to criminal defendants when their lives are at stake.

Such was not the case for noncapital offenses. In answering whether the right to exercise peremptory challenges extends to noncapital offenses, Jolly remarks, "At common law—and thus through early American history—the answer was generally accepted: There was no right to peremptory challenges outside of capital offenses."[161] While William Blackstone hailed the virtues of the peremptory challenge,[162] he qualified his praise by noting that they were granted to the accused only "in criminal cases, or at least in capital ones."[163] Early American case law confirms that the right to challenge peremptorily was restricted to capital cases. For example, in *United States v. Cottingham*, the defendant—a post office clerk—was charged with stealing money from a letter, an offense that carried a prison sentence between ten and twenty-one years.[164] The defendant argued that he was entitled to exercise peremptory challenges against prospective jurors.[165] The New York Circuit Court disagreed, holding that "the prisoner had no right to any of the peremptory challenges claimed, because such challenges were not allowed at common law in any other than capital cases."[166]

It would be some time before peremptory challenges were granted to defendants in noncapital cases, at least at the federal level. Unless a rule of a federal court made applicable a provision of state law allowing peremptory challenges in noncapital cases, there existed no right to exercise peremptory challenges in federal criminal trials until the Act of June 8, 1872.[167] Some states granted the right earlier. For example,

[159] See supra notes 68–71 and accompanying text.
[160] See Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119.
[161] Jolly, supra note 36, at 1566.
[162] Blackstone, supra note 1, at *353.
[163] Id.
[164] 25 F. Cas. 673, 673 (C.C.N.D.N.Y. 1852) (No. 14,872).
[165] Id.
[166] Id.; see also United States v. Randall, 27 F. Cas. 696, 696, 706 (D. Or. 1809) (No. 16,118) ("Section 2 of the act of March 3, 1868 (13 Stat. 500), regulating peremptory challenges in criminal cases, does not give the right to such challenge except in capital cases, because when the act was passed such right did not exist by law in any other cases, but was only permitted by rule of court.").
[167] Frazier v. United States, 335 U.S. 497, 505 & n.11 (1948) (discussing the Act of June 8, 1872, ch. 338, 17 Stat. 283 (codified as amended at 28 U.S.C. § 1870)).

Kentucky extended the same right of peremptory challenge that existed in capital cases to "all criminal cases whatsoever" in 1798.[168] Pennsylvania extended the right to challenge four jurors peremptorily in criminal cases "wherein peremptory challenges have not been heretofore permitted by law" in 1809.[169] And Mississippi, like Pennsylvania, granted "each and every defendant in criminal cases, not capital," the right to four peremptory challenges in 1822.[170] These states, however, were exceptions. Unlike in capital cases, there was no firmly entrenched right to exercise peremptory challenges at common law or in early American practice for noncapital offenses.

So, if the right to peremptory challenges only existed in some cases and not others, how did Jolly conclude that the right extends to all criminal defendants, regardless of the offense? The answer, according to Jolly, is in the plain text of the Constitution. He notes that Article III of the Constitution reads, "[T]he Trial of *all* Crimes, except in Cases of Impeachment, shall be by Jury."[171] And the Sixth Amendment states, "[I]n *all* criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[172] As Jolly's argument goes, because the right to exercise peremptory challenges was secure in capital cases at the Founding, and because the protections of both Article III and the Sixth Amendment apply to "all" criminal cases, the peremptory challenge right must therefore extend to all cases for which the jury trial right attaches.[173] In other words, because "[t]here is zero language in [Article III and the Sixth Amendment] drawing a distinction between the type of crime and the extent of the right so secured," the demands of the provisions must "extend to *all* criminal cases, regardless of punishment."[174]

There are a number of glaring issues with Jolly's textualist argument. First, if all crimes must be tried by jury (Article III) and the jury must be impartial in all criminal prosecutions (Sixth Amendment), yet the right to peremptory challenges was not secured in all criminal trials at the time of ratification, the most logical conclusion is that the right to peremptory

[168] Act of Dec. 22, 1798, ch. 169, *reprinted in* 2 The Statute Law of Kentucky 236, 236 (William Littell ed., Frankfort, Johnston & Pleasants 1810).
[169] Act of Apr. 4, 1809, ch. 3106, § 2, 1809 Pa. Laws 1133, 1133.
[170] Act of June 14, 1822, § 50, 1822 Miss. Laws 206, 216.
[171] Jolly, supra note 36, at 1569 (quoting U.S. Const. art. III, § 2, cl. 3).
[172] Id. (quoting U.S. Const. amend. VI).
[173] Id. at 1569–70.
[174] Id.

challenges is *not* included in the guarantees of Article III and the Sixth Amendment. Under this reading, the peremptory challenge constitutes a privilege beyond what is guaranteed by the Constitution. Indeed, that is how courts have referred to peremptory challenges for well over a century.[175] While more felonies were punishable by death at common law than today, not all felonies were punishable by death, particularly the non-dangerous ones.[176] In fact, there is evidence that most felonies were *not* punishable by death at the Founding.[177] To say that the Framers implied that peremptory challenges should be granted in all criminal cases when such challenges were only granted in some trials at the time defies even the most basic logic.

Peremptory challenges were also very rarely used at common law and at the time of ratification in those capital cases where defendants were granted such challenges.[178] So, if peremptory challenges were not granted to defendants in noncapital cases and were rarely used in capital cases, yet the protections of Article III and the Sixth Amendment apply to *all* criminal cases, the natural conclusion is that the Founders did not intend to include the right to peremptory challenges in the guarantees of the Constitution.

There are other problems with Jolly's argument that Jolly himself recognizes. One is that "the Supreme Court has not read the word 'all' as used in those two provisions to mean, in fact, 'all.'"[179] As Jolly notes, the Supreme Court has recognized a "petty offense" exception to the Sixth Amendment jury trial right.[180] In *Duncan v. Louisiana*, the Court held that the Sixth Amendment requires that defendants accused of serious crimes be afforded the right to trial by jury.[181] But despite the word "all" in the Sixth Amendment, the Court provided an exception to the constitutional mandate. The Court held that petty offenses—typically defined as crimes

[175] See supra notes 145–49 and accompanying text.

[176] See Act of Apr. 30, 1790, ch. 9, §§ 2, 6, 21, 1 Stat. 112, 112–13, 117 (creating various term-of-years sentences for nonviolent felonies, such as "misprision" and "bribery").

[177] 6 Nathan Dane, A General Abridgment and Digest of American Law 715 (Bos., Cummings, Hilliard & Co. 1823) (noting that "but a very few" felonies were punishable by death); see also 2 The Works of James Wilson 348 (James DeWitt Andrews ed., Chi., Callaghan & Co. 1896) (explaining that felonies no longer required the death penalty by the time of the Founding).

[178] See infra Section III.C.

[179] Jolly, supra note 36, at 1570.

[180] Id.

[181] 391 U.S. 145 (1968).

carrying possible penalties that do not exceed six months of imprisonment—may be tried without a jury.[182]

Jolly dismisses the issue by calling the petty offense exception "ahistorical" and "atextual."[183] Yet the Court specifically grappled with the history of the exception in *Duncan*, noting that petty offenses were tried without juries both at common law and in early American practice.[184] And because there was no evidence that the Framers intended to depart from that established common law practice, the Court presumed that petty offenses were exempt from the Sixth Amendment's jury trial provisions.[185] Jolly next tries to dismiss the issue by claiming that petty offenses do not implicate Article III at all because such offenses can be adjudicated by non-Article III judges.[186] But what about the Sixth Amendment? The *Duncan* Court never claimed that petty offenses do not implicate the Sixth Amendment. Rather, the Court held they are "exempt" from the Sixth Amendment despite finding that the Amendment requires that defendants accused of serious crimes be afforded the right to trial by jury.[187] Jolly is unable to explain how some guarantees of the Sixth Amendment apply in certain criminal cases and not others, despite the use of the word "all."

Worry not, says Jolly, for "the petty-offense exception is inapposite to our issue in determining the protected requisites of the jury-trial right itself."[188] Once the jury trial right attaches, he argues, it attaches in full, and all the protections that come with the right are guaranteed to the criminal defendant.[189] And, as he says, "The Court has never held that any other incident of the constitutionally secured jury trial might be limited based on the potential penalty associated with an offense."[190] But as quick as Jolly is to note this, he recognizes an exception to his claim.[191] Under *Witherspoon v. Illinois* and its progeny, prosecutors can strike for cause prospective jurors who harbor strong opposition to the death penalty.[192]

[182] Id. at 158–59.
[183] Jolly, supra note 36, at 1570.
[184] 391 U.S. at 160.
[185] Id.
[186] Jolly, supra note 36, at 1570.
[187] *Duncan*, 391 U.S. at 160.
[188] Jolly, supra note 36, at 1570.
[189] Id.
[190] Id. at 1570–71.
[191] Id. at 1571 n.281.
[192] 391 U.S. 510, 517–18 (1968); see also Wainwright v. Witt, 469 U.S. 412, 424 (1985) (holding that the proper standard for determining when a prospective juror may be excluded

Capital defendants receive a reciprocal benefit of excluding prospective jurors who are unwilling to impose a life sentence rather than the death penalty.[193] The "death qualification" process is a clear example of how the jury trial right can be altered depending on the potential penalty associated with the offense.

In sum, there can be no argument that the right to exercise peremptory challenges is constitutionally guaranteed for noncapital offenses. Defendants accused of noncapital offenses were not provided any peremptory challenges at common law or at the time of ratification of Article III and the Sixth Amendment. And while Jolly attempts to employ a textualist argument to contend that peremptory challenges are secured in *all* criminal trials, including noncapital offenses, his argument ultimately fails. So, the question becomes, if peremptory challenges are not constitutionally required in noncapital cases, might they be constitutionally required in capital cases? Apart from what has already been discussed regarding the peremptory challenge's inapplicability to findings of bias in fact,[194] history demonstrates that the peremptory challenge is inconsistent with the fundamental canons of an impartial jury.

B. Original Purpose of the Peremptory Challenge

In an article advocating for the abolition of peremptory challenges, Judge Morris Hoffman explores the context in which the peremptory challenge initially came to exist at common law, arguing that the original purpose of the peremptory challenge directly conflicts with the modern conception of an impartial jury.[195] As explained, the first peremptory challenges in England sprang to life as an aid to the Crown, essentially allowing the government to handpick a jury that would be favorable to the prosecution's case.[196] In other words, the peremptory challenge originated "as a corollary to the axiom of royal infallibility."[197]

for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (quoting Adams v. Texas, 448 U.S. 38, 45 (1980))).

[193] See Morgan v. Illinois, 504 U.S. 719, 728–29 (1992).

[194] See supra Part II.

[195] Hoffman, supra note 3, at 812.

[196] See supra notes 53–57 and accompanying text.

[197] Hoffman, supra note 3, at 846.

Peremptory challenges, therefore, originally posed a direct threat to "ensur[ing] that disputes [we]re given full democratic consideration."[198]

As Judge Hoffman points out, peremptory challenges first appeared two centuries before the concept of an impartial jury even existed.[199] At the time that peremptory challenges arose, jurors were selected precisely because of their knowledge of the dispute.[200] Eventually, Parliament attempted to employ the peremptory challenge as a tool to restrict the power of the Crown, but that effort was circumvented by the judicially created doctrine of "standing jurors aside."[201] As jury service steadily became more inclusive in England, and as the power of the Crown withered, "there simply was no need, and no temptation, for any protections above and beyond the challenge for cause."[202] Indeed, Parliament abolished all peremptory challenges in 1989, after a number of highly publicized trials exposed the potential for abuse of peremptory challenges.[203]

With this historical context in mind, it is clear that the modern conception of the peremptory challenge as a tool for promoting fairness and impartiality on the jury directly conflicts with the original purpose of the challenge. Yet, while the modern conception of the peremptory challenge may be at odds with its original purpose, modern practice is directly in line with the historical use and purpose of the challenge. Much like peremptory challenges were initially employed at common law to craft favorable juries, the peremptory challenge today has become a tool for subverting the democratic will of certain groups of people. Judge Hoffman notes that unlike in England, the barriers to jury service in the United States were never truly lowered over the course of history.[204] Since the end of Reconstruction, the American jury has reflected racial hierarchies in the United States, in large part because the peremptory challenge has been employed as a state-sanctioned tool for racial discrimination in jury selection.[205] Today, litigants do not exercise peremptory challenges to try to choose impartial jurors; rather, they

[198] Jolly, supra note 36, at 1532 (citing Lockhart v. McCree, 476 U.S. 162, 174 (1986)).
[199] Hoffman, supra note 3, at 812.
[200] See Van Dyke, supra note 53, at 147.
[201] See supra notes 58–62 and accompanying text.
[202] Hoffman, supra note 3, at 848.
[203] Id. at 822 (citing Criminal Justice Act 1988, c. 33, § 118(1) (Eng.)).
[204] See id. at 827–30.
[205] Thomas Ward Frampton, The Jim Crow Jury, 71 Vand. L. Rev. 1593, 1595 (2018); see also supra note 10.

attempt to "eliminate those who are sympathetic to the other side, hopefully leaving only those biased for [them]."[206] The peremptory challenge arose as a decidedly undemocratic feature of the jury system; today, it continues to be employed as such.

C. Rarity of the Peremptory Challenge

Despite the early origins of the peremptory challenge, such challenges were very rarely exercised at common law. In fact, historian J.B. Post examined late fourteenth-century jury records and uncovered no trace of the peremptory challenge at all,[207] even though defendants would have been granted thirty-five peremptory challenges in capital cases at this time.[208] Post noted that the first twelve prospective jurors on the jury list almost invariably were empaneled.[209] Another study of the English jury four hundred years later, in the eighteenth century, also reported that the peremptory challenge was "rarely used" in this period.[210] It was not until the nineteenth century, after the Sixth Amendment had already been ratified, that the use of peremptory challenges became more prevalent.[211]

There are various reasons why peremptory challenges were so rarely employed. One reason is that defendants did not want to risk offending jurors.[212] Jurors at the time were typically social superiors whom the defendants likely knew personally, so defendants may have avoided offending fellow members of the community by striking them from service.[213] Another reason for the rarity was ignorance.[214] Defendants, many of whom did not have counsel, may not have been aware of their right to challenge peremptorily.[215] Lastly, parties were not able to

[206] Babcock, supra note 112, at 551 (emphasis omitted).

[207] J.B. Post, Jury Lists and Juries in the Late Fourteenth Century, *in* Twelve Good Men and True: The Criminal Trial Jury in England, 1200–1800, at 65, 71 (J.S. Cockburn & Thomas A. Green eds., 1988) [hereinafter Twelve Good Men and True].

[208] See Hoffman, supra note 3, at 819–20.

[209] Post, supra note 207, at 71.

[210] P.J.R. King, "Illiterate Plebeians, Easily Misled": Jury Composition, Experience, and Behavior in Essex, 1735–1815, *in* Twelve Good Men and True, supra note 207, at 254, 277–78.

[211] See Jolly, supra note 36, at 1546.

[212] See John H. Langbein, The Historical Origins of the Privilege Against Self-Incrimination at Common Law, 92 Mich. L. Rev. 1047, 1058 n.51 (1994).

[213] See id.

[214] See R. Blake Brown, Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century, 38 Osgoode Hall L.J. 453, 460 (2000).

[215] See id.

question the prospective jurors about their connections, biases, or prejudices, making it very difficult to choose which jurors to remove.[216] No matter the reason, peremptory challenges were very rarely exercised until the nineteenth century at the earliest. To say that such challenges were essential to the notion of an impartial jury at common law and at the time of the ratification of the Sixth Amendment in 1791 is thus a stretch at best.

D. Procedure of the Peremptory Challenge

While the use of peremptory challenges was limited at common law, the procedure by which they were used when they were in fact employed was markedly different than the procedure by which they are used today. One key difference has already been mentioned. Whereas in modern practice parties or the court can ask jurors about their opinions, viewpoints, or personal characteristics to inform peremptory challenges, there is little evidence that parties had the opportunity to expose provocations for a strike in this way at common law.[217] In his study of late fourteenth-century jury records, Post uncovered "no marking that could represent the process of trying the jurors between selection and swearing" to inform peremptory challenges.[218]

When parties were permitted to question jurors, it was only as to specific biases, such as familial and economic relations between the defendant and a juror.[219] There is no evidence of parties questioning jurors in criminal cases for nonspecific biases.[220] To do so would have risked embarrassing or degrading the juror—something that would have been cautiously avoided at the time.[221] The restrictions on voir dire lend support to the theory that early challenges amounted to a hybrid between the

[216] See Anderson, supra note 32, at 14–15 ("As a practical matter, restrictions on voir dire made peremptory challenges nearly useless. They were often limited, perfunctory, or nonexistent because counsel could not ask questions to expose bias, opinions, or other provocation for a strike.").

[217] See id.

[218] Post, supra note 207, at 71.

[219] See Gutman, supra note 80, at 458.

[220] See id.

[221] See Henry H. Joy, On the Admissibility of Confessions and Challenge of Jurors in Criminal Cases in England and Ireland 110 (Phila., John S. Littell, American ed. 1843) (describing how at common law, jurors could not be asked questions that might "dishonour" or "disparage[]" (quoting Edward Coke, The First Part of the Institutes of the Lawes of England § 234 (Lond., Societie of Stationers 1628))).

modern peremptory challenge and the challenge for cause,[222] since, beyond knowledge of specific bias, parties would have to guess about a prospective juror's partiality. As one scholar suggested, "the judges who created the challenge might be surprised to learn of the tactical games that it now enables professional advocates to play."[223]

Another critical difference between the modern use of the peremptory challenge and the peremptory challenge at common law is that, unlike today, the government was not afforded any peremptory challenges at common law or by the ratification of the Sixth Amendment.[224] While the statute passed by Congress in 1790 gave criminal defendants thirty-five peremptory challenges in cases of treason and twenty in other capital cases, it made no mention of the right of the government to exercise peremptory challenges.[225] Some states, however, passed laws that explicitly forbade the use of peremptory challenges by the prosecution.[226] Other states, such as Kentucky and Maryland, shut down attempts to give the government the right to strike peremptorily at their constitutional conventions.[227] And the two most populous states at the time of the Framing, New York and Virginia, did not grant the government the right to exercise peremptory challenges until 1881 and 1991, respectively.[228]

While the function of the peremptory challenge today may be to "eliminate extremes of partiality on both sides, [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise,"[229] the same cannot be said of the early use of the peremptory challenge. The extremes of partiality could not be eliminated on both sides throughout the centuries when only one side was granted peremptory challenges. And even the one

[222] See supra notes 64–67 and accompanying text.

[223] Alschuler, supra note 2, at 165 n.51.

[224] The 1305 statute that limited the Crown to challenges for "cause certain" also entirely eliminated the right of the Crown to exercise peremptory challenges. See Van Dyke, supra note 53, at 147.

[225] Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119.

[226] See, e.g., An Act Against Treason and Misprision of Treason, and for Regulating Trials in Such Cases, and for Directing the Mode of Executing Judgments Against Persons Attainted of Felony, ch. 71, § 14, 1799 Mass. Acts 1046, 1050 ("That the Attorney-General, or any other person prosecuting for and in behalf of this State shall not be admitted, in any case whatever, peremptorily to challenge any Juror about to be impanelled for the trial of any criminal accusation or charge.").

[227] See Van Dyke, supra note 53, at 149.

[228] See id. at 148–49, 149 n.46.

[229] Swain v. Alabama, 380 U.S. 202, 219 (1965).

side that was granted the right to exercise peremptory challenges could not be assured that the jurors would only decide the cases on the basis of the evidence placed before them because defendants could not question prospective jurors on nonspecific biases. In other words, the reasons why one might today think that the peremptory challenge is essential to the right to an impartial jury are wholly inconsistent with the purpose and use of the peremptory challenge at common law and at the time of the ratification of the Sixth Amendment.

IV. IMPLICATIONS OF A STRICTLY FORMALIST APPROACH TO THE SIXTH AMENDMENT

As noted, the Supreme Court has shown an increasing enthusiasm for originalist methodology when it comes to criminal procedure and determining the scope of the jury trial right.[230] So, it makes sense that Jolly followed a formalist approach in his inquiry, analyzing the history of the peremptory challenge and the text of the Sixth Amendment. To respond directly to Jolly's work, this Note follows the same approach. But it should be noted that this is not the only approach to Sixth Amendment jurisprudence.

The Supreme Court has not always found that every feature of the original jury is constitutionally required. In *Williams v. Florida*, the Court addressed the constitutionally required size of juries.[231] Despite acknowledging that the common law jury was fixed at twelve men, the Court concluded that there was "no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury."[232] In so holding, the Court noted, "We do not pretend to be able to divine precisely what the word 'jury' imported to the Framers, the First Congress, or the States in 1789."[233] Because the twelve-man jury was, in the Court's view, a mere "historical accident," the six-person jury that convicted the defendant in *Williams* was not found to violate the Constitution.[234] *Williams* represents a marked shift from the formalist approach the Court had taken to Sixth Amendment jurisprudence in the past, as the *Williams* Court turned to functional and purposive arguments after declining to divine the intent of the Framers.

[230] See supra notes 49–52 and accompanying text.
[231] 399 U.S. 78 (1970).
[232] Id. at 99.
[233] Id. at 98.
[234] Id. at 86, 89.

Nevertheless, the Supreme Court refused to revisit the issue of the constitutionally required size of juries as recently as 2022, despite Justice Gorsuch's contention that *Williams* "contravened the Sixth Amendment's original meaning and hundreds of years of precedent in both common-law courts and this one."[235]

Regardless of whether *Williams* was correctly decided, the case demonstrates the challenge inherent in determining which features of the common law jury should be included in the Sixth Amendment's guarantees.[236] As Judge Joan L. Larsen notes, determining which jury trial rights are protected by the Sixth Amendment "turns out to be surprisingly hard. And it is particularly hard for an originalist, or more precisely, for an originalist judge."[237] The modern jury bears faint resemblance to the jury of 1791. Juries at the Founding were comprised of twelve, almost always white, propertied men.[238] They had the right to decide law as well as fact.[239] They were made aware of the penalties for the accused.[240] In some cases, they were "kept without meat, drink, fire, or candle" until they rendered a unanimous verdict.[241]

Adopting a strictly formalist approach to the Sixth Amendment that purports to divine which features of the common law jury are integral to the jury right by only looking at history and text can have devastating consequences. Take the "fair cross section" requirement, for example. In *Taylor v. Louisiana*, the Supreme Court held that the Sixth Amendment guarantees a defendant the right to a jury that represents "a fair cross section" of the community.[242] However, in 1791, "[e]very state limited jury service to men; every state except Vermont restricted jury service to property owners or taxpayers; three states permitted only whites to serve;

[235] Khorrami v. Arizona, 143 S. Ct. 22, 24–25 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

[236] See Daniel Epps & William Ortman, The Informed Jury, 75 Vand. L. Rev. 823, 889 (2022).

[237] Larsen, supra note 49, at 965.

[238] See id. at 967; see also Thomas Ward Frampton, The First Black Jurors and the Integration of the American Jury, 99 N.Y.U. L. Rev. 515, 517 (2024) ("Historians and legal scholars uniformly report that Black jury service was nonexistent until 1860 . . . .").

[239] See Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 75–76 (1994).

[240] See Epps & Ortman, supra note 236, at 840.

[241] Blackstone, supra note 1, at *375.

[242] 419 U.S. 522, 526 (1975).

and one state, Maryland, disqualified atheists."[243] The fair cross section requirement is fundamentally at odds with the jury right at the Founding. So, is the fair cross section requirement not included in the right to an impartial jury? According to strict originalists, such as Justice Thomas, it is not.[244] Because "[h]istorically, juries did not include a sampling of persons from all levels of society or even from both sexes" and because the fair cross section requirement "seems difficult to square with the Sixth Amendment's text and history," Justice Thomas would not find the fair cross section requirement to be guaranteed by the Sixth Amendment.[245] According to Justice Thomas, if the fair cross section requirement were constitutionally mandated at all, it would be through the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[246]

No one today believes that the original jury exactly as it was in 1791 should be restored. Locking twelve hungry men in a dark room together until they can make a unanimous decision seems downright irresponsible, if not dangerous. For strict formalists who believe that one must only look to history and the text of the Sixth Amendment to determine the scope of the jury trial right, the question thus becomes, why should some aspects of the jury of 1791 be constitutionally required and not others? Strict formalists may believe that the fair cross section requirement is compelled by other provisions of the Constitution. But what about the jury's right to judge the law? What about informing juries of penalties for the accused? A strict formalist must either find other provisions of the Constitution that would prohibit such practices or concede that modern juries should retain those anachronistic features.

Clearly, there are some features of the Founding jury that are inconsistent with the modern conception of a fair and impartial jury. To some, the peremptory challenge is one of those features. As Judge Hoffman opined, "Especially now, in their post-*Batson* mutated form, peremptory challenges conflict with the most basic notions of individual liberty and individual responsibility inherent in the idea of trial by an impartial jury."[247] The irony is that Washington, Arizona, and every other

[243] Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 877 (1994).

[244] See Berghuis v. Smith, 559 U.S. 314, 334 (2010) (Thomas, J., concurring).

[245] Id.

[246] Id. (citing Duren v. Missouri, 439 U.S. 357, 372 (1979) (Rehnquist, J., dissenting)).

[247] Hoffman, supra note 3, at 853; see also Broderick, supra note 4, at 407 ("Rather than promote fair trials, there is every reason to conclude that the peremptory undermines them.").

state that has reformed or is considering reforming its system of peremptory challenges have done so to achieve greater impartiality and fairness. That fact should not be lost when evaluating the legality of such reforms.

CONCLUSION

Determining whether there exists a freestanding constitutional entitlement to peremptory challenges is not merely a theoretical exercise. States have begun to reform their systems of peremptory challenges as they have grappled with the effects of such arbitrary challenges and the failures of *Batson*. Arizona became the first state to completely abolish peremptory challenges in 2022, and others are likely to follow suit. Ironically, if peremptory challenges are implicit in the Sixth Amendment's guarantee of an impartial jury, then any state that abolishes such challenges would be forced into a system of selecting jurors that it believes erode fairness and impartiality.

Fortunately for those states, there is overwhelming evidence that peremptory challenges are not constitutionally required. The Supreme Court has always held that the test to determine whether there has been a violation of the guarantee of an impartial jury is to ask if a seated juror has any bias in fact. Because peremptory challenges, by definition, do not remove jurors with actual bias, they are not of federal constitutional dimension. And while Jolly argues that the Court's analysis in these cases is incomplete because the Court has not adequately grappled with the history of the peremptory challenge and the text of the Sixth Amendment, neither the history nor the text undermines the Court's analysis. So, those states that wish to abolish peremptory challenges altogether can do so free of any fear that they will undermine the constitutional right to an impartial jury. If anything, abolition may further the right.