SUFFOLK UNIVERSITY
LAW REVIEW

Volume LIII 2020 Number 2

# Mississippi Allows Peremptory Challenges for Fake, Race-Neutral Reasons in Violation of *Batson*'s Equal Rights Rationale

L. Darnell Weeden*

*"[P]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."*[1]

## I. INTRODUCTION

Does the Equal Protection Clause prohibit Mississippi from demonstrating discriminatory intent by allowing the prosecution to strike at least one black juror, whose circumstances were like those of potential white jurors who were not stricken by the prosecution? In *Flowers v. Mississippi*[2] (*Flowers VI*), the

* Associate Dean for Research & Faculty Development, Roberson King Professor of Law, Texas Southern University, Thurgood Marshall School of Law, Houston, TX; B.A., Journalism & Political Science, University of Mississippi, Oxford, MS, 1972; J.D., University of Mississippi, 1975. I am appreciative of the acceptance my wife and my children provided me while I produced this Article. I would like to acknowledge my research assistant, Bernardo Villarreal Aguirre, Juris Doctor Candidate 2020, for his important research support. I would also like to thank the members of the *Suffolk University Law Review* for their very helpful suggestions during the publishing of my Article.

1. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

2. 139 S. Ct. 2228 (2019). Throughout this Article, the six trials and their corresponding appeals, which comprise the multiple dispositions of defendant Flowers's full case history, will be identified by certain, helpful numbers: *Flowers I* will refer to the first trial and its appeal in Flowers v. State (*Flowers I*), 773 So. 2d 309 (Miss. 2000) (en banc); *Flowers II* will refer to the second trial and its appeal in Flowers v. State (*Flowers II*), 842 So. 2d 531 (Miss. 2003) (en banc); *Flowers III* will refer to the third trial and its appeal in Flowers v. State (*Flowers III*), 947 So. 2d 910 (Miss. 2007) (en banc); *Flowers IV* will refer to the fourth trial; *Flowers V* will refer to the fifth trial; and the sixth, most recent trial will be referred to as the "sixth trial," and *Flowers VI* will refer collectively to the multiple appeals based on the outcome of the sixth trial, Flowers v. State (*Flowers VI*), 158 So. 3d 1009 (Miss. 2014) (en banc), Flowers v. Mississippi (*Flowers VI*), 136 S. Ct. 2157 (2016) (mem.), Flowers v. State (*Flowers VI*), 240 So. 3d 1082 (Miss. 2017) (en banc), and Flowers v. Mississippi (*Flowers VI*), 139 S. Ct. 2228 (2019).

Supreme Court of the United States declared that the *Batson v. Kentucky* decision prohibits Mississippi from discriminating on the basis of race when using its peremptory challenges to remove potential jurors in a criminal trial.[3] Writing for the Court, Justice Kavanaugh highlighted the *Batson* decision as endorsing a central goal of the Fourteenth Amendment—to stop racial discrimination by governmental actors.[4] Although *Batson* has noble goals, "*Batson* challenges are difficult to win. First, the judge must find enough merit in the challenge to require the opposing party to identify a non-discriminatory basis for its challenge. Many *Batson* challenges will fail at this stage."[5] When a court commands an opposing party to provide nondiscriminatory information for its challenges, competent attorneys have the ability to provide some justification other than race for their strikes.[6] "If the opposing party manages to offer a non-discriminatory basis, the challenger must demonstrate that the basis was pretext, another substantial hurdle. Accordingly, [parties] reserve *Batson* challenges for extreme circumstances."[7] Because peremptory challenges may serve as easy tools for intentional racial discrimination abuse in criminal trials, any nondiscriminatory justification under *Batson* should be required to meet a strict scrutiny test to protect racial equality in the jury selection process.

Part II of this Article asserts that *Batson* historically failed to end discrimination on the basis of race in peremptory challenges because a prosecutor may use any plausible, nonracial removal justification.[8] Part III provides an analysis of *Flowers VI* and the link between peremptory challenges and discrimination on the basis of race.[9] Part IV contends *Batson* remains a toothless tiger in slowing down or ending intentional, racially-biased jury selection by prosecutors because the Supreme Court refuses to apply the strict scrutiny test to a prosecutor's peremptory exclusion of black jurors on the basis of race even when that exclusion leaves the jury either all white or extremely disproportionately white.[10] Part V recommends eliminating peremptory

3. *See Flowers VI*, 139 S. Ct. at 2234-35 (remanding Flowers's capital murder conviction for State's racially-motivated peremptory strike and reaffirming *Batson* standard); *Jury Selection*—Batson *Challenges*, FED. LITIGATOR (Thomson Reuters), Aug. 2019 (summarizing *Flowers VI* 2019 decision). The *Batson* decision held that race considerations in the exercise of peremptory strikes violate the Equal Protection Clause of the Fourteenth Amendment. *Batson*, 476 U.S. at 89. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

4. *See Flowers VI*, 139 S. Ct. at 2234 (invoking unconstitutionality of race-based discrimination). *See generally* U.S. CONST. amend. XIV.

5. *See Jury Selection*—Batson *Challenges*, *supra* note 3 (outlining steps to succeeding on *Batson* challenge). Many *Batson* challenges fail at this initial stage due to the lack of sufficient evidence of racial discrimination. *See id.*

6. *See Batson*, 476 U.S. at 97 (describing prosecutor's burden in *Batson* challenges).

7. *See Jury Selection*—Batson *Challenges*, *supra* note 3 (noting substantive hurdles to winning *Batson* challenges).

8. *See infra* Part II.

9. *See infra* Part III.

10. *See infra* Part IV.

challenges in the jury selection process under the Fourteenth Amendment's Due Process Clause because the practice leaves the prosecution with unbridled discretion to exercise that power in a pretextual race-neutral or arbitrary manner.[11] Part VI of this Article asserts that because the exercise of peremptory strikes in a criminal trial—when there is an allegation of discrimination on the basis of race—is not subject to a strict scrutiny analysis, one can only conclude the Supreme Court is not serious about providing an effective judicial remedy to end discrimination against jurors on the basis of race.[12]

## II. *BATSON* HAS HISTORICALLY FAILED TO END DISCRIMINATION ON THE BASIS OF RACE IN PEREMPTORY CHALLENGES BECAUSE A PROSECUTOR MAY USE ANY PLAUSIBLE, NON-RACIAL REMOVAL JUSTIFICATION

In *Batson v. Kentucky*, a black man was indicted in Kentucky on allegations of committing second-degree burglary and receiving stolen personal property.[13] On the first day of trial, the judge did a *voir dire* examination of the jury venire.[14] The judge excused some jurors for cause, and allowed peremptory challenges.[15] The prosecutor utilized his peremptory challenges to strike the four black jurors on the venire, which produced an all-white jury.[16] Defense counsel requested a discharge of the jury because the prosecutor's removal of the black veniremen on the basis of race violated the black defendant's right to equal protection of the law.[17] In 1880, the Supreme Court held in *Strauder v. West Virginia*[18] that a state denies a black defendant equal justice under the law when black jurors are intentionally excluded.[19]

The *Strauder* decision represents the Court's dysfunctional approach to ending discrimination on the basis of race when selecting members of a jury in a criminal trial.[20] In *Strauder*, the Court asserted that the purpose of the Fourteenth Amendment was to stop governmental discrimination on the basis of race.[21]

11. *See infra* Part V.

12. *See infra* Part VI.

13. *See* Batson v. Kentucky, 476 U.S. 79, 82 (1986).

14. *See id.*; *see also Venire*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining term "venire"). Venire is defined as a "panel of persons selected for jury duty and from among whom the jurors are to be chosen." *Id. Voir dire* is defined as a "preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." *Voir Dire*, BLACK'S LAW DICTIONARY, *supra* (defining term "*voir dire*").

15. *See Batson*, 476 U.S. at 82-83.

16. *See id.* at 83 (noting racial pattern of prosecutor's strikes).

17. *See id.* (summarizing counsel's constitutional basis for motion).

18. 100 U.S. 303 (1880).

19. *See id.* at 310 (ruling statute discriminating in selection of jurors based on race denies equal protection of law); *see also* Batson v. Kentucky, 476 U.S. 79, 85 (1986) (explaining impact of *Strauder* decision in present case).

20. *See Strauder*, 100 U.S. at 306, 308 (noting backbone of decision rested on protections in Fourteenth Amendment); *see also Batson*, 476 U.S. at 85 (discussing *Strauder* holding).

21. *See Strauder*, 100 U.S. at 306 (holding Fourteenth Amendment not only assures citizenship privileges, but also prevents withholding of equal protection).

"Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure."[22] I believe that *Strauder* only proclaims equality in theory, because *Strauder*, the ancestor of *Batson*, was flawed in practice. In both cases, the prosecutors were allowed to exclude blacks as jurors for virtually any conceivable reason, other than on the basis of race. Currently, a prosecutor is free from consequences if they articulate any reason—manufactured or not—that distracts from a racially discriminatory purpose, thereby legally achieving the goal of an all-white or substantially white jury. Today, under *Batson*'s fake racial equality in peremptory strike rationale, a prosecutor motivated by race is undoubtedly willing to tolerate the *Batson* rule of judicially-approved, de facto race-based exclusion of black jurors.

A black or white defendant has the right to be tried by a jury whose participants are not chosen on the basis of race.[23] The Equal Protection Clause protects a black defendant from the fake, self-serving inference that members of his or her race are not qualified to serve as jurors.[24] Discrimination on the basis of race during juror selection undermines a black defendant's faith in an impartial criminal justice system.[25] Ultimately, the ability to serve as a juror should depend on a race-neutral judgment of a person's qualifications and his or her ability to impartially assess evidence offered during the trial.[26] Racial stereotyping is not related to whether a person is qualified to serve as a juror.[27] Since *Strauder*, the Supreme Court has consistently held that when a state denies a person the right to serve as a juror on the basis of race, the state has "unconstitutionally discriminated against the excluded juror."[28] "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[29] Discrimination in the judicial system, resulting from racial prejudice, creates unequal burdens on citizens of color seeking to serve as jurors and denies black defendants their right to equal justice

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

23. *See Strauder*, 100 U.S. at 309 (questioning compatibility of all-white juries with constitutional commands of equal protection).

24. *See Batson*, 476 U.S. at 86 (noting role Equal Protection Clause plays in protecting from false assumptions of jurors); *see also* Norris v. Alabama, 249 U.S. 587, 599 (1935) (holding state cannot exclude and deem black jurors unqualified on basis of race); Neal v. Delaware, 103 U.S. 370, 397 (1880) (calling out racist motivation behind exclusion of black jurors).

25. *See* Batson v. Kentucky, 476 U.S. 79, 87 (1986) (observing impact of racial discrimination in jury selection).

26. *See id.* (outlining nature of juror competency); Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) (noting competence of juror disconnected from race).

27. *See Batson*, 476 U.S. at 87 (adopting Justice Frankfurter's argument from *Thiel*).

28. *See id.* (noting Supreme Court's history of finding unconstitutional discrimination within judicial system).

29. *Id.*

regardless of race.[30]

*Batson*, holding that the Equal Protection Clause prohibits exercising peremptory strikes to remove jurors solely based on race, failed to provide meaningful safeguards to shield a black criminal defendant from a prosecutor, acting on the basis of race, deliberately and methodically denying black citizens the right to serve as jurors in the defendant's trial.[31] Justice Thurgood Marshall correctly predicted in his concurring opinion in *Batson* that the decision would not stop the racial discrimination that peremptory challenges routinely allow.[32] Soon after the Court's *Batson* decision, prosecutors developed techniques to evade or defeat a "*Batson* challenge" in order to continue the traditional pattern and practice of discriminating against black jurors on the basis of race.[33] These racist procedures were revealed one year after *Batson* when a training video from the Philadelphia District Attorney's office was leaked.[34] The video showed Assistant District Attorney Jack McMahon giving the following advice to inexperienced prosecutors:

> When you do have a black jury, you question them at length. And on this little sheet that you have, mark something down that you can articulate later. . . . You may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race.[35]

Similar behaviors, policies, and manuals could be found throughout the offices of prosecutors in the United States.[36] The use of these tactics provides overwhelming evidence that intentional discrimination to eliminate potential black jurors on the basis of race was, and still is, unrelenting.[37] It is conceded, however, that "[t]he problems and limitations that exist within *Batson* challenges are undeniable, but it is important that such a challenge exists within the system.

30. *See id*. at 87-88 (discussing wide-ranging impact of discrimination in jury selection); *see also* Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (noting racial discrimination of groups perpetuates assertion of inferiority).

31. *See* Drew Findling, *Beyond* Batson*: Challenging Systemic Racism at Every Level*, CHAMPION, July 2019, at 5, 5, https://www.nacdl.org/Article/July2019-FromthePresidentBeyondBatsonChallengingSy [https://perma.cc/7cx7-tmx9] (noting *Batson*'s intention to protect from exclusion based on race ineffective per Justice Marshall's prediction).

32. *See id.* (citing Batson v. Kentucky, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring)) (crediting Justice Marshall with excellent foresight on limited effectiveness of *Batson* decision).

33. *See id*. (describing troubling techniques prosecutor developed to defeat *Batson* challenges).

34. *See id*. (recognizing use of racist procedures arose immediately following *Batson* decision).

35. Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015) (alteration in original), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors [https://perma.cc/zvz7-r9by] (quoting advice given by Assistant District Attorney McMahon).

36. *See* Findling, *supra* note 31, at 5 (emphasizing wide-spread use of racial discrimination practices among prosecutors).

37. *See* Elizabeth Weill-Greenberg, *The Persistent History of Excluding Black Jurors in North Carolina*, APPEAL (Aug. 26, 2019), https://theappeal.org/north-carolina-black-jury-selection/ [https://perma.cc/UX2Q-LEYY] (comparing states with similar problematic policies promoting racial discrimination in prosecuting offices).

Making a motion pursuant to *Batson* is a way for a defendant, through his attorney, to call out the likelihood of racism affecting and infiltrating the trial."[38] In *Batson*, the Supreme Court held that a state may not discriminate on the basis of race when using peremptory challenges to remove prospective jurors in a criminal trial.[39] It is my position that the *Batson* approach is not effective as a practical matter because strict scrutiny is not required to justify a nondiscriminatory removal of a black juror.[40] Nevertheless, I suggest that the *Batson* motion could help end discrimination on the basis of race if granted anytime race is a factor in the selection of jurors.

## III. AN ANALYSIS OF *FLOWERS V. MISSISSIPPI* AND THE LINK BETWEEN PEREMPTORY CHALLENGES AND DISCRIMINATION ON THE BASIS OF RACE

In 1996, Curtis Flowers, a black man, was accused of killing four individuals in Winona, Mississippi.[41] Flowers went to jury trials six times for allegedly killing those individuals.[42] In all six trials, the lead prosecutor for Mississippi was the same.[43] Although the first three trials resulted in convictions, the Mississippi Supreme Court reversed those decisions.[44] The *Flowers I* conviction was reversed as a result of many examples of prosecutorial misbehavior.[45] In *Flowers II*, despite the prosecutor's attempt to use a peremptory challenge to exclude a black juror on the basis of race, the trial court seated the black juror.[46] The second conviction was reversed because of prosecutorial misbehavior during the trial.[47] The Mississippi Supreme Court overturned the *Flowers III* conviction holding that the prosecutor discriminated against black jurors on the basis of race.[48]

In its opinion, the Mississippi Supreme Court stated that Flowers presented the clearest prima facie case of *Batson* discrimination on the basis of race ever considered by the court.[49] The Mississippi Supreme Court held that Mississippi discriminated during jury selection in *Flowers III* when the prosecutor intentionally eliminated potential African-American jurors on the basis of race.[50]

38. *See* Findling, *supra* note 31, at 5 (stressing importance of access to *Batson* challenges).

39. Batson v. Kentucky, 476 U.S. 79, 89 (1986) (prohibiting prosecutors from striking jurors based on race).

40. *Contra id.* at 93-94 (allowing exclusion of black jurors from venire even with motion to challenge).

41. *See Flowers VI*, 139 S. Ct. 2228, 2234 (2019) (stating Flowers's race and discussing alleged murders).

42. *See id.* (discussing six jury trials); *supra* note 2 (detailing short-form references for each trial and subsequent appeals).

43. *See Flowers VI*, 139 S. Ct. at 2234 (explaining same lead prosecutor represented State in each trial).

44. *See id.* at 2235 (discussing three convictions and subsequent reversals).

45. *See Flowers I*, 773 So. 2d 309, 327 (Miss. 2000) (en banc) (concluding misconduct included "introduction of matters totally unsupported by any evidence").

46. *See Flowers VI*, 139 S. Ct. at 2235 (describing history of *Flowers II* trial in lower court).

47. *See Flowers II*, 842 So. 2d 531, 564 (Miss. 2003) (en banc) (holding prosecution went far beyond realm of admissible evidence).

48. *See Flowers III*, 947 So. 2d 910, 939 (Miss. 2007) (en banc) (plurality opinion).

49. *Id.* at 935.

50. *See id.* at 936, 939 (explaining evidence of racial discrimination).

*Flowers IV* and *Flowers V* ended in mistrials due to hung juries.[51] In the sixth trial, Flowers was convicted and again appealed to the Mississippi Supreme Court.[52] During the sixth trial, Mississippi struck five of the six black potential jurors.[53] In his appeal before the Mississippi Supreme Court, Flowers contended that Mississippi violated *Batson* by using its peremptory strikes to remove black jurors on the basis of race, but the court upheld his conviction.[54] After two petitions to the Supreme Court of the United States, the Court ultimately reversed the Mississippi Supreme Court's decision under *Batson*.[55]

### *A. Relevant Facts from Flowers's Sixth Trial*

In 1996, in Winona, Mississippi, four employees of the Tardy Furniture Store, three of whom were white and one of whom was black, were killed.[56] Of the five thousand residents of Winona, 53% were black and 46% were white.[57] In 2019, when reviewing Flowers's appeal of his conviction, the Supreme Court specifically focused on the *Batson* issue raised during his sixth trial.[58] At the sixth trial, the jury pool consisted of twenty-six potential jurors—six black and twenty white.[59] Mississippi used six peremptory strikes, five of which were used to exclude black persons as jurors, resulting in one black person sitting on the jury.[60] Flowers contended that Mississippi had continued its pattern and practice of using its peremptory strikes on the basis of race in his murder trials.[61] Failing to address Mississippi's problematic history in using its peremptory challenges on the basis of race, the trial court concluded that Flowers was not a victim of peremptory discrimination on the basis of race because Mississippi had provided a conceivable, race-neutral motive for each peremptory strike involved in removing the five potential black jurors.[62] The jury that convicted Flowers and recommended the death penalty in the sixth trial consisted of eleven white jurors

51. *See Flowers VI*, 139 S. Ct. 2228, 2235 (2019) (describing issues in Flowers's previous trials).

52. *See id.* (describing Flowers's argument on appeal to Mississippi Supreme Court).

53. *See id.* (discussing State's use of peremptory strikes in sixth trial).

54. *See Flowers VI*, 158 So. 3d 1009, 1046, 1075 (Miss. 2014) (en banc) (reiterating Flowers's argument on appeal and ultimate conclusion of court, affirming conviction for capital murder), *vacated*, 136 S. Ct. 2157 (2016) (mem.).

55. *See Flowers VI*, 139 S. Ct. at 2235 (reversing judgment of Mississippi Supreme Court). In 2016, the Court granted certiorari, vacated the Mississippi Supreme Court's decision, and remanded the case. *Flowers VI*, 136 S. Ct. 2157, 2157 (2016) (mem.). On remand, in a five-to-four split decision, the Mississippi Supreme Court found no *Batson* violations and reinstated the conviction. *Flowers VI*, 240 So. 3d 1082, 1092 (Miss. 2017) (en banc). In 2018, the Supreme Court granted certiorari again to address whether the peremptory strike of a black prospective juror was motivated by discriminatory intent. *Flowers VI*, 139 S. Ct. at 2235.

56. *See Flowers VI*, 139 S. Ct. at 2235-36 (describing underlying events giving rise to Flowers's murder charge).

57. *See Flowers VI*, 139 S. Ct. 2228, 2236 (2019) (outlining racial distribution in community of Winona).

58. *See id.* at 2246-51 (employing *Batson* standard to assess jury selection during Flowers's sixth trial).

59. *See id.* at 2237 (noting number and race of potential jurors).

60. *See id.* (describing State's use of peremptory strikes in sixth trial).

61. *See Flowers VI*, 139 S. Ct. at 2237 (acknowledging issues raised by Flowers's counsel).

62. *See id.* (describing findings in Mississippi trial court).

and one black juror.[63]

The Mississippi Supreme Court affirmed the trial court's conclusion that the *Batson* rule was not violated.[64] In doing so, the court implicitly accepted the dysfunctional legal reality that Mississippi's race-neutral justifications were authorized by *Batson*.[65] The Supreme Court of the United States vacated the judgment of the Mississippi Supreme Court, and remanded the case for reconsideration in light of the Court's recent decision in *Foster v. Chatman*.[66] On remand, the Mississippi Supreme Court again held in a five-to-four decision that *Batson* was not violated and reinstated Flowers's conviction.[67] Unfortunately, Mississippi easily reinstated and affirmed Flowers's conviction under *Batson* because the dysfunctional rule virtually allows a prosecutor to remove a potential black juror on the basis of race by simply stating that the black person is not being removed on the basis of race as a juror, but for a conceivable reason other than race. For example, a prosecutor could strike a potential black juror because he or she appeared to be more nervous or uncomfortable than a potential white juror when answering oral questions presented by a white prosecutor.

### *B. An Analysis of Flowers's Sixth Trial*

The Supreme Court's majority opinion in *Flowers VI* begins its analysis by emphasizing that "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."[68] The Court's analysis in *Flowers VI* is flawed, however, because the Court failed to recognize that the blanket discretion to use peremptory strikes against black jurors for any conceivable race-neutral reason violates the Equal Protection Clause. The Equal Protection Clause requires that race may be a predominant factor only if Mississippi's jury selection process survives the demanding strict scrutiny test.[69] The Court stated that *Flowers VI* arose at the intersection of the peremptory challenge and the Equal Protection Clause.[70] Further, the Court reviewed *Strauder*, and declared:

63. *See Flowers VI*, 139 S. Ct. 2228, 2237 (2019) (setting forth jury makeup and recommended sentence in sixth trial).

64. *See Flowers VI*, 158 So. 3d 1009, 1057-58 (Miss. 2014) (en banc) (rejecting Flowers's *Batson* challenges), *vacated*, 136 S. Ct. 2157 (2016) (mem.).

65. *See id.* at 1046 (providing standard employed for *Batson* challenges).

66. *See Flowers VI*, 136 S. Ct. 2157, 2157 (2016) (mem.); *see also* Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016). In *Foster*, the Supreme Court decided that the defendant proved a *Batson* violation. *Foster*, 136 S. Ct. at 1755 (discussing "concerted effort to keep black prospective jurors off the jury").

67. *See Flowers VI*, 240 So. 3d 1082, 1092, 1134-35, 1153 (Miss. 2017) (en banc) (holding *Batson* claims without merit and conviction affirmed).

68. *See Flowers VI*, 139 S. Ct. at 2238 (emphasizing significance of jury in determining guilt or innocence).

69. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding peremptory challenges of individual jurors subject to Equal Protection Clause).

70. *Flowers VI*, 139 S. Ct. 2228, 2238 (2019).

> [T]he Fourteenth Amendment require[s] "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." In the words of the *Strauder* Court: "The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and . . . qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority."[71]

Ultimately, the *Flowers VI* Court reaffirmed the very principle the Constitution forbids: striking even a single prospective juror on the basis of race.[72]

While reviewing the *Batson* issue in the *Flowers VI* case, the Court considered four types of evidence: the history from Flowers's trials; the prosecutor's striking of five of the six black prospective jurors at the sixth trial; the prosecutor's substantially disproportionate questioning of black and white prospective jurors at the sixth trial; and the prosecutor's "race-neutral reasons" for striking one black juror, while allowing similarly situated white jurors to serve on the jury at the sixth trial.[73] First, the Court considered the relevant history of the case and stated that a defendant may prove racial discrimination by establishing a historical pattern of racial exclusion of jurors in that jurisdiction.[74] In *Flowers VI*, the history of the prosecutor's peremptory strikes in four of Flowers's first five trials strongly supported the conclusion that his use of peremptory strikes in the sixth trial was motivated by discriminatory intent.[75] The Court acknowledged that over the course of the first four trials, there were thirty-six black prospective jurors against whom the State could have exercised a peremptory strike, and the State attempted to strike all thirty-six.[76] I believe that considering the relevant history of racial discrimination in Mississippi is not very helpful because *Batson* permits Mississippi to neutralize this history simply by articulating a conceivable race-neutral justification.

Second, the Supreme Court considered Mississippi's strikes of five of the six black prospective jurors at Flowers's sixth trial.[77] The Court noted *Batson*'s holding that "a 'pattern' of strikes against black jurors included in the particular

71. *Id.* at 2239 (citation omitted) (quoting Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880)).

72. *See id.* at 2244 (discussing constitutionality of striking jurors); *see also* Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016) (reaffirming unconstitutionality of discriminatory jury striking).

73. *See Flowers VI*, 139 S. Ct. at 2244 (noting categories of evidence considered by Court).

74. *See id.* at 2244-45 (noting pattern of racial exclusion in jury selection).

75. *Id.* at 2245.

76. *Flowers VI*, 139 S. Ct. 2228, 2245 (2019).

77. *Id.* at 2246 (highlighting impact of prosecution's striking of five of six prospective black jurors).

venire might give rise to an inference of discrimination."[78] In Flowers's sixth trial, the State only accepted one black prospective juror and struck the other five black prospective jurors, resulting in a jury of eleven white jurors and one black juror.[79] The *Flowers VI* Court acknowledged the trial record, as a whole, suggested that under *Batson*'s rationale, Mississippi's decision to strike five of the six black prospective jurors was evidence of intentional discrimination on the basis of race.[80] Under *Batson*, however, the Mississippi Supreme Court believed it was acceptable, as an evidentiary matter, for the prosecutor to strike five of the six black jurors at Flowers's sixth trial simply because the State had articulated a conceivable race-neutral justification for the exclusion.[81]

Third, the Supreme Court reviewed Mississippi's substantial disparate questioning of black and white prospective jurors in *voir dire* for Flowers's sixth trial.[82] The Court pointed out that disparate questioning can be probative of discriminatory intent on the basis of race.[83] The *Flowers VI* Court quoted *Miller-El v. Cockrell*[84] in saying, "if the use of disparate questioning is determined by race at the outset, it is likely [that] a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination."[85] The Court stated that the disparate treatment in the prosecutor's questioning can be evidence of whether the prosecutor's underlying goal is to determine the qualifications of black and white jurors or discriminate on the basis of race.[86] The prosecutor's substantially disparate questioning of black and white prospective jurors provided credible evidence that the prosecutor was seeking to paper the record and disguise an intent to discriminate on the basis of race in violation of *Batson*.[87] The Supreme Court concluded that the historical evidence from the earlier trials, the State's striking of five out of the six black potential jurors at the sixth trial, and the substantially disparate questioning and investigating of black and white potential jurors at the sixth trial created a reasonable inference that Mississippi discriminated on the basis of race.[88]

78. *Id.* (quoting Batson v. Kentucky, 476 U.S. 79, 97 (1986)).

79. *See id.* (noting trial court history of *Flowers VI*).

80. *See Flowers VI*, 139 S. Ct. at 2246 (noting substantial discriminatory intent).

81. *See id.* at 2248 (criticizing Mississippi Supreme Court determination).

82. *See Flowers VI*, 139 S. Ct. 2228, 2246-47 (2019) (describing Court's analytical approach). The prosecution persistently questioned potential black jurors as opposed to the minor questioning potential white jurors received. *See id.*

83. *See id.* at 2246; *Batson*, 476 U.S. at 97 (recognizing circumstances relevant to determining discriminatory purpose).

84. 537 U.S. 322 (2003).

85. *See Flowers VI*, 139 S. Ct. at 2247 (alteration in original) (quoting *Miller-El*, 537 U.S. at 344) (determining racially discriminatory questioning likely pretextual).

86. *See id.* at 2248 (identifying possible reasons for disparate questioning).

87. *See id.* (concluding disparate treatment of potential jurors related to race).

88. *See Flowers VI*, 139 S. Ct. 2228, 2248 (2019) (describing basis for determining prosecutor's actions based on race of at least one juror).

Because of the *Batson* escape to a conceivable race-neutral justification for removing blacks from the jury at the sixth trial, the Mississippi Supreme Court took the low ground when it decided the Mississippi prosecutor did not act on the basis of race in violation of the equal protection of the law concept. In overturning the Mississippi Supreme Court's decision, the Supreme Court of the United States held that at least one of the black prospective jurors' elimination was motivated by racial discrimination, which is prohibited by the Constitution.[89]

## IV. *BATSON* WILL CONTINUE TO REMAIN A TOOTHLESS TIGER IN THE ABSENCE OF STRICT SCRUTINY

*Batson* held that the Equal Protection Clause prohibits exercising peremptory strikes against jurors on the basis of race to safeguard equal justice under the law.[90] Nevertheless, the Supreme Court's remedy under the Equal Protection Clause to protect peremptory challenges for discriminating on the basis of race is dysfunctional. This remedy is flawed because the Court does not require prosecutors to meet the strict scrutiny test to justify the disproportionate removal of black jurors in a case involving a black defendant, even in circumstances where the removal would leave the jury disproportionally white or all white.[91] The *Batson* Court never gave the reason for its refusal to apply the strict scrutiny analysis to peremptory challenges where a reasonable inference existed that jurors were excluded on the basis of religion or, by analogy, race.[92]

A state has a "legitimate interest in achieving a fair and impartial trial" with peremptory strikes, but peremptory strikes are not legitimate tools to violate a black defendant's undeniable rights to equal justice.[93] The Fourteenth Amendment's prohibition against discrimination on the basis of race by prosecutors is promoted by requiring prosecutors to demonstrate a compelling justification, greater than a black person's unequal opportunity to serve as a

89. *See id.* (holding disqualification of even one juror for discriminatory purposes violates Constitution). *See generally* U.S. CONST. amend XIV.

90. *See* Batson v. Kentucky, 476 U.S. 79, 97-98 (1986) (explaining guarantee of equal protection means no racial discrimination); *see also* Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (concluding racial discrimination for jury selection violates Equal Protection Clause). *See generally* Findling, *supra* note 31, at 5 (indicating removal of jurors on basis of race violates Equal Protection Clause).

91. *See Batson*, 476 U.S. at 96 (explaining defendant must make prima facie case of purposeful discrimination); *see also* Robert W. Gurry, *The Jury Is Out: The Urgent Need for a New Approach in Deciding When Religion-Based Peremptory Strikes Violate the First and Fourteenth Amendments*, 18 REGENT U. L. REV. 91, 100-01 (2005) (stating what defendant must show to make prima facie case of discrimination). If the prosecution could not proffer a race-neutral explanation for the peremptory challenge, the strike could be precluded. *See* Gurry, *supra*, at 98-99.

92. *See* Gurry, *supra* note 91, at 98-99 (describing *Batson* Court's failure to explain lack of strict scrutiny).

93. *See id.* at 114-15; *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136-37 (1994) (noting states have legitimate interest in achieving fair trials); 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, 569-70 (1996) (noting Equal Protection Clause prohibits discriminatory peremptory challenges).

juror.[94] The prohibition against discrimination on the basis of race in jury selection makes race neutrality in jury selection a visible and inevitable measure of the judicial system's commitment to the Constitution's commands.[95] Moreover, the Equal Protection Clause guarantees that every person who is "granted the opportunity to serve on a jury [has] the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."[96] Because the denial of equal protection includes the denial of the right to serve as a juror, and because this denial is not ordinarily checked by the political process, racial minorities are entitled to the most searching judicial inquiry of strict scrutiny when they are excluded from jury service on the basis of race.[97]

In *Washington v. Davis*,[98] the Supreme Court, led by Chief Justice Burger, refused to apply the strict scrutiny test to facially-neutral laws that adversely impacted racial minorities.[99] In *Washington*, the Supreme Court did not apply strict scrutiny to review laws that disproportionately impaired racial minorities because implicitly, the Court believed that the implementation of racially disparate policies are presumed valid when subjected to an equal protection challenge.[100] In *Flowers VI*, the Supreme Court said aside from "voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."[101] I believe the Supreme Court's *Flowers VI* opinion demonstrates that facially-neutral judicial criteria, which disproportionately removes blacks from juries, are not entitled to a presumption of validity because other states have long histories of excluding blacks as jurors on the basis of race.

The Supreme Court should apply strict scrutiny and require that prosecutors justify their peremptory strikes on individuals who are members of a suspect class. Strict scrutiny and its compelling interest element are useful tools to safeguard the rights of racial minorities that serve as jurors. Without strict scrutiny safeguards, minorities are still subject to the relentless grasp of racial discrimination. The Supreme Court has long held legal restrictions that limit the civil rights of a single racial group are immediately suspect and "ethnic distinctions of any sort are inherently suspect and thus call for the most exacting

94. *See* Casarez v. State, 913 S.W.2d 468, 471-72 (Tex. Crim. App. 1994) (en banc) (citing Powers v. Ohio, 499 U.S. 400, 415-16 (1991)) (noting prosecutors need compelling interest to satisfy Fourteenth Amendment).

95. *See Powers*, 499 U.S. at 416 (discussing judicial system's actions pursuant to Fourteenth Amendment's Enabling Clause).

96. *Casarez*, 913 S.W.2d at 474 (quoting *J.E.B.*, 511 U.S. at 141-42).

97. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (acknowledging prejudice against minorities may require higher standard of judicial inquiry).

98. 426 U.S. 229 (1976).

99. *See id.* at 248 (declining to extend strict scrutiny to racially burdensome, but neutral, laws).

100. *See id.* (deferring to legislative judgment); *see also* Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1595-96 (2013) (positing Court's implicit deference to democratic process).

101. *See Flowers VI*, 139 S. Ct. 2228, 2238 (2019).

judicial examination."[102] As a result, a black citizen is denied the fundamental civil right of a fair and impartial trial by a jury of his or her peers if potential jurors are systematically excluded on the basis of their race.[103] Peremptory strikes that utilize the current, *Batson* challenge burden-shifting test should be subject to strict scrutiny—the most rigid form of judicial scrutiny—because it helps protect the right to a fair and impartial trial by a jury of one's peers, who were neither selected nor excluded on the basis of race.

Because the government has a compelling state interest in safeguarding racial equality in jury selection under the Equal Protection Clause, I support the argument that it should be clear by now that the *Batson* Court erroneously created a burden-shifting test that falls far below the Equal Protection Clause's strict scrutiny analysis. Under *Batson*'s burden-shifting test, the challenging party must first make a prima facie showing that a peremptory challenge has been exercised on the basis of an impermissible characteristic such as race; second, the opposing party offers its nondiscriminatory reasons for striking the juror; and third, the trial court determines, based on the parties' submissions, whether the moving party has met its burden of proving intentional discrimination on the basis of race.[104] Free of the strict scrutiny requirement, studies show that *Batson*'s burden-shifting test permits prosecutors to strike prospective jurors on the basis of race and allows peremptory strikes to exclude prospective jurors unreasonably on the basis of race.[105] Peremptory strikes have a long and continuing history of being used as tools to keep racial minorities off juries by allowing prosecutors to assert any facially-neutral reason—fake or real—for striking a juror because judges are very often unable to determine whether those reasons are for legitimate race-neutral purposes.[106] The Supreme Court has stated that the peremptory challenge is "essential to the fairness of trial by jury."[107]

The *Batson* Court failed to heed the warnings of Justice Thurgood Marshall that its burden-shifting test would not deter prosecutors from making peremptory challenges on the basis of race.[108] Justice Marshall warned that the *Batson*

102. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (noting Court has never questioned judicial scrutiny to legal restrictions based on race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (subjecting race-based restrictions to strict scrutiny). The *Korematsu* Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny." 323 U.S. at 216.

103. *See* U.S. CONST. amend. VI (establishing all criminal defendants have right to impartial jury).

104. *See* United States v. Stephens, 514 F.3d 703, 710 (7th Cir. 2008) (outlining three-part *Batson* test).

105. *See* Stephen B. Bright, *Our Jury System Is Racially Biased. But It Doesn't Have to Be That Way.*, WASH. POST: OPINIONS (Mar. 27, 2019), https://www.washingtonpost.com/opinions/2019/03/27/our-jury-system-is-racially-biased-it-doesnt-have-be-that-way/ [https://perma.cc/23UP-V5FM] (noting studies show prosecutors successfully use racial bias in jury selection).

106. *Id.*

107. Lewis v. United States, 146 U.S. 370, 376 (1892).

108. *See* Batson v. Kentucky, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring) (concluding complete elimination of peremptory challenges only solution to eradicate racially discriminatory challenges).

burden-shifting test would be a toothless tiger for protecting the rights of black defendants against peremptory challenges because a prosecutor can provide any conceivable reason to justify his or her thinly-disguised racial discrimination.[109] He was right. Legal scholars have condemned *Batson* as "almost surely a failure" because it created an "enforcement nightmare" by allowing prosecutors to strike black jurors and later assert they are not striking them on the basis of race, but on their perceived ideology, and nothing prevents prosecutors from using demographic stereotyping as a guide to jurors' ideologies.[110] Because *Batson* has become a wolf in sheep's clothing that eats the jury-serving rights of black citizens, *Batson* requires strict scrutiny to serve as a check on exercising peremptory challenges on the basis of race. When the Supreme Court allows a state to use a peremptory strike on a prospective black juror without requiring a compelling justification that is narrowly tailored with no less restrictive alternatives available, it has abandoned a black juror as an insular and discrete racial minority in the judicial process in need of heightened judicial review from a prosecutor abusing, on the basis of race, the exercise of his or her power.

## V. UNBRIDLED PROSECUTORIAL DISCRETION TO USE PEREMPTORY STRIKES TO REMOVE A BLACK JUROR VIOLATES THE DUE PROCESS CLAUSE

The Supreme Court should eliminate peremptory challenges in the jury selection process for criminal trials under the Due Process Clause because such a procedure leaves the prosecutor with unbridled discretion to exercise his or her power in an arbitrary manner. Procedural due process entitles a defendant to a reasonable opportunity to be heard at a meaningful time and in a meaningful manner.[111] In *Seubert v. State*,[112] a Texas appellate court held that due process requires that prosecutorial peremptory challenges should not deprive a defendant of a competent and impartial tribunal.[113] A prosecutor's unbridled discretion in the use of peremptory strikes on the basis of race, with a limitless use of "non-racial" reasons, denies a defendant a meaningful opportunity to be heard before impartial jurors in the tribunal. The Supreme Court has historically and consistently been wary of unbridled discretion by government actors.[114] An

109. *See id*. (asserting *Batson* decision will not end racial discrimination).

110. *See* Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 503 (1996) (calling for end to peremptory challenges); William T. Pizzi, Batson v. Kentucky*: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 134 (raising problems with *Batson*); Joshua Revesz, Comment, *Ideological Imbalance and the Peremptory Challenge*, 125 YALE L.J. 2535, 2535-38 (2016) (noting *Batson* does not prevent attorneys from striking jurors based on perceived ideologies).

111. *See* Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (holding motion appropriate to ensure petitioner received due process of law); *see also* Grannis v. Ordean, 234 U.S. 385, 394 (1914) (noting constructive notice to parties satisfies due process).

112. 749 S.W.2d 585 (Tex. Ct. App. 1986).

113. *Id.* at 588 (highlighting traditional view of peremptory challenges).

114. *See* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 133 (1992) (stating "First Amendment

unjust court would allow a powerful government actor in the position of a prosecutor to deny a person of life, liberty, or property by manipulating the racial makeup of a jury through unbridled discrimination. The right to use peremptory challenges is characterized as an "arbitrary and capricious right."[115] Justice Marshall said the *Batson* decision would be an ineffective remedy to end racial discrimination endangered by peremptory challenges.[116] As a result, Justice Marshall believed the only way to prevent racial discrimination in the jury selection process is to eliminate peremptory challenges entirely.[117]

Because *Batson* has not been very useful in combatting discrimination on the basis of race, I join the many commentators who support the abolition of peremptory challenges altogether.[118] Other supporters of abolishing peremptory challenges contend that "beyond protecting individual rights and improving perceived and actual case outcomes, eliminating peremptory challenges has the potential to function as a much-needed constraint on prosecutorial discretion."[119] Commentators attacking peremptory challenges believe where there is discretion, there is always the danger it will be a vehicle for unlawful discrimination.[120] Even if peremptory strikes serve a compelling justification to enhance the fairness of a trial by jury, a more efficient legal system seeking to remove discrimination on the basis of race—while promoting equal justice for all—would exclusively include a cause-based system for challenges.[121] For-cause challenges ensure the same benefits of peremptory challenges while avoiding their defects.[122] According to *Swain v. Alabama*,[123] peremptory challenges allow lawyers to remove prospective jurors for real or imagined partiality, or even hostility engendered during *voir dire*.[124] The Supreme Court should eliminate such peremptory challenges in criminal trials under a Due

prohibits the vesting of such unbridled discretion in a government official"); Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982) (plurality opinion) (holding school board attempt to claim absolute authority misplaced); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (recognizing city licensing board not vested with unfettered discretion).

115. *See* Lamb v. State, 36 Wis. 424, 427 (1874).

116. *See* Batson v. Kentucky, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring).

117. *Id.* at 103.

118. *See* Note, *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121, 2123 (2006) (arguing elimination of peremptory challenges would protect individual rights and limit prosecutorial discretion); *supra* note 110 (providing additional commentary suggesting elimination of all peremptory challenges).

119. *See* Note, *supra* note 118, at 2123 (identifying primary justification for support of abolishing peremptory challenges).

120. *See id.* at 2124 (describing potential juror dangers of prosecutorial discretion).

121. *See* Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 283 (1986) (concluding legislatures should abolish peremptory challenges).

122. *See* Note, *supra* note 118, at 2142 (claiming elimination would protect individual rights and improve perceived and actual outcomes).

123. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

124. *See id.* at 220-21 (describing function of peremptory challenges); *see also* Times Editorial Bd., *The Problem with Peremptory Challenges*, L.A. TIMES: OPINION (Sept. 20, 2013, 12:00 AM), https://www.latimes.com/opinion/editorials/la-xpm-2013-sep-20-la-ed-peremptory-challenges-sexual-orientation-20130920-story.html [https://perma.cc/9RZC-JT8Q] (distinguishing peremptory challenges from for-cause challenges).

Process Clause analysis because these challenges allow a prosecutor to unconstitutionally exercise power in an arbitrary manner.

## VI. CONCLUSION

Unlike the Supreme Court of the United States, the Mississippi Supreme Court was not persuaded that Flowers was discriminated against on the basis of race in his sixth trial. To justify this decision, Mississippi provided a conceivable race-neutral justification for removing blacks from the jury, which is permitted under *Batson.*

The Supreme Court uses the strict scrutiny standard when it is serious about providing an effective judicial remedy to combat racial discrimination. Because exercising peremptory strikes in a criminal trial where there is an allegation of racial discrimination is not subject to a strict scrutiny analysis, is it clear the Supreme Court is not serious about providing an effective judicial remedy to end discrimination against jurors on the basis of race. When the denial of the right to serve as a juror occurs with peremptory challenges for racial reasons, it is not ordinarily checked by the political process. Racial minorities are entitled to a heightened judicial inquiry of strict scrutiny when they are excluded from jury service by racially discriminatory peremptory challenges.