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ARTICLE

THE END OF *BATSON*? RULEMAKING, RACE, AND CRIMINAL PROCEDURE REFORM

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On January 1, 2022, the Arizona Supreme Court announced the most radical change to the American jury in nearly thirty-five years: the elimination of peremptory strikes. Arizona's move is part of a broader trend of states experimenting with new ways to counter racial exclusion in the selection of juries after decades of federal inaction. Perhaps as noteworthy as the reforms themselves is the way in which many have come about: Rather than announcing new constitutional rules or awaiting legislation, state courts have wielded their rulemaking authority to quietly change how juries are constituted.

This Article makes four contributions. First, it situates the recent wave of rulemaking in historical context, revisiting the century-long conflict between state judiciaries and legislatures for control over criminal procedure. Second, it provides a comprehensive account of the state-level reforms to jury selection, situating these developments as a response to the U.S. Supreme Court's anemic efforts to counter racial exclusion, tracking how the reforms have built upon one another, and highlighting how they depart from federal antidiscrimination doctrine. Third, it describes Arizona's historic abolition of peremptory strikes, drawing largely upon original interviews with key actors, including the Chief Justice of the Arizona Supreme Court. It surfaces a surprising

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explanation for why the overwhelmingly conservative court eliminated peremptory strikes altogether: Many perceived the reforms undertaken elsewhere as "too woke." Finally, it offers a detailed analysis of the legal landscape throughout the fifty states, exploring where ambitious state supreme courts could undertake further reforms to jury selection or criminal procedure more broadly.

INTRODUCTION

On January 1, 2022, the most radical change to the American jury in at least thirty-five years occurred in Arizona: Peremptory strikes, long a feature of American trial adjudication, were eliminated.[1] Arizona has gone furthest, but it is not alone in reforming the law of jury selection in fundamental ways. In the span of just a few years, four other states—California, Connecticut, New Jersey, and Washington—have overhauled their approach to peremptory strikes, and others are considering doing the same.[2] Under the U.S. Supreme Court's 1986 decision in *Batson v. Kentucky* and its progeny, peremptory strikes substantially motivated by a

1. See infra Part III.
2. See infra sections II.B.1–.2.

prospective juror's race[3] or sex[4] violate the Equal Protection Clause. But the new reforms are different in subtle though important ways: Most notably, they proscribe certain justifications for peremptory strikes that would disproportionately exclude protected classes from service, even when the proponent's actual subjective motivation is pristine.[5] Nearly one-fifth of the country's population now lives in a jurisdiction where *Batson v. Kentucky*'s familiar three-part framework[6] no longer governs the validity of a peremptory strike.[7]

These new legal frameworks are sometimes called "*Batson*-plus" regimes, insofar as they mandate heightened scrutiny of whether a peremptory strike is impermissibly discriminatory.[8] But this label elides the ways in which these states' new laws reject core features of the U.S. Supreme Court's decision in *Batson v. Kentucky* and its equal protection jurisprudence more generally: The new laws focus on disparate outcomes rather than discriminatory intent, ordinarily the *sine qua non* of modern constitutional discrimination claims.[9] Surveying the "racial common sense" of the Roberts Court in her recent *Harvard Law Review* Foreword, Professor Khiara M. Bridges argues that "nonwhite people cannot expect the courts to intervene in the race-neutral processes that do most of the heavy lifting of reproducing racial disadvantage and reiterating racial

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3. 476 U.S. 79, 89 (1986).

4. J.E.B. v. Alabama, 511 U.S. 127, 129–31 (1994).

5. See infra section II.B.

6. As the U.S. Supreme Court has summarized the framework:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam).

7. Specifically, approximately sixty-seven million people—about eighteen percent of the U.S. population—live in the five states (Arizona, California, Connecticut, New Jersey, and Washington) that have adopted these reforms. See U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia and Puerto Rico: April 1, 2020 to July 1, 2022 (Dec. 2022), https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html (spreadsheet on file with the *Columbia Law Review*) (providing 2022 national and state-level population estimates); infra section II.B.1 (discussing the states that have made reforms).

8. See, e.g., Peter B. Swann & Paul J. McMurdie, Petition at 14, In re Petition to Amend Rules 18.4 & 18.5 of the Ariz. Rules of Crim. Proc. & Rule 47(e) of the Ariz. Rules of Civ. Proc., No. R-21-0020 (Ariz. filed Jan. 11, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9375 [https://perma.cc/7P37-ESRW] [hereinafter Swann & McMurdie Petition] ("[A] Washington-style '*Batson* plus' approach will [not] be effective enough . . . .").

9. See Washington v. Davis, 426 U.S. 229, 248 (1976) (declining to invalidate facially neutral state action based on racially disparate outcomes); infra section II.B.

hierarchy in the post-Civil Rights Era."[10] The recent state-level reforms should be understood against this backdrop as a reaction (albeit a limited one) to the yawning gap between the U.S. Supreme Court's periodic pronouncements that racial exclusion in jury selection is "at war with our basic concepts of a democratic society and a representative government"[11] and the lived reality of its racial justice jurisprudence.[12]

This trend is noteworthy on its own, but equally important is *how* these major criminal procedure reforms are occurring. In Arizona and nearly all the other states that have adopted new jury selection regimes, state supreme courts have not waited for their legislatures to pass new statutes; nor, in the ordinary course of deciding appeals, did they construe state or federal constitutions to require these new procedures. Rather, state supreme courts have increasingly turned to rulemaking, wielding their traditional authority to control matters of procedure through the promulgation of court rules.[13] Opponents have criticized the recent reforms not just as poor policy but also as examples of judicial overreach. Legislators in Arizona, for example, accused the Arizona Supreme Court of usurping their authority to determine substantive law in the state.[14] But nothing about these state supreme courts' recent assertions of rulemaking power or the critiques is particularly novel: At various times over the past century, state judiciaries and legislatures have been in dialogue (and sometimes open conflict) over how the rules of American criminal procedure ought to be authored.[15] When thinking about what courts "do" nowadays—and, in particular, how they regulate criminal procedure—we have grown accustomed to privileging federal courts, federal constitutional doctrine, and the federal adjudicatory process. But for the vast majority of criminal defendants, rules promulgated by state supreme courts are often the primary force shaping not only jury selection but every aspect of their interaction with the adjudicatory system.[16] Indeed, in most jurisdictions in

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10. Khiara M. Bridges, The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court, 136 Harv. L. Rev. 23, 31 (2022).

11. Smith v. Texas, 311 U.S. 128, 130 (1940).

12. See Bridges, supra note 10, at 31 (characterizing the record as "ghastly"). But see Daniel S. Harawa, Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence, 110 Calif. L. Rev. 681, 685 (2022) ("While racial justice advocates can rightly take a negative view of this line of cases, viewing them as lemons, this Article recasts the cases as tools in the fight for racial justice, exploring how these lemons can be turned into lemonade.").

13. See infra Part II (discussing developments in various states); infra Part III (focusing on Arizona). California, which also developed its new rules through legislation, is the exception. See infra notes 165–180 and accompanying text.

14. See infra notes 312–322 and accompanying text (discussing Arizona's H.B. 2413 and the legislative effort to reinstate peremptory strikes).

15. See infra Part I.

16. See, e.g., infra notes 19–23 (discussing the use of procedural rules to govern pretrial diversion and expungement of convictions).

the United States, state supreme courts have long enjoyed broad authority under state constitutional law (sometimes supplemented by statutory delegations) to act as quasi-legislatures, drafting and promulgating procedural rules as they best see fit. Such rules govern everything from pretrial diversion programs[17] to the expungement of convictions,[18] and everything in between.[19]

Perhaps it is unsurprising, then, that scholars and activists are beginning to think about judicial rulemaking as a vehicle for achieving reforms that constitutional litigation or legislative advocacy have failed to deliver. In recent years, scholars focused on ending mass incarceration and reducing racial disparities in criminal justice have begun to recognize the importance of rulemaking, urging courts to promulgate new rules allowing judges to dismiss cases "in the interest of justice"[20] or to expand discovery to allow easier detection of discriminatory policing patterns.[21] State supreme courts have recently begun "to address the problems associated with fees, fines, and bail" through rulemaking, as Professor Jane S. Schacter has observed.[22] Most notably, Professor Andrew Manuel Crespo has meticulously excavated how the subconstitutional state law of criminal procedure, encompassing both statutory law and court-promulgated rules, supplies a "hidden law" that "establishes the mechanisms and legal frameworks through which prosecutorial . . . power is generated and deployed" in the context of plea bargaining.[23] And it is not just scholars who are devoting renewed attention to the issue: In 2018, dissatisfaction over the Ohio Supreme Court's failure to approve a proposed rule regarding plea bargaining spurred an insurgent candidate's (successful) bid for a seat on the court.[24]

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17. See State v. Leonardis, 375 A.2d 607, 614 (N.J. 1977) (enforcing N.J. Ct. R. 3:28).

18. Key v. State, 48 N.E.3d 333, 339–40 (Ind. Ct. App. 2015) (finding no conflict between a statutory expungement procedure and a court-promulgated procedural rule).

19. See, e.g., Alaska R. Crim. P. 43(c) (allowing courts to dismiss cases sua sponte "in furtherance of justice"); Haw. R. Penal P. 16(b)(1)(vii) (establishing a standard for pretrial disclosure of exculpatory evidence that omits the "materiality" requirement of Brady v. Maryland, 373 U.S. 83, 87 (1963)).

20. Valena E. Beety, Judicial Dismissal in the Interest of Justice, 80 Mo. L. Rev. 629, 633 (2015).

21. See Alison Siegler & William Admussen, Discovering Racial Discrimination by the Police, 115 Nw. U. L. Rev. 987, 1041 (2021).

22. Jane S. Schacter, Glimpses of Representation-Reinforcement in State Courts, 36 Const. Comment. 349, 370 (2021); see also Leonard Sosnov, *Brady* Reconstructed: An Overdue Expansion of Rights and Remedies, 45 N.M. L. Rev. 171, 191 n.122 (2014) (discussing state discovery rules eliminating the "materiality" prong of the *Brady* inquiry).

23. Andrew Manuel Crespo, The Hidden Law of Plea Bargaining, 118 Colum. L. Rev. 1303, 1306 (2018).

24. See Bob Ratterman, Judicial Candidate Expresses Frustration With the Plea Bargain Process, J.-News, https://www.journal-news.com/news/local/judicial-candidate-expresses-frustration-with-the-plea-bargain-process/DEn1cDLn83Hz2m5GLIiJjJ/ [https://perma.cc/88SY-ZLQ5] (last updated July 7, 2018); see also Michael P. Donnelly, Sentencing

But if the current wave of reform around the law of the jury is to continue or expand into other facets of criminal procedure, it is essential to take a more nuanced look at how judicial rulemaking actually operates. How many other state supreme courts could promulgate rules to overhaul the use of peremptory strikes, as Washington has done? Or eliminate them altogether, as in Arizona? What if an antagonistic legislature sought to undo such reforms?[25] The answer: It depends![26] In some jurisdictions, the state supreme court's authority to promulgate rules is expressly set forth in a state constitution; in others, it has been delegated by the legislature; in a few, it does not exist at all.[27] The rulemaking authority extends to all matters of civil and criminal procedure in many states; in a few jurisdictions, though, the state supreme court is barred from promulgating rules related to particular subject matter (e.g., juries).[28] As at the federal level, state supreme courts can typically promulgate "procedural" (as opposed to "substantive") rules, but states have adopted idiosyncratic approaches to assessing the dividing line, or overlap, between the two realms.[29] And, perhaps most importantly, states have developed disparate approaches to resolving conflicts between the judiciary and the legislature: Rules trump statutes in some states, statutes trump rules in others, and in many jurisdictions the law is unclear.[30]

This Article begins in Part I by placing the current explosion of rulemaking in historical perspective. A century ago, the legal profession's leading luminaries and the ABA fought to assert the primacy of judicial rulemaking over legislative meddling, insisting that state supreme courts (re)assume their control over procedure.[31] The crowning achievement of these efforts was Congress's passage of the Rules Enabling Act in 1934, but an even more robust version of judicial rulemaking expanded in state courts throughout the early twentieth century, too.[32] Often, rulemaking in the states looked very different than its federal counterpart: In the 1950s, the New Jersey Supreme Court declared the state legislature powerless to contradict its procedural rules, prompting prominent law reviews to

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by Ambush: An Insider's Perspective on Plea Bargaining Reform, 54 Akron L. Rev. 223, 231–33 (2020) (discussing the author's state supreme court campaign).

25. See infra section IV.C (examining state law and historical practice regarding conflicts between the judiciary and the legislature over rulemaking).

26. See infra Table 1 (displaying the authors' assessment of judicial rulemaking power to unilaterally reform the use of peremptory strikes).

27. See generally infra Part IV (highlighting the vast differences across jurisdictions).

28. See infra Appendix A (showing this to be true of states such as Arkansas).

29. See infra Appendix A (surveying these differing approaches).

30. See infra Part IV (discussing the ways in which states address such conflicts).

31. See infra Part I.

32. See infra Part I.

devote full-length articles to the issue.[33] In more recent decades, state supreme courts and legislatures have occasionally engaged in open battles over rulemaking, ranging from disputes over bail in Florida[34] to "tort reform" in Arkansas.[35] Far from a novel innovation, the recent spate of reforms to peremptory strikes falls within a long tradition of conflict over rulemaking and the control of American criminal procedure.

Part II provides an assessment of the recent wave of state-level reforms to jury selection, a trend that contrasts sharply with the U.S. Supreme Court's hands-off approach to the topic in recent decades. Beginning with the Washington Supreme Court's promulgation of General Rule 37 in 2018, courts across the country have begun experimenting with various frameworks (or, in the case of Arizona, outright elimination of peremptory strikes) to better address racial exclusion, and more may soon follow suit.[36] As the Part explains, these efforts have built upon one another, with reformers and jurists looking to other jurisdictions as they have developed their own states' models. This Article does not take a stance on the comparative merits of these reform efforts, but it does seek to surface a common feature of these projects: All have targeted the use of certain "race neutral" criteria in peremptory strikes, not just because such rationales might pretextually mask subjective bias but out of recognition that such exclusion can and does independently reinscribe racial subordination.[37] In displacing the (typically futile) search for an impermissible hidden purpose on the part of a strike's proponent, the legal frameworks in these states now reject a central feature of *Batson* and our "colorblind" equal protection jurisprudence more generally.[38]

The Article then zooms in, providing a detailed examination of how Arizona's historic decision to give up on peremptory strikes came to pass. Part III offers a case study of judicial rulemaking in action, but it is also a case study of how a longstanding goal of racial justice advocates became law in a relatively improbable jurisdiction. Why did Arizona—with its

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33. See Benjamin Kaplan & Warren J. Greene, The Legislature's Relation to Judicial Rule-Making: An Appraisal of *Winberry v. Salisbury*, 65 Harv. L. Rev. 234, 239–40 (1951); Roscoe Pound, Procedure Under Rules of Court in New Jersey, 66 Harv. L. Rev. 28, 28 (1952) (responding to Kaplan & Greene, supra); see also A. Leo Levin & Anthony G. Amsterdam, Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 1, 24–29 (1958) (discussing Winberry v. Salisbury, 74 A.2d 406 (N.J. 1950)).

34. See infra section IV.C.

35. See infra section IV.C.

36. See infra sections II.A–.B.

37. See infra section II.B.

38. But see Devon W. Carbado, Strict Scrutiny & the Black Body, 69 UCLA L. Rev. 2, 39–40 (2022) ("This atomizing, colorblind approach to race . . . is not race neutral but deeply racially invested in ignoring or explicitly dismissing contemporary manifestations of racial injustice . . . .").

staunchly conservative judiciary[39]—become the first to abolish peremptory strikes, a proposal most closely associated with Justice Thurgood Marshall?[40] As the Part explores, shortly after the tumultuous summer of 2020, when racial justice demonstrations prompted the governor to impose a statewide emergency curfew order, the Arizona Supreme Court had before it two dueling rule-change proposals related to jury selection. The first was a reform proposal, modeled after Washington and California's measures; the second urged scrapping peremptory strikes altogether.[41] But over several months of debate, certain criticisms of the Washington-style reform proposal gained traction: With its aim of adapting *Batson* to account for "implicit, institutional, and unconscious biases"[42]—and its instruction to trial judges to determine whether "any reasonable person could view . . . race . . . as a[n] . . . unconscious factor" influencing a peremptory strike[43]—many judges came to see the Washington-style reform as "too woke."[44] Elimination of peremptories, which promised more efficient trials and no such awkward inquiries into attorneys' biases, eventually became the more attractive option.

Finally, in Part IV, the Article surveys the current lay of the land when it comes to state supreme courts' rulemaking authority. While a comprehensive comparative analysis could fill a treatise, the Part focuses on peremptory strikes (and the possibility of other states following in the footsteps of Washington or Arizona) to explore where further reforms might be possible, and where they would stall. As the Part demonstrates, most state supreme courts currently have the power to substantially revamp how jury selection occurs, with several doing so not because their state constitutions require it but because such procedural reform would have a salutary effect on the administration of justice.[45] Somewhat fewer

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39. See Hank Stephenson, Where Court Packing Is Already Happening, Politico Mag. (Oct. 12, 2020), https://www.politico.com/news/magazine/2020/10/12/where-court-packing-is-already-happening-428601 [https://perma.cc/A48D-E4FM] ("A body that had four conservatives and one liberal when [Arizona Governor Doug] Ducey took office now consisted of seven conservatives and zero liberals.").

40. Concurring in *Batson v. Kentucky*, Justice Marshall predicted that the decision would "not end the racial discrimination that peremptories inject into the jury-selection process." 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring). That goal, he argued, would only be "accomplished . . . by eliminating peremptory challenges entirely." Id. at 103.

41. See infra section III.B.

42. Jodi Knobel Feuerhelm & Lawrence S. Matthew, *Batson* Working Grp., Petition app. A at 1, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed Jan. 8, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9310 [https://perma.cc/L7KE-4SD3] [hereinafter BWG Proposal].

43. Id. app. A at 2.

44. See infra section III.C (discussing the interviews with Arizona state judges during which this sentiment was revealed).

45. See infra Part IV.

state supreme courts have the power to abolish peremptory strikes altogether, but Arizona is by no means exceptional: We assess that more than half of the country's state supreme courts probably have such power.[46] The judiciary's power to promulgate such rules in the first instance does not imply full supremacy over the legislature, however, so Part IV concludes by exploring how rule-based reforms might fare in the face of legislative pushback. A brief Conclusion considers the implications of the foregoing for criminal procedure reform moving forward, particularly in a moment when racial justice movements have centered ways in which "our criminal legal system itself . . . yields forms of domination and violence."[47]

While the judicial rulemaking authority of state supreme courts has been (we argue) underappreciated and understudied, this Article fits within several bourgeoning literatures. First, we join a growing group of scholars who contend that state courts warrant greater attention than they typically receive.[48] A focus on issues affecting state courts is both important in its own right and can usefully inform our thinking about analogous issues at the federal level.[49] Second, and relatedly, the Article's focus on the intricacies of state-level rulemaking in particular is part of a shift away from larger constitutional-doctrinal or normative questions in criminal law scholarship and toward a focus on the criminal law's real-world operation.[50] State courts are, of course, "where the overwhelming bulk of

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46. See infra Table 1.

47. Jocelyn Simonson, Police Reform Through a Power Lens, 130 Yale L.J. 778, 787 (2021).

48. See, e.g., Marin K. Levy, Packing and Unpacking State Courts, 61 Wm. & Mary L. Rev. 1121, 1132 (2020) ("[S]tate courts tend to be understudied in the academic literature . . . [perhaps because] they are challenging subjects of study."); Michael C. Pollack, Courts Beyond Judging, 46 BYU L. Rev. 719, 725 (2021) ("[S]cholars have largely overlooked the need for a systematic understanding of *state court* judges beyond traditional judging . . . ."); Miriam Seifter, State Institutions and Democratic Opportunity, 72 Duke L.J. 275, 284 (2022) (urging greater attention to the important role of state courts in limiting attacks on majoritarian institutions); Adam B. Sopko, Catalyzing Judicial Federalism, 109 Va. L. Rev. Online 144, 158 (2023), https://virginialawreview.org/wp-content/uploads/2023/07/Sopko_Book.pdf [https://perma.cc/2BYY-ET3X] (arguing that, "[w]ith their policymaking powers, [state] courts can influence the ways the state's justice system functions" to better safeguard rights); see also Jeffrey S. Sutton, 51 Imperfect Solutions 6 (2018) ("[A]n underappreciation of state constitutional law has hurt state *and* federal law and has undermined the appropriate balance between state *and* federal courts in protecting individual liberty."); Goodwin Liu, State Courts and Constitutional Structure, 128 Yale L.J. 1304, 1310 (2019) (reviewing Sutton, supra).

49. See, e.g., William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2399–400 (2015) (exploring the diversity of state court approaches to originalism when interpreting state constitutions); Joseph Blocher, Reverse Incorporation of State Constitutional Law, 84 S. Cal. L. Rev. 323, 385 (2011) (urging greater use of state constitutional doctrine to resolve problems arising under the federal Constitution).

50. Stephanos Bibas, The Real-World Shift in Criminal Procedure, 93 J. Crim. L. & Criminology 789, 791–92 (2003) (book review) (noting that "the real-world approach" to criminal law scholarship "is coming into its own"); Benjamin Levin, Rethinking the Boundaries of "Criminal Justice", 15 Ohio St. J. Crim. L. 619, 623 (2018) (book review)

criminal prosecutions actually take place."[51] And in this domain, beyond the dominance of the "two familiar legal pillars of the American criminal justice system—substantive and constitutional criminal law— . . . lies a third, unseen but essential body of law."[52] This Article explores in more granular detail how a core feature of this subconstitutional law—state judicial rulemaking—operates when it comes to race, the jury, and criminal procedure today (and perhaps tomorrow).

I. JUDICIAL RULEMAKING AND AMERICAN CRIMINAL PROCEDURE

Writing in 1928, Dean John Wigmore insisted that it was "high time" to confront a legal problem that had "long remained in abeyance."[53] Both Congress and state legislatures, Wigmore insisted, "exceed[] [their] constitutional power when [they] attempt[] to impose upon the judiciary any rules for the dispatch of the judiciary's duties; and . . . therefore all legislatively declared rules for procedure, civil or criminal, in the courts, are void, except such as are expressly stated in the Constitution."[54] Dean Roscoe Pound's views were not quite so radical,[55] but he too firmly believed rulemaking ought to be within the purview of the judiciary: "In truth procedure of courts is something that belongs to the courts rather than to the legislature, whether we look at the subject analytically or historically. It is a misfortune that the courts ever gave it up."[56] Regulation of procedure by

("[A] range of scholars increasingly has shifted away from the normative question of justified criminalization . . . or even the descriptive question of statutory criminalization . . . to ask a bigger descriptive question—where is criminal law operating surreptitiously or what is the importance of under-examined aspects of the system?"); see also Crespo, supra note 23, at 1305–06 (describing the "blind spots" in criminal law scholarship due to the traditional focus on substantive and constitutional law).

51. Daniel Epps, Checks and Balances in the Criminal Law, 74 Vand. L. Rev. 1, 19 (2021); see also Nancy J. King & Michael Heise, Misdemeanor Appeals, 99 B.U. L. Rev. 1933, 1939–40 (2019) (estimating that there were "approximately 5.8 million misdemeanor convictions entered by state courts nationwide in 2016"); Megan Stevenson & Sandra Mayson, The Scale of Misdemeanor Justice, 98 B.U. L. Rev. 731, 737 (2018) (estimating that 13.2 million misdemeanor cases are filed in the United States each year).

52. Crespo, supra note 23, at 1305.

53. John H. Wigmore, Editorial Notes—All Legislative Rules for Judiciary Procedure Are Void Constitutionally, 23 Ill. L. Rev. 276, 276 (1928).

54. Id. (emphasis omitted).

55. See Roscoe Pound, The Rule-Making Power of the Courts, 12 A.B.A. J. 599, 601 (1926) [hereinafter Pound, The Rule-Making Power] ("It may be that today, after seventy-five years of codes and practice acts and prolific procedural legislation, we can't go so far as to pronounce such legislative interference with the operations of a coordinate department to be unconstitutional.").

56. Id.; see also Roscoe Pound, Regulation of Judicial Procedure by Rules of the Court, 10 Ill. L. Rev. 163, 163 (1916) [hereinafter Pound, Regulation of Judicial Procedure] (advocating for "leaving the regulation of procedure wholly to rules of court, to be framed by the judges").

court rule was not just a worthy "innovation," reformers insisted, "but a return to fundamental principles."[57]

If the method by which the law of jury selection is now being rewritten seems odd, dubious, or even illegitimate, the debates that gripped the legal profession a century ago provide helpful context. What's happening now, in other words, is nothing new, though the history has largely been forgotten. Judicial rulemaking "dominated the scene for most of the first century of the American judiciary,"[58] an inheritance of "common-law courts and the court of chancery in England[,] [which] had regularly exercised this power down to the Revolution."[59] The judiciary's "power to control procedure was hardly questioned."[60] But by the middle of the nineteenth century, reaction against "cumbrous, dilatory, expensive, ultra-formal procedure" sparked calls for modernization and reform.[61] Courts "appeared unable or unwilling to initiate the procedural reforms necessary to satisfy changing social and economic needs," while the creation of new states (with new court systems) "required the immediate adoption of comprehensive rules of procedure."[62] Into the void stepped state legislatures, most notably that of New York, whose Field Code (governing civil procedure) spurred similar codification efforts in jurisdictions across the country.[63] Over the next seventy-five years, "codes and practice acts and prolific procedural legislation" became so commonplace, for both civil and criminal procedure, that it was hard to imagine a time when it was otherwise.[64]

But Pound, Wigmore, and other reformers bristled at the "strait-jacket of statutory procedure" that legislatures had "impose[d]" upon American courts.[65] The judiciary knew best how to run the courts; it was "as nearly disinterested as any conceivable body could be"—unlike the legislature, which was "the catspaw of a few intriguing lawyers."[66] And the judiciary could amend its rules more efficiently as the need arose, unlike the "slow-moving machinery" of the legislature.[67] "When rules of procedure are

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57. Minimum Standards of Judicial Administration app. A at 514 (Arthur T. Vanderbilt ed., 1949) [hereinafter Minimum Standards] (reproducing reports adopted by the ABA's Section of Judicial Administration and approved by the ABA's general governing body).

58. Carrie Leonetti, Watching the Hen House: Judicial Rulemaking and Judicial Review, 91 Neb. L. Rev. 72, 80 (2013).

59. Pound, Regulation of Judicial Procedure, supra note 56, at 170–71.

60. Paul E. Wilson, Implementation by Court Rule of the Criminal Justice Standards, 12 Am. Crim. L. Rev. 323, 324 (1974).

61. Pound, The Rule-Making Power, supra note 55, at 599.

62. Wilson, supra note 60, at 324.

63. See id.; see also Kellen Richard Funk, The Lawyer's Code: The Transformation of American Legal Practice, 1828–1938, at 5–6 (2018).

64. Pound, The Rule-Making Power, supra note 55, at 601.

65. Id.

66. Wigmore, supra note 53, at 278.

67. Id.

made by judges," Pound argued, "they will grow out of experience, not out of the ax-grinding desires of particular law-makers."[68] "The leaders of the American bar," Professor Charles Alan Wright later wrote, were "firmly of the opinion that the courts should possess the rule-making power and that neither Congress nor the state legislatures should continue the haphazard, wasteful and unscientific method of regulating the minutiae of judicial procedure by statute."[69]

Congress's passage of the Rules Enabling Act (REA) in 1934,[70] which authorized the Supreme Court to promulgate rules of practice and procedure in civil actions, was a crowning achievement of this movement.[71] In short order, the Court would use its new authority to produce the much-lauded Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure,[72] and (decades later) the Federal Rules of Evidence. This history is well known and carefully studied, but parallel developments in the states have received less attention. In many jurisdictions, the spirit of reform caught on long before Congress acted, with several states experimenting with rulemaking regimes prior to the REA.[73] In 1938, under the leadership of Arthur T. Vanderbilt and buoyed by the REA, the ABA pressed other states to follow suit, urging that "practice and procedure in the [state] courts should be regulated by rules of court; and that to this end the courts should be given full rule-making power."[74] Over the next few decades, judicial rulemaking became central to the development of both civil and criminal procedure in American state courts.[75]

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68. Judicial Versus Legislative Determination of Rules of Practice and Procedure—A Symposium, 6 Or. L. Rev. 36, 44 (1926); see also Levin & Amsterdam, supra note 33, at 10–11 (summarizing arguments in favor of judicial control over rules of procedure).

69. Charles Alan Wright, Procedural Reform in the States, 24 F.R.D. 85, 86 (1959).

70. Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2018)).

71. See Charles E. Clark, The Influence of Federal Procedural Reform, 13 Law & Contemp. Probs. 144, 144–45 (1948) ("This achievement, therefore, is an event in American judicial history.").

72. Id.

73. Silas A. Harris, The Rule-Making Power, 2 F.R.D. 67, 68–70 (1943) (discussing the shift from legislative to judicial rulemaking in Colorado, Delaware, Maryland, New Jersey, Ohio, Washington, and Wisconsin from 1912 to 1930); see also Wilson, supra note 60, at 326 (discussing "growing disenchantment in many of the states with the results of attempting to regulate court procedures through the enactment of legislative codes" throughout the 1910s). For a thorough bibliography of writing on the topic by 1930, see generally The Rule-Making Power: A Bibliography, 16 A.B.A. J. 199 (1930).

74. Minimum Standards, supra note 57, app. A at 506.

75. Wright, supra note 69, at 86–87 (noting that "rules substantially similar to the federal rules . . . are now in effect in 17 jurisdictions"); see also Minimum Standards, supra note 57, at 97–127 (describing the development of state courts' rulemaking power).

Legal scholarship on judicial rulemaking generally focuses on post-1934 federal rulemaking under the REA,[76] but federal judicial rulemaking and its state-level analogues have followed very different trajectories. Under the REA, for instance, Congress granted to the U.S. Supreme Court rulemaking power,[77] but this limited delegation has never been viewed as abrogating Congress's power to subsequently alter court-promulgated procedural rules.[78] To those who believed that the judiciary enjoys absolute power over its own procedure—either as an inherent feature of being a court or as a logical corollary to separation-of-powers principles—the notion that rulemaking authority is a legislature's to "give" in the first place seemed strange. And indeed, many states (even those in which the state legislature passed "enabling acts" akin to the REA) have long assumed that the power over procedure has always been allocated primarily, if not exclusively, to the judiciary.[79] In 1931, the Supreme Court of

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76. See, e.g., Stephen B. Burbank & Sean Farhang, Federal Court Rulemaking and Litigation Reform: An Institutional Approach, 15 Nev. L.J. 1559, 1561 (2015) (exploring the influence of ideology on the Justices' interpretations of the Federal Rules); Richard D. Freer, The Continuing Gloom About Federal Judicial Rulemaking, 107 Nw. U. L. Rev. 447, 449 (2013) (discussing the reasons for the lack of innovation and leadership in federal rulemaking in recent decades); Jordan M. Singer, The Federal Courts' Rulemaking Buffer, 60 Wm. & Mary L. Rev. 2239, 2242 (2019) (exploring federal procedural rulemaking through the lens of "buffering"); Charles M. Yablon, Inherent Judicial Authority: A Study in Creative Ambiguity, 43 Cardozo L. Rev. 1035, 1038 n.13 (2022) ("[T]his Article will deal almost exclusively with the inherent judicial authority of the federal courts."). For more historically based recent scholarship on federal rulemaking, see Thomas Ward Frampton, Why Do Rule 48(a) Dismissals Require "Leave of Court"?, 73 Stan. L. Rev. Online 28, 32–33, 35–37 (2020), https://www.stanfordlawreview.org/online/why-do-rule-48a-dismissals-require-leave-of-court [https://perma.cc/HV8B-UBSS] [hereinafter Frampton, Rule 48(a) Dismissals] (arguing that the primary purpose of Rule 48(a) was to prevent politically influenced dismissals of criminal cases by prosecutors); Ion Meyn, Constructing Separate and Unequal Courtrooms, 63 Ariz. L. Rev. 1, 4 (2021) (arguing that the Federal Rules of Criminal Procedure "operated in concert with existing structural inequalities" in 1940s America to "reinforc[e] the racial ordering of the period within the criminal law arena"); Ion Meyn, Why Civil and Criminal Procedure Are So Different: A Forgotten History, 86 Fordham L. Rev. 697, 707–12 (2017) (exploring the initial draft of the Federal Rules of Criminal Procedure and how it mirrored the Federal Rules of Civil Procedure).

77. See 28 U.S.C. § 2072 (2018).

78. See Hanna v. Plumer, 380 U.S. 460, 472 (1965) (acknowledging the "congressional power to make rules governing the practice and pleading" in federal courts); cf. Ellen A. Peters, Getting Away From the Federal Paradigm: Separation of Powers in State Courts, 81 Minn. L. Rev. 1543, 1554 (1997) ("[O]ne of the flash points of conflict for state courts has been the question of who determines the rules of judicial procedure. This is not an open question in the federal system, in which that authority unambiguously belongs to Congress, although it has been delegated to the Supreme Court." (footnote omitted)).

79. See, e.g., State v. Roy, 60 P.2d 646, 660 (N.M. 1936) (arguing that the state's REA is "not a delegation of power," since the judiciary already had the power to make procedural rules). For discussions of state separation-of-powers jurisprudence, see generally Michael C. Dorf, The Relevance of Federal Norms for State Separation of Powers, 4 Roger Williams U. L. Rev. 51 (1998) (discussing diverse state-level approaches to separation-of-powers problems); Epps, supra note 51, at 19 ("[T]here is reason to think that the story of the separation of powers in state criminal justice systems diverges from the federal account.").

Colorado, citing Dean Pound, issued a strident defense of "the *constitutional* power of the courts to make its [sic] own rules for its own procedure."[80] In 1936, upholding a murder conviction—and its court rules promulgated under a recent enabling statute—the New Mexico Supreme Court was similarly forceful:

> Whether the legislative branch of the government was ever rightfully in the rule-making field, or was a mere trespasser or usurper, need not now be determined. [The enabling statute] is not a delegation of power. It is a mere abdication or withdrawal from the rule-making field . . . . The Legislature, in effect, [has] said to the court: "You make the rules hereafter."[81]

In contrast, the Florida Supreme Court in 1941 declined the invitation of the Florida State Bar Association to promulgate a set of civil rules under its own inherent authority: "[W]e owe it to society to hike the administration of justice off the ass," the court explained in a colorful (and very extended) metaphor, but "it takes more than public urgence to clothe the court with power where none existed before."[82]

One of the most forceful assertions of judicial rulemaking power came from the Supreme Court of New Jersey in 1950. At issue in *Winberry*

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80. Kolkman v. People, 300 P. 575, 585 (Colo. 1931) (emphasis added). Professor Charles McCormick called the majority opinion, which signaled that the court would declare unconstitutional any legislative attempt to override its rules, "significant as a spark thrown off in the clash of forces now contending for dominance in the administration of justice." Charles T. McCormick, Legislature and Supreme Court Clash on Rule-Making Power in Colorado, 27 Ill. L. Rev. 664, 664 (1932); see also *Kolkman*, 300 P. at 590 (Butler, J., dissenting) ("[The majority] gives this warning to the Legislature: Hands off! There must be no more . . . legislative acts concerning procedure in either civil or criminal cases. Such interference will not be tolerated by this court.").

81. *Roy*, 60 P.2d at 660 (identifying "inherent power" as the authority for the rule).

82. As the court evocatively explained:

> It is inconceivable that litigants of the present who transact business by the press of a button, the aid of a dictaphone, or the switch of a gadget, who ride in high-powered cars, traverse the continent overnight by airplane, hop to Europe by Clipper, and spend the weekend in Miami out of New York, would be content like Balaam, to travel the highway to justice on the back of an ass, and if ultimately secured, record it at the point of a goose quill in the light of a tallow dip. I think we owe it to society to hike the administration of justice off the ass, but for the reasons stated, [w]e refuse to twit those who are reluctant to abandon him for the means proposed. This stupid old quadruped is the moron of the equine genus but he is the symbol of our democracy, hence it is not strange that as lawyers, we have acquired an affinity for him akin to reverence. We officiated at the manger of the thing he symbolizes and by and large have been its most consistent defenders. If ever it vanishes from earth we will be there to chant a requiem at its tomb.

In re Fla. State Bar Ass'n for Promulgation of New Fla. Rules of Civ. Proc., 199 So. 57, 60 (Fla. 1940). In 1956, the Florida Constitution was amended to vest rulemaking power in the Florida Supreme Court. See Fla. Const. art. V, § 3 (1956) ("The practice and procedure in all courts shall be governed by rules adopted by the supreme court.").

v. Salisbury was a provision of New Jersey's newly adopted constitution, which read: "The Supreme Court shall make rules governing the administration of all courts in the State and, *subject to law*, the practice and procedure in all such courts."[83] During drafting, former ABA President Vanderbilt (unsuccessfully) urged that the words "subject to law" be eliminated, as the language seemed to impose legislative supremacy over judicial rulemaking.[84] If the New Jersey Legislature repealed a court-promulgated rule by statute, the "subject to law" language certainly would seem to give the legislature overriding power. But three years later, as the new Chief Justice of the New Jersey Supreme Court, Vanderbilt took a different view.[85] The "ambiguous [and] elliptical" phrase "subject to law," Vanderbilt explained, did not mean "subject to legislation," but rather subject to "substantive law as distinguished from pleading and practice."[86] The language actually reinforced the judiciary's authority over the procedural domain and, within that domain, supported the "conclu[sion] that the rule-making power of the Supreme Court is not subject to overriding legislation."[87]

Another key area where federal and state judicial rulemaking have diverged concerns the boundaries between "procedural" and "substantive" rules. Under the REA, the U.S. Supreme Court "shall have the power" to promulgate "general rules of practice and procedure"; such rules, Congress provided in the Act's next sentence, "shall not abridge, enlarge or modify any substantive right."[88] Over the past ninety years, however, the precise line between "procedural" and "substantive" federal rules has remained unclear.[89] State judicial rulemaking likewise is generally confined to "procedure," but many state supreme courts have developed their

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83. 74 A.2d 406, 408 (N.J. 1950) (emphasis added) (internal quotation marks omitted) (quoting N.J. Const. art. VI, § 2, para. 3 (1947)).

84. See Letter from Arthur T. Vanderbilt, Esq., to the Comm. on the Judiciary Const. Convention (July 29, 1947), *in* 4 State of New Jersey Constitutional Convention of 1947, at 729, 729 (Sidney Goldmann & Herman Crystal eds., 1947).

85. Vanderbilt's evolving interpretations are wryly noted in Levin & Amsterdam, supra note 33, at 25–26.

86. *Winberry*, 74 A.2d at 408–10.

87. Id. at 414.

88. 28 U.S.C. § 2072 (2018).

89. See Leslie M. Kelleher, Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously, 74 Notre Dame L. Rev. 47, 49 (1998) ("[N]either the Court nor the commentators have managed to produce a workable definition of the 'substantive rights' limitation."). The language of the Act might plausibly be construed as imposing two independent constraints on rulemaking authority (that is, a rule could be "procedural" while impermissibly abridging substantive rights), but the Court has effectively collapsed the inquiries into one: "[B]y [the Court's] lights, either a Rule [is] procedural *or* it affect[s] substantive rights." John Hart Ely, The Irrepressible Myth of *Erie*, 87 Harv. L. Rev. 693, 719 (1974). Importantly, though, no federal rule has ever been invalidated as exceeding the "procedural" authority conferred under the REA, leading some to argue that "the Court's failure to provide a rigorous articulation of the contours of the REA . . . [has] enabled some

own approach(es) to ascertaining the outer limits of their "procedural" authority. In a notable 1974 case, for instance, the Connecticut Supreme Court invalidated a statute governing criminal discovery but struggled at length to develop a definition of "procedural" within the meaning of the Connecticut Constitution (before, essentially, giving up on the enterprise).[90] Two years later, the Supreme Court of New Mexico similarly acknowledged that "the line between substance and procedure is often elusive and that authorities, in endeavoring to follow this dichotomy in the rule-making process, are not always in accord."[91] In one jurisdiction, then, a court rule might be considered impermissibly "substantive," while in another the same rule might permissibly regulate practice and "procedure."

In recent decades, scholarly interest in judicial rulemaking—particularly at the state level—seems to have waned.[92] "[S]cholars have tended to gravitate toward 'where the action is,'"[93] and for the last several decades, the most notable action has been the Supreme Court's constitutionalization of criminal procedure (including, of course, the law of jury selection).[94] Criminal law and criminal procedure scholars have become

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rules to escape being detected as ultra vires judicial regulation." A. Benjamin Spencer, Substance, Procedure, and the Rules Enabling Act, 66 UCLA L. Rev. 654, 658–59 (2019); see also Mistretta v. United States, 488 U.S. 361, 392 (1989) (explaining that the Court has upheld various rules notwithstanding that "all rulemaking is nonjudicial in the sense that rules impose standards of general application" and that such rulemaking "has been substantive and political in the sense that the rules of procedure have important effects on . . . substantive rights"); Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure[]—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.").

90. See State v. Clemente, 353 A.2d 723, 727–32 (Conn. 1974). *Clemente*, it appears, was subsequently overruled, or at least substantially undermined, by cases suggesting that "judicial and legislative authority may properly coexist" in certain areas under the Connecticut Constitution. Peters, supra note 78, at 1554 n.50.

91. Ammerman v. Hubbard Broad., Inc., 551 P.2d 1354, 1357 (N.M. 1976); see also J.T. v. O'Rourke ex rel. Tenth Jud. Dist., 651 P.2d 407, 410 n.2 (Colo. 1982) ("The line that separates a substantive rule from a procedural rule is amorphous; no legal test has been uniformly adopted.").

92. Currently, it is difficult to imagine a state supreme court decision on rulemaking authority would create much of a stir in the legal profession. But the *Winberry* decision, discussed earlier, garnered significant attention at the time. See supra note 33.

93. G. Alan Tarr, Understanding State Constitutions 2 (2000).

94. See Andrew D. Leipold, Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation, 86 Geo. L.J. 945, 946–47 (1998) ("The Supreme Court has had more to say about who sits on criminal juries in the last twenty years than it did in the previous 180."); William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 18 (1997) (describing the increasing procedural regulation of grand jury and petit jury selection). But see Thomas Ward Frampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 Mich. L. Rev. 785, 791 (2020) [hereinafter Frampton, For Cause] (arguing that the Court's assertive "constitutionalization" of the jury selection process largely exempted challenges for cause).

accustomed to (1) ignoring state courts generally[95] and (2) overlooking subtler ways in which the subconstitutional law of criminal procedure (both statutes and court-promulgated rules) continues to shape the criminal process as experienced by most defendants.[96] But, beneath the surface, judicial rulemaking continues to play a powerful role in shaping American criminal procedure. The past century of rulemaking has left a patchwork system in which, for criminal defendants in many states, judicial rulemaking is the primary mode through which criminal procedure is regulated and in which the power of many state supreme courts is far greater than those accustomed to the federal paradigm likely realize.

II. *BATSON* AND THE TURN TO THE STATES

Nowhere is the ongoing importance of judicial rulemaking more apparent, at least in recent years, than in the law of jury selection. Thirty-five years ago, in *Batson v. Kentucky*, the U.S. Supreme Court announced that the Equal Protection Clause of the Fourteenth Amendment required trial courts to apply a three-step framework for assessing the validity of peremptory strikes.[97] Since then, a broad scholarly consensus has developed that the landmark opinion failed to end (or even meaningfully limit) discrimination in jury selection.[98] Whatever promise *Batson* initially held—and some scholars have questioned whether it held any[99]—the Court has since "render[ed] its own decision as meaningless, ineffective, and unthreatening as possible."[100] The criticism is not limited to academia: In 2006, Justice Stephen Breyer came out in favor of "reconsider[ing] *Batson*'s test and the peremptory challenge system as a whole,"[101] and other prominent judges have argued recently that "[t]he only way to eliminate discrimination in the use of peremptory strikes is to eliminate peremptories."[102] Every few years, the U.S. Supreme Court grants relief in a *Batson*

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95. See supra notes 48–49 and accompanying text.

96. See supra notes 50–52 and accompanying text.

97. 476 U.S. 79, 96–98 (1986) (establishing the framework); see also Purkett v. Elem, 514 U.S. 765, 767–68 (1995) (applying the framework).

98. See Frampton, For Cause, supra note 94, at 786–88 (collecting representative scholarship).

99. See, e.g., Paul Butler, Mississippi Goddamn: *Flowers v. Mississippi*'s Cheap Racial Justice, 2019 Sup. Ct. Rev. 73, 106 ("*Batson* . . . encourage[s] ignorance, or at least the performance of an obstinate, counterfactual color-blindness by people who likely know better.").

100. Leonard L. Cavise, The *Batson* Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection, 1999 Wis. L. Rev. 501, 501.

101. Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring).

102. Gregg Costa, A Judge Comments, Litigation, Summer 2022, at 36, 36; see also State v. Veal, 930 N.W.2d 319, 340 (Iowa 2019) (Wiggins, J., concurring in part and dissenting in part) ("The only way to stop the misuse of peremptory challenges is to abolish them in Iowa and require judges to enforce rigorously challenges for cause."); Spencer v. State, 149 A.3d 610, 648 (Md. 2016) (McDonald, J., dissenting) ("[T]he *Batson* analysis is

case—solemnly proclaiming the Court's unwillingness to allow racism to pollute the jury—but these opinions have been so fact-bound as to render them practically irrelevant beyond their immediate (exceptional) circumstances.[103]

But the Supreme Court's hands-off approach when it comes to race and the jury does not mean that change is not underway. Momentum has been building quietly at the state level for changes to jury selection practices. While scholars have noted and discussed reform efforts in particular jurisdictions,[104] this Part is the first to consider the movement as a whole, assessing its growth and broader significance.[105]

A. *Rhetoric and Reality*

The U.S. Supreme Court regularly affirms the importance of eliminating racial bias in jury adjudication, underscoring that "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury

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not intuitive and appellate review is difficult and deferential. . . . A better solution, in my view, would be to eliminate peremptory challenges altogether . . . ."); Ray-Simmons v. State, 132 A.3d 275, 290 (Md. 2016) (McDonald, J., dissenting) ("There is no compelling reason to retain peremptory strikes."); State v. Saintcalle, 309 P.3d 326, 350 (Wash. 2013) (González, J., concurring) ("To prevent ongoing violations of the federal and state constitutions, and more generally as a matter of policy, we should abolish peremptory challenges in this state.").

103. See, e.g., Butler, supra note 99, at 81 ("The message that the Kavanaugh and Alito opinions sent to anyone hoping that *Flowers* might signal a more progressive race or criminal jurisprudence from the Roberts Court is, 'Move on. There is nothing to see here.'" (citing Flowers v. Mississippi, 139 S. Ct. 2228 (2019))); Thomas Ward Frampton, What Justice Thomas Gets Right About *Batson*, 72 Stan. L. Rev. Online 1, 3, 5 (2019), https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/09/72-Stan.-L.-Rev.-Online-Frampton.pdf [https://perma.cc/MA9N-2Q45] (discussing the narrowness of *Flowers*); Nancy S. Marder, *Foster v. Chatman*: A Missed Opportunity for *Batson* and the Peremptory Challenge, 49 Conn. L. Rev. 1137, 1143 (2017) ("Petitioner Foster asked the Court to answer a narrow question—whether prosecutors exercised their peremptories in violation of *Batson*—and that is all the Court did.").

104. See, e.g., Anna Offit, Race-Conscious Jury Selection, 82 Ohio St. L.J. 201, 242–47 (2021) (discussing reforms to jury selection in Washington and Massachusetts); Timothy J. Conklin, Note, The End of Purposeful Discrimination: The Shift to an Objective *Batson* Standard, 63 B.C. L. Rev. 1037, 1039–40, 1066–84 (2022) (tracing the efforts of jury selection task forces in Washington, California, and Connecticut); Recent Order, Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021), 135 Harv. L. Rev. 2243, 2243 (2022) (discussing Arizona's abolition of peremptory strikes); Annie Sloan, Note, "What to Do About *Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection, 108 Calif. L. Rev. 233, 242–54 (2020) (discussing jury selection reform in Washington).

105. At least in law review form. For several years, the Berkeley Law Death Penalty Clinic and Professor Elisabeth Semel have maintained an online, public-facing database of recent reform efforts. 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/WPG9-FENL] (last visited Sept. 27, 2023).

selection process."[106] Per the official account, existing doctrine is doing well: *Batson* "immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States," and since 1986, the Court has "vigorously enforced and reinforced the decision[] and guarded against any backsliding."[107] Justice Anthony Kennedy hit similarly whiggish notes in *Peña-Rodriguez v. Colorado*, emphasizing the "progress" of our nation's "maturing legal system" in promoting "thoughtful, rational dialogue" and "purg[ing] racial bias from the administration of justice."[108]

But, while stressing the importance of this project, the Court has crafted narrow opinions with virtually no applicability beyond the (highly idiosyncratic) facts of the cases at hand. In *Flowers v. Mississippi*, for example, the Court invalidated a Mississippi murder conviction, obtained at the defendant's sixth trial, on *Batson* grounds; Curtis Flowers was exonerated and freed before a seventh trial could take place.[109] In concluding that District Attorney Doug Evans had been motivated by race when he struck one of the Black jurors in Flowers's final trial, the Court emphasized the "extraordinary" facts of Flowers's ordeal: Over the many trials, Evans struck forty-one of the forty-two Black prospective jurors; in the sixth trial, he engaged in "dramatically disparate" questioning and striking of Black and white prospective jurors; and he struck one Black juror for reasons that appeared to apply equally to (unstruck) white jurors.[110] The Court pointedly refused to find any of the evidence, standing alone, sufficient to warrant reversal.[111] Instead, "break[ing] no new legal ground," the Court found that "all of the relevant facts and circumstances taken together" rendered the jury selection process unconstitutional.[112] Similarly, in *Foster*

106. *Flowers*, 139 S. Ct. at 2242; see also Williams v. Louisiana, 136 S. Ct. 2156, 2156 (2016) (granting certiorari and vacating and remanding a murder conviction on *Batson* grounds); Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016) (reversing a capital murder conviction on *Batson* grounds); Snyder v. Louisiana, 552 U.S. 472, 474 (2008) (same); Miller-El v. Dretke, 545 U.S. 231, 237 (2005) (same).

107. *Flowers*, 139 S. Ct. at 2242–43.

108. 137 S. Ct. 855, 868 (2017).

109. Nicholas Bogel-Burroughs, After 6 Murder Trials and Nearly 24 Years, Charges Dropped Against Curtis Flowers, N.Y. Times (Sept. 4, 2020), https://www.nytimes.com/2020/09/04/us/after-6-murder-trials-and-nearly-24-years-charges-dropped-against-curtis-flowers.html (on file with the *Columbia Law Review*) (last updated Sept. 5, 2021); Jesus Jiménez, Curtis Flowers Sues Prosecutor Who Tried Him Six Times, N.Y. Times (Sept. 4, 2021), https://www.nytimes.com/2021/09/04/us/curtis-flowers-doug-evans.html (on file with the *Columbia Law Review*).

110. See *Flowers*, 139 S. Ct. at 2235.

111. Id. ("We need not and do not decide that any one of those four facts alone would require reversal.").

112. Id. Flowers was subsequently exonerated, in significant part due to reporting conducted by the podcast *In the Dark*, which shone a national spotlight on the facts of his case. See Mihir Zaveri, Curtis Flowers's Conviction Tossed by Mississippi Supreme Court, N.Y. Times (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/us/curtis-flowers-doug-

v. Chatman, the Court found purposeful discrimination in the selection of an all-white jury that convicted and sentenced a Georgia man to death.[113] The evidence of racial bias during jury selection was overwhelming: Handwritten notes revealed a "persistent focus on race in the prosecution's file," and the record belied prosecutors' shifting (and sometimes demonstrably false) race-neutral rationales for striking particular Black jurors.[114] But again, the Court's opinion offered little support for defendants unable to produce "smoking gun" evidence as could Timothy Foster: The Court simply explained that "[c]onsidering all of the circumstantial evidence" together with the additional "compelling" evidence, Foster had done enough.[115] Scholars have been near unanimous in their criticism of *Batson* and its progeny.[116]

Though cases involving peremptory strikes have garnered the most attention, the same trend appears across the law of the jury. Over several decades, the Court has largely ignored, and effectively insulated from meaningful constitutional review, the challenge-for-cause process, an underappreciated engine of racial exclusion.[117] To better root out bias (racial or otherwise), some federal courts of appeals have invoked their supervisory power over the district courts in their circuits to promulgate rules guaranteeing meaningful voir dire,[118] but two terms ago in *United*

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evans.html (on file with the *Columbia Law Review*) (recounting the "national conversation" sparked by the podcast); Parker Yesko, It's Over: Charges Against Curtis Flowers Are Dropped, Am. Pub. Media Reps. (Sept. 4, 2020), https://www.apmreports.org/episode/2020/09/04/charges-against-curtis-flowers-are-dropped [https://perma.cc/4K2X-NDX8] (reporting on Flowers's exoneration); see also *Flowers*, 139 S. Ct. at 2254 (Thomas, J., dissenting) (suggesting that "the Court granted certiorari because the case has received a fair amount of media attention").

113. See 136 S. Ct. 1737, 1742–43 (2016).

114. Id. at 1754.

115. Id. at 1754–55; see also Marder, supra note 103, at 1181–82 ("There are few *Batson* challenges that will come as close to having a 'smoking gun' as *Foster* did . . . .").

116. See Frampton, For Cause, supra note 94, at 786–88 & nn.1, 3 (collecting sources).

117. See People v. Suarez, 471 P.3d 509, 567 (Cal. 2020) (Liu, J., concurring) (arguing that "there is significant evidence that removal of jurors for cause is an equally if not more significant contributor to the exclusion of Black jurors" than peremptory strikes); Matthew Clair & Alix S. Winter, The Collateral Consequences of Criminal Legal Association During Jury Selection, 56 Law & Soc'y Rev. 532, 533 (2022) (noting how challenges for cause based on criminal legal association result in "systematic exclusions of marginalized racial/ethnic minorities" from juries); Frampton, For Cause, supra note 94, at 788–89 (discussing the Court's failure to create rules governing for cause challenges); Anna Offit, Benevolent Exclusion, 96 Wash. L. Rev. 613, 625–34 (2021) (arguing that challenges for cause disproportionately exclude people of color from juries).

118. See, e.g., Patriarca v. United States, 402 F.2d 314, 318 (1st Cir. 1968) (suggesting enhanced questioning of prospective jurors that "have been exposed to potentially prejudicial material"); see also Mu'Min v. Virginia, 500 U.S. 415, 446 (1991) (Marshall, J., dissenting) ("Numerous Federal Circuits . . . have adopted . . . procedures for screening juror bias . . . ." (citing United States v. Davis, 583 F.2d 190, 196 (5th Cir. 1978); United States v. Addonizio, 451 F.2d 49, 67 (3d Cir. 1971); Silverthorne v. United States, 400 F.2d 627, 639 (9th Cir. 1968))). The U.S. Supreme Court has done the same. See, e.g., Rosales-

States v. Tsarnaev the Court ruled that the courts of appeals lack such power.[119] The Court's last encounter with the fair cross section doctrine,[120] which purports to guarantee defendants a jury drawn from a representative cross section of the community,[121] came more than a decade ago in *Berghuis v. Smith*; there, the Court sharply curtailed the ability of those convicted in state court to establish they faced an unconstitutionally unrepresentative venire (at least on federal habeas review).[122] And when it comes to racial bias tainting jury deliberations, the Court recently recognized that the common law's "no-impeachment rule"[123] must yield when a defendant presents strong evidence that racial bias infected the jury deliberations process.[124] But the Court carefully circumscribed that holding, limiting it to the "vanishingly rare"[125] situations in which "a juror comes forward with *compelling* evidence that another juror made *clear and explicit* statements indicating that racial animus was a *significant* motivating

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Lopez v. United States, 451 U.S. 182, 191–92 (1981) (plurality opinion) (using the Court's "supervisory power" to declare the subconstitutional rule that the trial court must allow voir dire concerning a juror's potential racial or ethnic prejudice when certain conditions are met). This voir dire is required "when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups." Id.

119. 142 S. Ct. 1024, 1036 (2022). The author of the Court's concurring opinion in *Tsarnaev* wrote extensively on the issue of federal courts' inherent or supervisory powers as a law professor. See, e.g., Amy Coney Barrett, Procedural Common Law, 94 Va. L. Rev. 813, 815 (2008) (offering an account of the federal common law of procedure); Amy Coney Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324, 325 (2006) (questioning whether the Court possesses "inherent supervisory authority" over the procedure of lower courts).

120. See Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (holding that "the Sixth Amendment right to a jury trial" requires "selection of a [trial] jury from a representative cross section of the community").

121. See Nina W. Chernoff, Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It With Equal Protection, 64 Hastings L.J. 141, 143–44 (2012) (arguing that the development of the fair cross section doctrine has undermined the protections the doctrine could provide to defendants); Paula Hannaford-Agor, Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded, 59 Drake L. Rev. 761, 764 (2011) (noting how the doctrine fails to account for nonsystematic underrepresentation of certain groups on juries).

122. See 559 U.S. 314, 332 (2010) (rejecting the defendant's "laundry list of factors" contributing to the systematic underrepresentation of Black jurors as too speculative). But see Paula Hannaford-Agor & Nicole L. Waters, Safe Harbors From Fair-Cross-Section Challenges? The Practical Limitations of Measuring Representation in the Jury Pool, 8 J. Empirical Legal Stud. 762, 772–73 (2011) (offering qualified praise for the Court's affirmation that various methods of assessing statistical disparities should be considered).

123. See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017) ("A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations.").

124. Id. at 869.

125. Bridges, supra note 10, at 101.

factor in his or her vote to convict."[126] The Black defendant sentenced to die by a white juror who "wondered if [B]lack people even have souls,"[127] like the Black defendant sentenced to die for the murder of his white wife by three jurors firmly opposed to interracial marriage,[128] has since been turned away.

In short, the gulf between the Court's rhetoric regarding race and the jury, on the one hand, and the doctrine it has crafted over the past thirty-five years, on the other, is jarring. While celebrating the jury as "a central foundation of our justice system and our democracy,"[129] and affirming that "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process,"[130] the Court has shown little appetite for meaningfully confronting the "unique historical, constitutional, and institutional concerns"[131] implicated by racial bias in this area. True, the Court still sometimes responds to forms of racism that "recall[] the racism prevalent during the days of the nation's formal racial caste system," but when it comes to the subtler "processes that sustain racial subordination today," remedies are lacking.[132] Yet despite (or, perhaps, because of) the Court's inaction, change is afoot.

B. *The Move to the States*

Since 2018, jurisdictions representing nearly one-fifth of the American population have adopted reforms to the law of jury selection that depart substantially from the *Batson* framework.[133] These reforms have varied, in terms of both the method by which they have been implemented and their scope. *Batson*, of course, was a constitutional decision: The Court announced, while adjudicating a criminal appeal, that the Fourteenth Amendment's Equal Protection Clause required adherence to a now-familiar three-part framework for evaluating peremptory strikes.[134] But in most of the reforming jurisdictions (Arizona, Connecticut, New Jersey, and Washington), the changes have come about differently: State supreme

126. *Peña-Rodriguez*, 137 S. Ct. at 861 (emphasis added); see also id. at 869 (requiring "overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict" to allow further judicial inquiry); Daniel S. Harawa, The False Promise of *Peña-Rodriguez*, 109 Calif. L. Rev. 2121, 2133 (2021) ("[B]ecause the standard set in *Peña-Rodriguez* is so hard to satisfy, . . . the decision has worked to insulate racial bias from review.").

127. Tharpe v. Ford, 139 S. Ct. 911, 913 (2019) (Sotomayor, J., statement respecting the denial of certiorari).

128. Thomas v. Lumpkin, 143 S. Ct. 4, 4 (2022) (Sotomayor, J., dissenting from the denial of certiorari).

129. *Peña-Rodriguez*, 137 S. Ct. at 861.

130. Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019).

131. *Peña-Rodriguez*, 137 S. Ct. at 868.

132. Bridges, supra note 10, at 100, 167.

133. See supra note 7.

134. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

courts have promulgated subconstitutional rules outside the context of any particular case.[135] Only in California did reform come about as the result of new legislation—though the Supreme Court of California, somewhat belatedly, appointed a working group to study jury selection as legislation advanced.[136] And the scope of state-level *Batson* reforms varies as well. Most have preserved a framework that superficially resembles *Batson* while altering one or more stages of the challenge process; Arizona abolished peremptory strikes altogether. This section offers the first comprehensive review of where and how the law of jury selection is changing at the state level. As relevant, we note the ways in which these efforts have built off one another, gaining inspiration and momentum from reforms in other jurisdictions.

1. *Jurisdictions that Have Made Reforms.* — On October 7, 2010, two justices of the Washington Supreme Court "stunned" a group of judges and court staff when they offered their explanation for why African Americans made up four percent of Washington's total population but twenty percent of its prisoners: "[C]ertain minority groups," they explained, "have a crime problem."[137] This crude account—along with other racially charged language from the justices—prompted a group of "concerned community members" to form the Task Force on Race and the Criminal Justice System, cochaired by Professor Robert S. Chang and then-Judge Steven González.[138] As the Task Force later explained, the justices' comments failed to account for the ways in which "facially neutral policies[] and bias" could fuel racial disparities,[139] and dozens of organizations soon joined the effort "to address bias in the justice system at every level."[140]

While the Task Force was meeting, a criminal appeal was working its way to the Washington Supreme Court. Anna Tolson was the sole Black

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135. See infra section II.B.1.

136. See infra section II.B.1. As discussed below, smaller changes to the *Batson* framework have also been made through the ordinary adjudicatory process in Colorado (in an appellate court, as a matter of federal constitutional law) and Massachusetts (in the state supreme court, as a matter of state and federal constitutional law).

137. Steve Miletich, Two State Supreme Court Justices Stun Some Listeners With Race Comments, Seattle Times (Oct. 21, 2010), https://www.seattletimes.com/seattle-news/two-state-supreme-court-justices-stun-some-listeners-with-race-comments [https://perma.cc/3UAR-ZTKY] (last updated Oct. 22, 2010) (explaining that the justices made other racially charged comments, according to reports, including using phrases like "you all" or "you people" (in reference to Black people) and "poverty pimp" (apparently in reference to those emphasizing the role of racial discrimination in the legal system)).

138. See Task Force on Race & Crim. Just. Sys., Preliminary Report on Race and Washington's Criminal Justice System, at i, 7 (2011), https://law.seattleu.edu/media/school-of-law/documents/centers-and-institutes/korematsu-center/initiatives-and-projects/raceand-criminal-justice-task-force/task-force-10-2010–2012/preliminary-report_report_march_1_2011_public_cover.pdf [https://perma.cc/5YY5-ADW8].

139. Id. at 1.

140. Id. at 1, 23; see also Sloan, supra note 104, at 244.

juror in the venire for the trial of Kirk Saintcalle, a Black man ultimately convicted of felony murder (and sentenced to over forty-nine years in prison).[141] Tolson was questioned "far more extensively than any other juror," largely about her opinions about racial prejudice in the legal system.[142] In a remarkably fractured opinion, the court's majority rejected the defendant's *Batson* claim[143]—prosecutors had race-neutral reasons for striking Tolson[144]—but opined at length that *Batson*'s procedures were not "robust enough to effectively combat race discrimination in the selection of juries."[145] Declining to use the case as a vehicle to erect a new framework, the court nevertheless indicated that "it might be more appropriate to consider whether to abolish peremptory challenges through the rulemaking process instead of in the context of a specific case."[146] Justice González, promoted to the Washington Supreme Court in 2011,[147] called for the immediate abolition of peremptory strikes, chastising his colleagues for shirking their duty to "ensure that none of our trial procedures propagate injustice."[148]

Saintcalle launched a multi-year process to craft a court rule responsive to the court's concern that "*Batson* recognizes only 'purposeful discrimination,' whereas racism is often unintentional, institutional, or unconscious."[149] An initial proposal was submitted by the ACLU of Washington in 2015, prompting the Washington Association of Prosecuting Attorneys to file its own competing proposal ("essentially codif[ying] *Batson* and its progeny").[150] Eventually, the Washington Supreme Court convened its own twenty-person workgroup involving key stakeholders "to see if a consensus could be reached."[151] Consensus proved elusive:

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141. See State v. Saintcalle, 309 P.3d 326, 329–30 (Wash. 2013).

142. Id.

143. Id. at 339–41.

144. Prosecutors justified their strike of Tolson on the grounds that she was "inattent[ive]" and that a friend of hers was recently killed (despite conceding earlier in voir dire that her empathy for both sides might make her "representative of the perfect juror"). Id. at 331–32. The court held that the trial court's acceptance of these rationales did not constitute clear error. Id. at 340.

145. Id. at 329.

146. Id. at 338; see also id. at 339 ("A rule change of this magnitude might also be best made through the rulemaking process. . . . [T]his may be the most effective way to reduce discrimination and combat minority underrepresentation in our jury system.").

147. See Steve Miletich, King County Judge Named to State Supreme Court, Seattle Times (Nov. 16, 2011), https://www.seattletimes.com/seattle-news/king-county-judge-named-to-state-supreme-court/ [https://perma.cc/89RT-D5DA].

148. *Saintcalle*, 309 P.3d at 349 (González, J., concurring).

149. See id. at 329 (majority opinion).

150. Sloan, supra note 104, at 248; see also Jury Selection Workgroup, Proposed New GR 37: Final Report 1 (2018), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf [https://perma.cc/NZ42-XZ8E] [hereinafter Washington Workgroup Final Report].

151. Washington Workgroup Final Report, supra note 150, at 1.

Prosecutors reiterated their opposition to key portions of the workgroup's proposal, and one of the group's two cochairs gave up on reform altogether, "conclud[ing] that the only way discrimination can be eliminated from the jury selection process is to eliminate peremptory challenges."[152]

Nevertheless, on April 5, 2018, the Washington Supreme Court promulgated General Rule 37 (G.R. 37), adopting the "most protective version" of the reforms advanced by the ACLU of Washington and their allies on the working group.[153] The new framework departs from *Batson* in two key respects. First, G.R. 37 identifies seven facially race-neutral justifications for a peremptory strike that are now "presumptively invalid" if offered by a proponent at Step Two of the *Batson* framework: (1) having prior contact with law enforcement officers (LEOs); (2) expressing a distrust in LEOs or a belief that they engage in racial profiling; (3) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (4) living in a high-crime neighborhood; (5) having a child outside of marriage; (6) receiving state benefits; and (7) not being a native English speaker.[154] Second, the new rule removes *Batson*'s requirement that challengers prove subjective "purposeful discrimination" at Step Three, replacing it instead with a different inquiry: "If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, the peremptory challenge shall be denied."[155] The "objective observer," the rule instructs, is one who is "aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[156] The rule also effectively eliminates Step One of the *Batson* framework (that is, a challenger has no initial burden of production) and establishes other limitations on strikes, including new restrictions on the invocation of "conduct" (e.g., body language, demeanor, inattentiveness) to justify a strike.[157]

152. Id. app. 2 at 1 (statement of Superior Court Judge Blaine Gibson, Workgroup Cochair).

153. See Sloan, supra note 104, at 253.

154. Wash. Ct. Gen. R. 37(h). The rule does not explain how or when a party might overcome this presumption.

155. Wash. Ct. Gen. R. 37(e).

156. Wash. Ct. Gen. R. 37(f).

157. Wash. Ct. Gen. R. 37(c), (i).

Courts outside of Washington quickly took note of G.R. 37, with judges in California,[158] Connecticut,[159] Iowa,[160] Massachusetts,[161] North Carolina,[162] Oregon,[163] and Texas[164] hailing the development. "The State of Washington has shown that other reforms [apart from abolition] are also possible," wrote one California appellate judge in 2019, in an opinion calling for "the Legislature, Supreme Court, and Judicial Council to consider meaningful measures to reduce actual and perceived bias in jury selection."[165] A few months later, the Supreme Court of California announced a workgroup to study possible changes, crediting the Washington reforms as a direct inspiration: "In recent years, some states have adopted or begun to consider additional measures designed to address perceived shortcomings in the practical application of the *Batson* framework . . . . Today we join this dialogue . . . ."[166]

The Supreme Court of California's announcement, however, came as scholars, advocates, and legislators were already preparing a legislative push,[167] and that process was well underway by the time workgroup members were announced.[168] (Activists also had little reason for

158. People v. Bryant, 253 Cal. Rptr. 3d 289, 310 (Ct. App. 2019) (Humes, J., concurring).

159. State v. Holmes, 221 A.3d 407, 434–36 (Conn. 2019) (commending Washington's "comprehensive court rule governing jury selection").

160. State v. Veal, 930 N.W.2d 319, 340 (Iowa 2019) (Wiggins, J., concurring in part and dissenting in part) ("Washington General Rule 37, cited by Justice Appel in his opinion, helps but does not solve the problem.").

161. Commonwealth v. Carter, 172 N.E.3d 367, 388–89 (Mass. 2021) (Lowy, J., concurring).

162. State v. Clegg, 867 S.E.2d 885, 917 (N.C. 2022) (Earls, J., concurring) ("If we are to give more than lip service to the principle of equal justice under the law, we should not . . . pretend that thirty-five years of experience with *Batson* will magically change. There are [various] tools [like rulemaking] at our disposal[;] we urgently need to use them.").

163. State v. Curry, 447 P.3d 7, 14 (Or. Ct. App. 2019) ("Our neighbor, Washington, has been at the forefront of jurisdictions addressing that question, and last year adopted a concrete set of rules for handling *Batson* challenges, which are attached as an appendix.").

164. Tennyson v. State, 662 S.W.3d 401, 408 n.6 (Tex. Crim. App. 2018) (Alcala, J., dissenting from the denial of a petition for discretionary review).

165. People v. Bryant, 253 Cal. Rptr. 3d 289, 310 (Ct. App. 2019) (Humes, J., concurring).

166. Press Release, Cal. Sup. Ct., California Jury Selection Work Group Charge 1 (Jan. 29, 2020), https://newsroom.courts.ca.gov/sites/default/files/newsroom/2020-11/SupCt 20200129.pdf [https://perma.cc/BWN9-8YYT].

167. Supporters of the final measure included a broad range of civil rights organizations, public defenders, community groups, reentry and parole organizations, and other criminal justice reformers. See Off. of Senate Floor Analyses, Bill Analysis of AB 3070, at 9–10 (2020), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB3070 (on file with the *Columbia Law Review*) (listing thirty-one organizations supporting passage).

168. See Jury Selection Work Grp., Final Report to the Supreme Court of California 2 (2022), https://newsroom.courts.ca.gov/sites/default/files/newsroom/2022-09/Jury%20Selection%20Work%20Group%20Final%20Report.pdf [https://perma.cc/ER4N-LVQD] ("Thus, by the time the work group began to meet regularly[,] . . . groundbreaking legislation to modify the existing *Batson/Wheeler* framework had already taken shape and

confidence in a judiciary-led process: In June 2020, a report published by Professor Elisabeth Semel and the Berkeley Law Death Penalty Clinic meticulously documented the California courts' "abysmal" *Batson* record over the past three decades.)[169] In February 2020, the State Assembly introduced a bill (A.B. 3070) modeled after G.R. 37, and, in September 2020, the Governor signed it into law.[170] Like G.R. 37, A.B. 3070 abolished both *Batson*'s first step[171] and the need for proof of subjective "purposeful discrimination"—instead employing an "objectively reasonable" viewer standard.[172] But A.B. 3070 went further than Washington's approach in three main ways.[173] First, in addition to race and ethnicity, it forbade strikes motivated by a prospective juror's "gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups."[174] Second,

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addressed some of the key questions outlined in the court's charge to the work group."); see also Elisabeth Semel, Dagen Downward, Emma Tolman, Anne Weis, Danielle Craig & Chelsea Hanlock, Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors, at viii (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf [https://perma.cc/7W4Y-J6N7] ("We acknowledge the California Supreme Court's interest in studying [and addressing] *Batson*'s shortcomings . . . . Over the last three decades, the court has declined many opportunities to remedy these inequities. The legislature—through the passage of AB 3070—is better suited to effectively address persistent discrimination in jury selection . . . .").

169. Semel et al., supra note 168, at 23. Numerous dissents authored by Justices Goodwin Liu and Mariano-Florentino Cuéllar—amplified in the *Whitewashing the Jury Box* report—advanced similar critiques. Id. at 54–65.

170. Assemb. B. 3070, 2019–2020 Leg., Reg. Sess. (Cal. 2020). For bill history, see AB-3070 Juries: Peremptory Challenges, Cal. Legis. Info., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB3070 [https://perma.cc/AR4F-SW44] (last visited Sept. 26, 2023).

171. See Cal. Civ. Proc. Code § 231.7(b) (2023) ("A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a).").

172. The amended rule provides:

> If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained. The court need not find purposeful discrimination to sustain the objection.

Id. § 231.7(d)(1).

173. There are several additional differences. For example, the California legislation provides a lengthy (but nonexclusive) list of "circumstances" that judges are invited to consider when assessing a strike, id. § 231.7(d)(3)(A)–(G); offers greater detail on the showing necessary to rehabilitate a strike justified by a "presumptively invalid" rationale, id. § 231.7(f); and places additional restrictions on strikes based on demeanor or conduct, id. § 231.7(g)(2) (requiring judicial confirmation of demeanor or conduct and that proponent of strike "explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried").

174. Id. § 231.7(a).

in lieu of Washington's "objective observer *could view*"[175] standard, the ultimate inquiry under California law is whether "there is a substantial likelihood that an objectively reasonable person *would view*" a protected category as being a "factor" in the use of the strike.[176] While this language might initially appear to impose a more demanding standard than Washington's, "substantial likelihood" is defined as something shy of "more likely than not," meaning the burden of persuasion never shifts from the proponent of the strike.[177] And finally, California added to Washington's list of "presumptively invalid" bases for a strike—adding, for example, "[d]ress, attire, or personal appearance" and "underemployment of the prospective juror or [their] family member."[178] As before, state courts in other jurisdictions quickly took notice, with Colorado,[179] Connecticut,[180] and Montana[181] courts citing California's innovation.

Arizona was the next jurisdiction to reform its jury selection practices. In early 2021, soon after California's A.B. 3070 went into effect, judges and other reformers submitted dueling rule-change petitions to the Arizona Supreme Court to either reform or abolish the use of peremptory strikes. Arizona stakeholders carefully studied the Washington and California changes as part of this process, though ultimately they decided to go in a very different direction. (We explore the remarkable story of how Arizona settled on elimination in the next Part.)

The most recent dominoes to fall are Connecticut and New Jersey; once again, the changes came about through the adoption of new rules by state judiciaries, not through the ordinary adjudicatory process. Within a month of one another during the summer of 2022, both states announced new rules (now in effect) modeled after Washington's G.R. 37.[182] Both abolished Step One of the *Batson* inquiry,[183] both dispensed with the

175. Wash. Ct. Gen. R. 37(e) (emphasis added).

176. Cal. Civ. Proc. Code § 231.7(d)(1) (emphasis added).

177. Id. § 231.7(d)(2)(B).

178. Id. § 231.7(e)(9), (11), (13).

179. People v. Johnson, 523 P.3d 992, 1009 (Colo. App. 2022) (Berger, J., concurring in part and dissenting in part) (accusing the majority of sub silentio importing Washington- and California-style reforms through adjudication).

180. State v. Jose A.B., 270 A.3d 656, 679 n.25 (Conn. 2022).

181. State v. Wellknown, 510 P.3d 84, 99 (Mont. 2022) (Baker, J., concurring).

182. While the New Jersey rule was promulgated by the state's supreme court, Connecticut assigns rulemaking responsibility for the trial courts to the judges of its superior courts. See Conn. Gen. Stat. Ann. § 51-14 (West 2023). Although the proposal for the new rule originated with Chief Justice Richard A. Robinson, it did not become a part of the state's Practice Book until ratified at the Annual Meeting of the Judges of the Superior Court. See Minutes, Rules Comm. Superior Ct. (Dec. 13, 2021), https://www.jud.ct.gov/committees/rules/rules_minutes_121321.pdf [https://perma.cc/92PR-VTNW] (discussing "proposal from Chief Justice Robinson"); Minutes: Annual Meeting, Judges Superior Ct. (June 10, 2022), https://www.jud.ct.gov/committees/judges/JudgeAnnual_minutes_061022.pdf [https://perma.cc/3GZA-3ZF9] (reflecting unanimous approval).

183. Conn. Super. Ct. R. § 5-12(b); N.J. Ct. R. 1:8-3A(b).

requirement of proving a subjective discriminatory purpose,[184] and both declared certain race-neutral rationales "presumptively invalid."[185] While Connecticut's rule (like Washington's) is limited to "race or ethnicity," New Jersey's law applies to strikes based on actual or perceived membership "in a group protected under . . . the New Jersey Law Against Discrimination."[186] This provision makes it the most expansive in terms of the scope of classes protected from peremptory strikes, extending protections (in addition to those categories listed in California's A.B. 3070) to "nationality, or ancestry; . . . disability; marital status or domestic partnership/civil union status; and liability for military service."[187] Connecticut's rule is also notable for having adopted a unique formulation for assessing when a challenged strike is impermissible, asking whether the strike "legitimately raises the appearance" of bias to the objective observer.[188]

In all, nearly seventy million people (almost one-fifth of the country) live in jurisdictions that have significantly changed their jury selection laws in recent years.[189] Notably, none of the foregoing has occurred by way of courts adjudicating cases or interpreting constitutions.[190] And more reform efforts are underway.

2. *Jurisdictions that Are Considering Reforms.* — In other jurisdictions, reform efforts have not yet resulted in changes to the law of jury selection. But in many of the above states, change was years in the making, and the flurry of recent activity (even if unsuccessful) demonstrates the salience of the issue in the states' courts and legislatures.

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184. Conn. Super. Ct. R. § 5-12(d) ("If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror's race or ethnicity was a factor in the challenge, then the challenge shall be disallowed . . . ."); N.J. Ct. R. 1:8-3A(d)(2) ("The court shall determine, under the totality of the circumstances, whether a reasonable, fully informed person would find that the challenge violates paragraph (a) of this Rule.").

185. Conn. Super. Ct. R. § 5-12(g); N.J. Ct. R. 1:8-3A, official cmt. 3.

186. Conn. Super. Ct. R. § 5-12(d); N.J. Ct. R. 1:8-3A(a).

187. N.J. Ct. R. 1:8-3A, official cmt. 1. Curiously, although the rule prohibits a party from exercising a peremptory strike on the basis of nationality, New Jersey law provides that only "citizen[s] of the United States" may serve as jurors. See N.J. Stat. Ann. § 2B:20-1 (West 2023).

188. Conn. Super. Ct. R. § 5-12(d).

189. See supra note 7.

190. An appellate court in Colorado has come very close, though. See People v. Johnson, 523 P.3d 992, 997 (Colo. App. 2022) (holding that the prosecutor failed to offer a race-neutral justification for a peremptory strike when the strike was justified based on the juror's disclosure of negative experiences with "cops [who] are disrespectful due to certain racial identities"); see also id. at 1009 (Berger, J., concurring in part and dissenting in part) ("In essence, the majority has adopted, through its adjudicatory authority, precisely what the Colorado Supreme Court has so far rejected."). Massachusetts's highest court has also recently expanded *Batson* to cover sexual orientation under both the Massachusetts Constitution and the Fourteenth Amendment's Equal Protection Clause. See Commonwealth v. Carter, 172 N.E.3d 367, 378–81 (Mass. 2021).

In Colorado—where conflict between the judiciary and the legislature over rulemaking authority has a lengthy history[191]—the debate over *Batson* has surfaced tensions over which branch is more competent to enact politically controversial reforms to jury selection (and how). In response to the racial justice protests during the summer of 2020, a committee appointed by the Colorado Supreme Court began "investigat[ing] and debat[ing] whether to recommend [that the court adopt] a rule in Colorado modeled on Washington State's General Rule 37."[192] Despite strident opposition from the state's prosecutors, a majority of the committee recommended that the court adopt a Washington-style rule.[193] The state supreme court balked, declining to open a public comment period on the proposal and suggesting it might reconsider if "greater consensus" could be reached.[194] A group of Democratic legislators then introduced a bill mirroring the committee's rule proposal, but the state's prosecutors exerted even greater political pressure in front of the Senate Judiciary Committee: All twenty-two of Colorado's elected prosecutors registered their opposition, effectively killing the bill.[195] Defiantly, the legislation's key sponsors challenged the state's high court to revisit the issue through rulemaking, insisting that the rulemaking process was the most viable path to reform.[196] This time, an 8-4 supermajority of the rules committee endorsed the reform proposal (again largely tracking G.R.

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191. See, e.g., McCormick, supra note 80, at 664–68 (discussing the 1931 controversy).

192. Email from John Dailey, J., Colo. Ct. App., to Carlos Samour, J., Colo. Sup. Ct. attach. 2, at 3 (Oct. 4, 2022), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Rules_Committee/Crim%20P%2024d%20submission%20documents.pdf [https://perma.cc/XQK8-2MMR] (letter from the Colorado Criminal Rules Committee outlining the majority proposal).

193. Kevin McGreevy, Majority Report for the Adoption of Crim. P. 24(d)(5) Addressing the Exercise of Peremptory Challenges During Jury Selection 1 (2021), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Rules_Committee/Crim%20P%2024%20Majority%20Report.pdf [https://perma.cc/5B5H-7CUL]; see also id. at 13 (describing the state's prosecutors as "the most vehement objectors" to the proposal).

194. Thy Vo, Racial Discrimination Still Exists in Jury Selection. Colorado's Supreme Court Rejected a Proposal Meant to Fix That., Colo. Sun (July 21, 2021), https://coloradosun.com/2021/07/21/racism-jury-selection-colorado-supreme-court/ [https://perma.cc/X2A6-HTV4] (internal quotation marks omitted) (quoting Supreme Court Justice Carlos A. Samour, Jr.'s email to the committee).

195. Letter from Pete Lee, Colo. State Sen., to John Dailey, J., Colo. Ct. App., and Members of the Colo. Crim. Rules Comm. (Mar. 16, 2022), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Rules/Sen_%20Pete%20Lee%20letter%20re%20Implicit%20Bias_Judge%20Dailey_3_16_2022.pdf [https://perma.cc/2ZP9-PMEB] [hereinafter Lee Letter]. For a nuanced examination of the effects of legislative lobbying by prosecutors, see generally Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, The Prosecutor Lobby, 80 Wash. & Lee L. Rev. 143 (2023).

196. See Lee Letter, supra note 195, at 4 ("The communities we represent interpreted the Court's prior refusal to even solicit input from the public . . . as a clear message that its members have no interest in addressing racial bias in our criminal courts in any meaningful way.").

37),[197] and the Colorado Supreme Court opened a period of public comment; the matter remains pending as of fall 2023.[198]

Utah's movement toward reform has more closely resembled those in the states described in the previous section. In September 2021, the Supreme Court of Utah unanimously rejected a *Batson* appeal of a Black defendant who objected to prosecutors' striking of the sole person of color in the jury pool.[199] In so doing, however, the court recognized that *Batson*'s prohibition on "purposeful discrimination" does nothing to limit strikes based "on the concern that potential jurors will be biased against law enforcement witnesses due to past negative experiences with the police," a practice which "may lead to the disproportionate removal of persons of color from juries."[200] The court recognized that the resulting racial disparities in jury composition implicated many of the same concerns animating *Batson* itself:

> [E]ven where a *Batson* violation has not occurred, the disproportionate removal of racial minorities from juries—whether it is due to peremptory strike criterion that disparately impact persons of color, implicit bias, or some other factor—erodes confidence in the justice system and weakens the very notion of a fair trial by an impartial jury. These are important concerns that deserve attention and an earnest search for solutions.[201]

The court formally referred the issue to an advisory committee, with a charge to consider how to craft new rules that would address these concerns,[202] and the body has been regularly meeting on the issue since.[203]

In several states, legislation has been introduced (sometimes at the urging of the state supreme court) to adopt changes akin to those in Washington and California, but thus far, those efforts have sputtered. In New York, for example, a Justice Task Force created by the state's high court recommended in August 2022 a set of reforms to summon a more diverse pool of jurors, including (1) removing the prohibition on jury

197. Colo. R. Crim. P. 24, Proposed Changes (Clean) (2022), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2022%20Proposed%20Changes/CrimP24marked%20and%20clean.pdf [https://perma.cc/KL7J-UMJS].

198. Michael Karlik, State Supreme Court Opens Comment Period for Jury Bias Proposal, Colo. Pol. (Oct. 20, 2022), https://www.coloradopolitics.com/courts/state-supreme-court-opens-comment-period-for-jury-bias-proposal/article_d523a132-50a8-11ed-8f6a-1bcab85ec324.html [https://perma.cc/VHU2-S5BX] (last updated Jan. 12, 2023).

199. State v. Aziakanou, 498 P.3d 391, 394 (Utah 2021).

200. Id. at 406.

201. Id. at 407.

202. Id. at 407 & n.12.

203. See Committee Meeting Schedule, Sup. Ct.'s Advisory Comm. on the Rules of Crim. Proc., https://legacy.utcourts.gov/utc/crimproc/urcrp-committee-meeting-schedule/ [https://perma.cc/AH7H-UHPU] (last visited Oct. 19, 2023) (noting that "[m]eetings are held every other month").

service by those convicted of a felony and increasing juror pay; and (2) reforming the *Batson* framework for peremptory strikes.[204] But New York's highest court is one of the few that lacks robust rulemaking powers,[205] and so far bills to rewrite the statute governing peremptory strikes have stalled in committee.[206] Likewise in Massachusetts, a senate bill based on G.R. 37 was introduced in March 2021,[207] but the matter was deferred for further "investigation and study" (along with over 100 other criminal-justice-related bills) in February 2022.[208] The minority leader of the Mississippi Senate introduced a bill replicating California's A.B. 3070 in January 2021, but it died in committee without a vote the following month.[209]

Finally, even in states that have not yet begun any rulemaking or legislative process to reform peremptory strikes, appellate judges have issued calls for changes akin to those discussed above. In Iowa,[210] Montana,[211] and Oregon,[212] jurists have recently issued opinions calling for the abolition of peremptory strikes or their states' *Batson* frameworks. And

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204. See N.Y. Just. Task Force, Recommendations Regarding Reforms to Jury Selection in New York 16–19 (2022), http://www.nyjusticetaskforce.com/pdfs/Report-on-Recommendations-Regarding-Reforms-to-Jury-Selection-in-New-York.pdf [https://perma.cc/52XT-E29N].

205. See id. at 15 ("To fully implement [the *Batson* reform] recommendation, legislative action is required . . . ."); see also infra note 461 (indicating that a Washington-style reform could not be implemented by court rule in New York).

206. See Assemb. B. 8010, 2021–2022 Leg., Reg. Sess. (N.Y. 2021); S.B. 6066, 2021–2022 Leg., Reg. Sess. (N.Y. 2021).

207. S.B. 918, 192d Gen. Ct., 2021–2022 Sess. (Mass. 2021).

208. S.B. 2665, 192d Gen. Ct., 2021–2022 Sess. (Mass. 2022). It is worth noting that Massachusetts *has* made some changes to its *Batson* framework through the adjudicatory process in recent years, albeit more modest than the changes discussed above. In *Commonwealth v. Carter*, the Supreme Judicial Court extended *Batson* to sexual orientation under both the Massachusetts Constitution and the Fourteenth Amendment's Equal Protection Clause. 172 N.E.3d 367, 378–81 (Mass. 2021). While the majority opinion made no mention of the reforms underway elsewhere, a concurring justice noted that G.R. 37 had eliminated *Batson*'s "first step" in Washington and urged Massachusetts to follow suit. Id. at 389 (Lowy, J., concurring).

209. S.B. 2211, 2021 Leg., Reg. Sess. (Miss. 2021).

210. State v. Veal, 930 N.W.2d 319, 340 (Iowa 2019) (Cady, C.J., concurring specially) ("I . . . agree . . . that the solution in the future is to do away with the use of peremptory challenges."); id. (Wiggins, J., concurring in part and dissenting in part) ("I think it is time to abolish peremptory challenges in Iowa."); id. at 361 (Appel, J., concurring in part and dissenting in part) (urging adoption of a modified "*Batson* with teeth" standard, at least for elimination of the last minority juror).

211. State v. Wellknown, 510 P.3d 84, 97 (Mont. 2022) (Baker, J., concurring) ("[W]e should revisit Montana's approach to equal protection in the jury selection context, consistent with the Montana Constitution and with society's improved understanding of implicit bias.").

212. State v. Vandyke, 507 P.3d 339, 344 (Or. Ct. App. 2022) (Aoyagi, J., concurring) ("Unless reimagined, *Batson* will never live up to its stated purpose of 'eradicat[ing] racial discrimination' in jury selection. It will not even come close." (quoting Batson v. Kentucky, 476 U.S. 79, 85 (1986))).

in Kansas[213] and North Carolina,[214] racial justice task forces established by the states' governors have both recommended (among a suite of proposed reforms) changes to the law of jury selection.

* * *

Before moving on, a few points about the recent legal reform efforts warrant emphasis. First, in all of the above jurisdictions, what has animated reforms is *not* merely dissatisfaction with the *Batson* framework's ineffectiveness in curtailing intentional racial discrimination (or even that it fails to account for "unconscious bias"); rather, there has been a clear "focus[] on outcomes over intent,"[215] on grappling with the ways in which racial exclusion can arise from "race-neutral justifications that mirror the racial fault lines in society" (for example, prospective jurors' experiences with or perceptions of law enforcement and the courts).[216] The state courts' attentiveness to disparate impact in the jury selection context stands in sharp contrast to the U.S. Supreme Court's skepticism toward such an approach in other race discrimination contexts (at least when nonwhite claimants seek remedies for racial injury).[217]

Second, in every jurisdiction where reform efforts have gained traction, the proposals have faced organized opposition from prosecutors. In California, for example, the state's Association of Deputy District Attorneys insisted that A.B. 3070 was an "absurdity" designed "to make sure our juries are filled with unsuitable jurors."[218] In Arizona, the Arizona

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213. Governor's Comm'n on Racial Equity & Just., Initial Report: Policing and Law Enforcement in Kansas 23 (2020), https://governor.kansas.gov/wp-content/uploads/2020/12/CREJ-Report-December-1-2020_FINAL-1.pdf [https://perma.cc/J9VK-WY76].

214. See N.C. Task Force for Racial Equity in Crim. Just., Report 2020, at 102 (2021), https://ncdoj.gov/wp-content/uploads/2021/02/TRECReportFinal_02262021.pdf [https://perma.cc/K2MT-Q2WM].

215. See id.

216. People v. Triplett, 267 Cal. Rptr. 3d 675, 692 (Ct. App. 2020). Or perhaps one could view these measures as attempts to grapple with core undertheorized features of antidiscrimination law—How do we define a protected trait? When is action taken "because of" that trait?—in ways that depart from the U.S. Supreme Court's approach. For a thoughtful exploration of the difficulties posed by the "definition" and "mechanism" questions, see generally Deborah Hellman, Defining Disparate Treatment: A Research Agenda for Our Times, 57 Ind. L. Rev. (forthcoming 2024), https://ssrn.com/abstract=4409714 [https://perma.cc/QLS2-QW3A].

217. See Bridges, supra note 10, at 153–66; Reva B. Siegel, Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court, 66 Ala. L. Rev. 653, 660–61 (2015) ("[I]n the 1970s . . . many federal judges thought inquiry into the racial disparate impact of state action was constitutionally *required* under the Equal Protection Clause; but the Supreme Court instead held that inquiry into disparate impact was constitutionally *permitted*. . . . [Now,] equal protection might *prohibit* inquiry into disparate impact.").

218. Michele Hanisee, Opinion, Legislation Advances Allowing Sleeping, Hostile, and Unintelligible Jurors, Antelope Valley Times (May 20, 2020), https://theavtimes.com/

Prosecuting Attorneys' Advisory Council denounced a reform proposal as "untenable and illogical," accusing its authors of "assum[ing] nefarious motives of the prosecutors and courts."[219] Legal scholars have recently begun to explore the ways in which prosecutors, as an organized lobby, have been able to shape the trajectory of criminal law by influencing legislatures (and when those efforts have fallen short).[220] Whether the quasi-administrative/quasi-legislative process of judicial rulemaking is more insulated from these political dynamics—and, if so, which variables matter (for example, judicial elections)—is ripe for further exploration.[221]

Finally, although this Part has focused on the decisions of judges and legislators in adopting new jury selection regimes, the push to remake the law of jury selection has emerged from the organizing efforts of civil rights organizations, community activists, affinity bar groups, public defenders, academics, and even excluded prospective jurors.[222] While discontent with *Batson* has been building for years, the racial justice protests of 2020 put pressure on courts to reckon with the various ways state criminal justice practices have contributed to and reinforced racial inequality.[223] The law of jury selection is one area in which political mobilizations have translated into formal criminal legal reforms.

2020/05/20/op-ed-legislation-advances-allowing-sleeping-hostile-and-unintelligible-jurors/ [https://perma.cc/2QJB-LKMV].

219. Elizabeth Burton Ortiz, Comment of the Arizona Prosecuting Attorneys' Advisory Council at 2, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed Apr. 30, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9652 [https://perma.cc/522S-T665] [hereinafter Comment of the APAAC].

220. See, e.g., Hessick et al., supra note 195, at 149–52.

221. For thoughtful examinations of how state supreme courts respond to majoritarian pressure, see Amanda Frost & Stefanie A. Lindquist, Countering the Majoritarian Difficulty, 96 Va. L. Rev. 719, 731–40 (2010); Stefanie A. Lindquist, Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior, 28 Stan. L. & Pol'y Rev. 61, 68–69 (2017); see also Crespo, supra note 23, at 1379–88 (expounding on state judges' quasi-legislative role in the realm of plea bargaining).

222. See, e.g., Sloan, supra note 104, at 243–44 (discussing the movement in Washington); Emmanuel Felton, Many Juries in America Remain Mostly White, Prompting States to Take Action to Eliminate Racial Discrimination in Their Selection, Wash. Post (Dec. 23, 2021), https://www.washingtonpost.com/national/racial-discrimination-jury-selection/2021/12/18/2b6ec690-5382-11ec-8ad5-b5c50c1fb4d9_story.html (on file with the *Columbia Law Review*) (discussing the role of excluded jurors, activists, and academics in pushing for legal reform); see also supra note 167 and accompanying text (discussing the coalition in support of A.B. 3070); infra Part III (discussing the Arizona reforms).

223. See Felton, supra note 222 ("I'm being frank and realistic in saying that we had the advantage of the moment . . . . We got this passed in August 2020, just a few months after George Floyd was murdered, and it was one of several racial justice pieces that passed in the wake of his murder." (internal quotation marks omitted) (quoting interview with Professor Elisabeth Semel)).

III. ARIZONA SUPREME COURT'S ELIMINATION OF PEREMPTORY STRIKES

A closer look at a judicial rulemaking process in one state, Arizona, helps illustrate these dynamics. When the Arizona Supreme Court made the historic decision to eliminate peremptory strikes, it surprised most scholars, practitioners, and other court observers, particularly given the Arizona courts' traditional hostility to *Batson* claims.[224] Even if the court was dissatisfied with the status quo, there were other options available: At the time of the decision, the court had before it two dueling rule-change petitions, one of which (championed by the Arizona State Bar and civil rights organizations) urged reforms short of outright abolition.[225] Why, then, did the Arizona Supreme Court do away with peremptory strikes altogether? Why did a conservative court composed of seven Republican-appointed justices become the first to embrace Justice Marshall's call to get rid of peremptory strikes altogether?

This Part explores how reformers used the rulemaking process to enact arguably the most significant reform to the American jury in the past thirty-five years. We interview key actors to supplement the official record—which, notably, contains no official statement or reasoning from the Arizona Supreme Court—and thereby shed light on the various forces that shaped the process. At the time of the court's decision, the COVID-19 pandemic had already prompted Arizona courts to adjust their jury selection practices, and political pressure from the mass protests for racial justice that took place in the summer of 2020 were instrumental in building support for change. But another important narrative emerges from the official record and interviews with participants: Alongside concerns about racial exclusion, judicial aversion to the perceived "wokeness" of Washington and California's reforms provided the momentum necessary to abolish peremptory strikes. Arizona's "colorblind" rejection of peremptory strikes thus offers not only an important chapter in the history of the American jury but also a case study in racial justice advocacy in a less-than-hospitable political climate.[226]

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224. See infra notes 227–228 and accompanying text. On the other hand, Arizona has traditionally evinced a willingness to explore jury reforms. See, e.g., B. Michael Dann & George Logan III, Jury Reform: The Arizona Experience, 79 Judicature 280, 280 (1996) (recounting the Arizona Supreme Court's call for a jury service task force in 1993); Valerie P. Hans, Paula L. Hannaford & G. Thomas Munsterman, The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors, 32 U. Mich. J.L. Reform 349, 349–50 (1999) (noting the Arizona Supreme Court's adoption of a "sweeping set of changes [to] the state's jury system" in 1995).

225. See infra note 256.

226. Cf. Derrick A. Bell, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 524 (1980) (arguing *Brown* "cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation").

A. *Backdrop*

Judged solely based on the success of *Batson* claims in state courts, Arizona might seem like an unlikely jurisdiction to adopt pioneering jury selection reforms. Indeed, between 2002 and 2019, Arizona courts reversed only one criminal conviction due to a *Batson* violation;[227] two more cases (including one involving a *Batson* claim challenging the exclusion of white male jurors) were remanded to the trial court for further proceedings.[228]

One of the appellate cases involving a rejected *Batson* claim was *State v. Gentry*, litigated by public defender (and chair of the local National Lawyers Guild (NLG) chapter) Kevin Heade in 2018.[229] There, in a case involving a Black defendant, prosecutors wielded a peremptory strike to remove from the venire the sole remaining Black juror.[230] When the court solicited a race-neutral rationale, the prosecutor explained that she was concerned that the juror's husband had "the same exact background" as the defendant and that the juror might "identify[] with the defendant and his wife" as a result.[231] To be sure, the record contained evidence indicating race-neutral similarities between the juror's husband and the defendant—both were military veterans, worked at banks, and had children by previous marriages—but Heade argued the racial subtext of "same exact background" was clear.[232] To no avail. The Court of Appeals rejected Gentry's appeal[233]—and his invitation to use the case as a vehicle to adopt a modified *Batson* framework modeled after Washington's G.R. 37[234]—and the Arizona Supreme Court denied review on January 7, 2020.[235] Two days later, the Central Arizona National Lawyers Guild

227. State v. Brown, No. 1 CA-CR 13-0608, 2014 WL 2565551 (Ariz. Ct. App. June 5, 2014).

228. State v. Valenzuela, No. 1 CA-CR 11-0066, 2012 WL 1138985 (Ariz. Ct. App. Apr. 3, 2012); State v. Christian, No. 2 CA-CR 2009-0061, 2010 WL 1241096 (Ariz. Ct. App. Mar. 31, 2010); see also Jodi Knobel Feuerhelm, *Batson* Working Grp., Reply at 8–9, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed June 1, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9912 [https://perma.cc/Q65F-FTVS] [hereinafter BWG Reply] (listing dubious justifications for strikes upheld under *Batson*).

229. 449 P.3d 707, 711 (Ariz. Ct. App. 2019).

230. Id. at 710.

231. Appellant's Opening Brief at 31, *Gentry*, 449 P.3d 707 (No. 1 CA-CR 18-0357), 2018 WL 6729565, at *32.

232. Id.

233. *Gentry*, 449 P.3d at 714.

234. Id. at 711 ("Defendant further asks that we adopt [Washington's] approach to peremptory challenges . . . , which carves out a list of reasons presumed invalid and . . . include[s] an 'objective observer' standard. . . . We are neither bound by Washington state law, nor are we inclined to ignore well-established Arizona legal precedent.").

235. Id. at 707.

petitioned the Arizona Supreme Court to adopt a new rule governing peremptory strikes that would track the Washington approach.[236]

As Heade explains it, he harbored no illusions that the 2020 NLG proposal "would lead to any meaningful change";[237] rather, he simply "went rogue," hoping that the proposal might "engender some public dialogue," a "first step" in what would likely be a decade-long process.[238] As Heade began soliciting support for the proposal, however, he encountered an unexpectedly receptive audience when he pitched the proposal to the State Bar's Civil Practice and Procedure committee.[239] Members of the committee persuaded Heade that he should withdraw his petition if he was serious about changing the rule. Instead, the State Bar would convene a *Batson* Working Group (BWG), study the proposal with key stakeholders, and develop a new proposal that could garner broader support.[240]

Two developments in the summer of 2020 reconfigured the political landscape, laying groundwork for that broad support to materialize: The courts were forced to adjust to the COVID-19 pandemic, and racial justice protests exploded across Arizona and the country. Both played a key role in the final decision to reject peremptory strikes altogether.

When the pandemic arrived in Arizona, the Arizona Supreme Court aimed to keep the state's courthouses running, but in some counties, would-be jurors sought "postponements and excusals" in such high numbers that "the number of prospective jurors [was] less than [what was] needed to schedule jury trials."[241] Traditionally, "large groups of jurors [would] report to the courthouse for jury selection," but this simply "was

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236. Kevin D. Heade, Petition at 10, In re Petition to Amend the Rules of the Sup. Ct. of Ariz.: Rule 24—Jury Selection, R-20-0009 (Ariz. filed Jan. 9, 2020), http://www.centralaznlg.org/wp-content/uploads/2020/12/central-az-nlg-petition-to-amend-the-rules-of-the-supreme-court-of-arizona-rule-24-jury-selection.pdf [https://perma.cc/2Z44-8UJN].

237. Telephone Interview with Kevin D. Heade, Chair, Cent. Ariz. Nat'l Laws. Guild (Sept. 22, 2022) [hereinafter Heade Interview].

238. Id.

239. Id.; Telephone Interview with Andrew Jacobs, *Batson* Working Grp. Member, State Bar of Ariz. (Sept. 29, 2022) [hereinafter Jacobs Interview].

240. Heade Interview, supra note 237; Jacobs Interview, supra note 239; see also Kevin D. Heade, Motion to Withdraw at 1, In re Petition to Amend the Rules of the Sup Ct. of Ariz.: Rule 24—Jury Selection, R-20-0009 (Ariz. filed May 19, 2020), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=7940 [https://perma.cc/NE6Z-FPL5] (discussing convening of State Bar efforts); Lisa M. Panahi, Comment of the State Bar of Arizona at 2, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. by Adopting a New Rule: Rule 24—Jury Selection, No. R-20-0009 (Ariz. filed May 1, 2020), https://www.azcourts.gov/Rules-Forum/aft/1081 [https://perma.cc/NRF6-Y8LG] (same).

241. Samuel A. Thumma & Marcus W. Reinkensmeyer, Post-Pandemic Recommendations: COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup, 75 SMU L. Rev. Forum 1, 40 (2022), https://scholar.smu.edu/cgi/viewcontent.cgi?article=1039&context=smulrforum [https://perma.cc/3C6B-76RV].

not practical" given the imperatives of social distancing.[242] So, in addition to a host of other reforms (like conducting electronic jury questionnaires ahead of time), the court decided to sharply limit peremptory strikes by emergency administrative order.[243] In noncapital felony cases, both sides were limited to only two strikes; in misdemeanors, just one.[244] The emergency measure was initially slated to last only until the end of 2020, but the shift proved popular with trial court judges because it streamlined the jury selection process and allowed clerks to summon smaller venires.[245] "Judges had already become accustomed to fewer peremptory challenges," reported Professor Valena Beety, a member of the BWG.[246]

The other major event occurred on May 25, 2020: Within a matter of hours, Minneapolis police murdered George Floyd and a Phoenix trooper shot and killed an unarmed Black motorist named Dion Johnson.[247] While large protests occurred in towns small and large across the country, the killing of Johnson fueled especially large and militant protests in Phoenix and around Arizona.[248] For over a month,[249] thousands of protestors took to the streets on a nightly basis; police responded violently, arresting hundreds and often indiscriminately attacking protestors.[250] Citing the "violent civil disturbances and riots" in Arizona during the first few nights of protests, Governor Doug Ducey declared a state of emergency on May

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242. Id. at 41.

243. See In re Authorizing Limitation of Court Operations During a Public Health Emergency and Transition to Resumption of Certain Operations at 6, Admin. Order No. 2020-75 (Ariz. May 8, 2020), https://www.azcourts.gov/portals/22/admorder/orders20/2020-75.pdf [https://perma.cc/5PZG-JWFA].

244. See id.

245. Telephone Interview with Robert M. Brutinel, C.J., Ariz. Sup. Ct. (Apr. 22, 2022) [hereinafter Brutinel Interview]; Telephone Interview with Peter B. Swann, C.J., Ariz. Ct. App., Div. 1 (Sept. 23, 2022) [hereinafter Swann Interview]; supra text accompanying note 44.

246. Telephone Interview with Valena Beety, Professor of L., Ind. Univ. Maurer Sch. of L. & Member of the *Batson* Working Grp., State Bar of Ariz. (Oct. 10, 2022) [hereinafter Beety Interview].

247. Terry Tang, Family of Man Killed by Arizona Cop Wants Federal Probe, AP News (June 5, 2020), https://apnews.com/article/ac179d71e2260ab263e8641f25d71591 [https://perma.cc/6G74-YRDR].

248. See BrieAnna J. Frank, Andrew Oxford & Helena Wegner, Vandals Smash Windows at End of Night of Protests Over the Deaths of George Floyd, Dion Johnson, AZ Central (May 30, 2020), https://www.azcentral.com/story/news/local/phoenix-breaking/2020/05/29/phoenix-braces-another-night-protests-george-floyd-dion-johnson/5288308002/ [https://perma.cc/G8PV-2STS].

249. Alana Minkler, Protests Against Police Brutality to Continue in Metro Phoenix Thursday, AZ Central (June 25, 2020), https://www.azcentral.com/story/news/local/phoenix-breaking/2020/06/25/phoenix-area-protests-against-police-brutality-continue-thursday/3256804001/ [https://perma.cc/GVN9-J2ZR].

250. See, e.g., Uriel J. Garcia, Residents of Phoenix Neighborhood Say Police, Not Protesters, Were Problem on Sunday, AZ Central (June 1, 2020), https://www.azcentral.com/story/news/local/phoenix/2020/06/01/residents-phoenix-garfield-neighborhood-say-police-not-protesters-were-problem-protest/5312347002/ [https://perma.cc/AR4U-X92B].

30, 2020, which included an 8:00 PM curfew statewide that lasted more than a week.[251]

The protests put substantial pressure on the Arizona judiciary to demonstrate that the courts took seriously protestors' anger at racial injustice. Throughout June 2020, many state supreme courts (or their chief justices) took the unusual step of issuing public statements recognizing protestors' grievances and pledging to commit themselves to promoting racial equality.[252] The Arizona courts released no such statement. But, according to key actors, "there was a general sense in the judiciary that *something* had to be done, if for nothing else than to preserve the credibility of the state courts."[253]

B. *Dueling Proposals*

While protestors filled Arizona streets in May 2020, the State Bar first convened a *Batson* Working Group comprising prominent civil practitioners, criminal attorneys (both prosecutors and public defenders), civil rights lawyers, several judges, and a law professor.[254] The full group met more than a dozen times between May 2020 and January 2021, studying the academic literature on *Batson*, reviewing Arizona case law, and assessing strengths and weaknesses of recent reforms elsewhere.[255]

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251. Maria Polletta & Jessica Boehm, Ducey Declares State of Emergency, Announces Weeklong 8 PM Curfew, AZ Central (May 31, 2020), https://www.azcentral.com/story/news/politics/arizona/2020/05/31/arizona-gov-ducey-declares-state-emergency-weeklong-8-p-m-curfew/5301432002 [https://perma.cc/6XQF-3DMR] (internal quotation marks omitted) (quoting Governor Doug Ducey).

252. See State Court Statements on Racial Justice, Nat'l Ctr. for State Cts., https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice [https://perma.cc/C3AY-XDC8] (last visited Sept. 26, 2023) (collecting statements from more than two dozen jurisdictions). Chief Justice Bernette Johnson of the Supreme Court of Louisiana, for example, wrote the following:

> [H]ear the voices of the protesters. So many feel our criminal legal system is part of the problem. . . .
>
> . . . [T]he glaring [class and race] disparities [in] the rate of arrests, severity of prosecutions and lengths of sentences for drug offenses [demonstrate] how we are part of the problem. Is it any wonder why many people have little faith that our legal system is designed to serve them or protect them from harm? Is it any wonder why they have taken to the streets to demand that it does?

Letter from Bernette Joshua Johnson, C.J., La. Sup. Ct., to Colleagues in the Jud., Exec., and Legis. Branches 1–2 (June 8, 2020), https://www.lasc.org/press_room/press_releases/2020/2020-18_Justice_for_All_in_Louisiana.pdf [https://perma.cc/596B-FEWK].

253. Swann Interview, supra note 245; see also Heade Interview, supra note 237 ("We had a historic uprising in the streets that demanded action . . . ."). But see Email from Robert M. Brutinel, C.J., Ariz. Sup. Ct., to Thomas Frampton, Assoc. Professor of L., Univ. of Va. Sch. of L. (Feb. 3, 2023) ("With due respect to Judge Swann, I was unaware of a 'general sense.' There were certainly individuals, like Judge Swann, who felt that way.").

254. BWG Proposal, supra note 42, app. B at 1 (listing group members).

255. Id. at 2.

The final proposal of the State Bar's BWG (like the earlier NLG proposal) adopted the overall structure of G.R. 37–style reforms undertaken elsewhere, though it expanded upon other jurisdictions' changes in ambitious ways. As in Washington and California, the BWG proposed the abolition of Step One of the *Batson* inquiry;[256] abandoned *Batson*'s ultimate focus on subjective intent; and declared "presumptively invalid" certain justifications closely correlated with a protected status or trait.[257] But the BWG proposal also went further—in ways that would ultimately trouble key stakeholders. Its proposed rule would have prohibited strikes targeting new characteristics of prospective jurors ("race, sex, gender, religion, national origin, ethnicity, disability, age, or sexual orientation").[258] Second, language in the proposed rule was more explicit than other jurisdictions' that "unconscious bias," as assessed from the vantage of an objective observer, rendered a strike invalid.[259] That is, a strike would be disallowed if "any reasonable person could view any of [the protected categories] as a conscious or unconscious factor in the use or waiver of a peremptory challenge."[260]

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256. Compare id. app. A at 1 (Arizona's proposed rule), with Wash. Ct. Gen. R. 37(d) (Washington's rule).

257. Compare BWG Proposal, supra note 42, app. A at 4 (Arizona's proposed rule), with Cal. Civ. Proc. Code § 231.7(e)–(g) (2023) (California's rule), and Wash. Ct. Gen. R. 37(d) (Washington's rule).

258. BWG Proposal, supra note 42, app. A at 2–4 (providing an expanded list of protected classes, beyond that of Washington's and California's recent reforms).

259. See id. app. A at 1, 2. The Maricopa County Attorney took particular issue with this provision:

> While the "reasonable person" standard is a well-known facet of the law, in this context it is useless. How is a judge to know what "*any* reasonable person *could* view" as a "conscious or *unconscious*" factor in a decision? Is a judge really in a position to rule, as a matter of law, whether a reason for a strike could possibly be seen by a reasonable person somewhere to *unconsciously* indicate that race, for example, was a factor in some way in the decision to strike? With this standard, the striking party and the judge could both be "consciously" certain that a strike was not racially based, but the judge could still find that some reasonable person somewhere *could* think that, even unconsciously, the reason had a racial component and be required to overrule the strike.

Kenneth N. Vick, Maricopa County Attorney's Comment in Opposition at 7, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, R-21-0008 (Ariz. filed May 3, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9789 [https://perma.cc/C4VL-WCT8].

260. BWG Proposal, supra note 42, app. A at 2. This is not to say that the Washington and California proposals ignored "implicit" or "unconscious" bias. Both jurisdictions' definitions provide that the "objective observer" or "reasonable person" (from whose perspective the strike should be assessed) must be aware that unconscious bias has resulted in the unfair exclusion of potential jurors historically. See Cal. Civ. Proc. Code § 231.7(d)(2)(A); Wash. Ct. Gen. R. 37(f).

From the outset, however, a competing proposal was in the works. Judge Peter Swann, a member of the BWG, made clear at the first meeting of the group that he intended to submit a competing petition that recommended the complete elimination of peremptory challenges.[261] For Swann, racial exclusion in jury selection presented a profound and intractable "moral crisis" for the courts.[262] But he feared that "the *Batson*-plus approach would be inefficient, impractical, and lead to more difficult litigation—concerns that are not present with an abolitionist approach."[263] Dispensing with peremptory strikes altogether, he explained, was both better policy and more likely to succeed:

> The very first meeting of the working group, I urged them to consider abolition. Everyone thought that I was some kook sitting on a hill. I kept pounding that drum: "You guys really need to think about something other than [reform] if you want to see it passed."[264]

While Swann was unable to convince the BWG that his proposal was realistic, he remained an active member of the group, and most members welcomed his competing proposal; if nothing else, the specter of abolition made their reform proposals seem more palatable.

But BWG members split on whether eliminating peremptory strikes was actually *preferable*. For some, the decision to mobilize for reform was purely tactical, especially in light of existing precedents for reform in California and Washington.[265] Reforming the basic *Batson* framework might ultimately "prop[] up an inefficient structure," but it still marked a meaningful improvement over the status quo, and "the possibility of eliminating peremptory challenges" seemed slim in any event.[266] For others, though, a targeted rule tailored to eliminate only *improper* peremptory strikes remained preferable to abolition. On this view, nondiscriminatory

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261. Swann Interview, supra note 245; see also Heade Interview, supra note 237. Swann's proposal was eventually coauthored with a colleague on Arizona's Court of Appeals, Division I, Judge Paul McMurdie. Swann and McMurdie had recently been on opposite sides of a *Batson* appeal: Swann voted to remand, while McMurdie believed no *Batson* violation had been established. See State v. Porter, 460 P.3d 1276, 1278 (Ariz. Ct. App. 2020), vacated, 491 P.3d 1100 (Ariz. 2021). In his dissent, however, McMurdie endorsed Washington's "objective observer" test but noted that "such a radical change to our state's implementation of the *Batson* framework" should come through rulemaking, a process "'better suited to consider the array of relevant studies and data in this area, along with the interests of the stakeholders.'" Id. at 1290–91 (McMurdie, J., dissenting) (quoting State v. Holmes, 221 A.3d 407, 437 n.25 (Conn. 2019)).

262. Swann Interview, supra note 245.

263. Id.

264. Id.

265. Heade Interview, supra note 237 (describing views of other participants).

266. Beety Interview, supra note 246; see also Jacobs Interview, supra note 239.

peremptory strikes could play an important and perhaps indispensable role in promoting fair trials for defendants.[267]

C. *"Too Woke"*

Both BWG and Judge Swann formally submitted proposals to the Arizona Supreme Court in January 2021, which opened a window of both formal and informal lobbying.[268] Organizations and individuals who submitted formal comments to the Arizona Supreme Court on the BWG's proposal overwhelmingly supported its recommendation, including numerous civil rights and civil liberties groups,[269] public interest law organizations,[270] public defenders,[271] and the State Bar of Arizona.[272] Comments on the competing proposal, meanwhile, were mostly negative, particularly those from individual trial attorneys who cautioned against stripping parties of control over the jury selection process. Even the local NLG chapter opposed the abolition petition, explaining that the ostensibly "fair and even-handed" path of abolition, by

267. Beety Interview, supra note 246; Heade Interview, supra note 237 (providing a view that the BWG proposal was better when compared with abolition, at least at first).

268. Brutinel Interview, supra note 245; see also Beety Interview, supra note 246 (emphasizing that the dueling petitions were "*the* hot topic" at the state judicial conference in June 2021 where attendees "felt very comfortable sharing their opinions" as to the best path forward (and where members of the state's high court were in attendance)).

269. Dianne Post, Comment of the NAACP, In re Petition to Amend Ariz. Rules of the Sup. Ct. Rule 24 Regarding Jury Selection, No. R-21-0008 (Ariz. filed Feb. 11, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9418 [https://perma.cc/7HQC-XZ85].

270. Amy Armstrong, Comment of the Arizona Capital Representation Project, In re Petition to Amend Ariz. Rules of the Sup. Ct., Rule 24 Regarding Jury Selection, No. R-21-0008 (Ariz. filed May 3, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9811 [https://perma.cc/2XQB-PFPC]; David J. Euchner, Comment of the Arizona Attorneys for Criminal Justice, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0020 (Ariz. filed May 4, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9850 [https://perma.cc/A8N3-K5EW].

271. Gary M. Kula, Comment of the Maricopa County Office of the Public Defender, In re Petition to Amend the Ariz. Rules of Sup. Ct. to Adopt Rule 24 on Jury Selection, R-21-0008 (May 3, 2021), https://www.azcourts.gov/Rules-Forum/aft/1196/afpg/2 [http://perma.cc/L53D-3KDC]; Annamarie L. Valdivia, Comment of the Pascua Yaqui Public Defenders Office, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed May 3, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9786 [https://perma.cc/W7Q4-YARF].

272. Lisa M. Panahi, Comment of the State Bar of Arizona at 1, In re Petition to Amend the Ariz. Rules of Sup. Ct. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed Apr. 30, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9704 [https://perma.cc/GH28-3M55].

stripping defendants of their peremptory strikes, "reflect[s] a crucial misunderstanding of the interplay between race and power."[273]

But the proposal to do away with peremptory strikes garnered public support from one critical constituency: trial court judges. Nine of the ten members of the Yavapai County Superior Court bench, for example, submitted a formal comment in support of abolition, highlighting its "additional pragmatic and significant benefits" (apart from eliminating racial bias).[274] The judges noted that under the modified jury selection procedures employed during the pandemic, "the time needed to select a jury ha[d] dropped significantly," with several juries being "selected within an hour."[275] The speedier and more efficient jury selection process yielded "significant" benefits "for the Court and the citizenry."[276]

Beyond efficiency, judges from Mohave County emphasized their distaste for "scrutiniz[ing] lawyers' motives or the effect of race or ethnicity on the exercise of strikes," a process that the BWG's proposal preserved (and complicated).[277] Eliminating peremptory strikes avoided the awkward "guesswork" inherent in such inquiries, the judges explained.[278] By eliminating peremptory strikes altogether, judges could avoid having to ascertain whether an attorney's "rationale is legitimate or pretextual" or whether "race, ethnicity, or other status [was] a 'conscious or unconscious factor' in a strike."[279] Of course, the BWG's proposal aimed to address this concern by shifting from a subjective to an objective inquiry, but the Chief Justice of the Arizona Supreme Court, Robert Brutinel, dismissed the significance of this change:

> The assertion is that somehow it's easier for a judge to look at a prosecutor in the eye, and say, "An objective person would think you were motivated by racial animus," as opposed to him saying,

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273. Victor Aronow, Comment of the Central Arizona National Lawyers Guild Opposing the Abolition of Peremptory Strikes at 5, In re Petition to Amend Rules 18.4 and 18.5 of the Ariz. Rules of Crim. Proc. and Rule 47(e) of the Ariz. Rules of Civ. Proc., No. R-21-0020 (Ariz. filed Apr. 23, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9571 [https://perma.cc/J3AD-H5MH].

274. John Napper, Comment of the Yavapai County Superior Court at 1, In re Petition to Amend Rules 18.4 and 18.5 of the Ariz. Rules of Crim. Proc. and Rule 47(e) of the Ariz. Rules of Civ. Proc., No. R-21-0020 (Ariz. filed Apr. 15, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9462 [https://perma.cc/5XNY-TFCQ].

275. Id. at 2.

276. Id.

277. 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 Ariz. Rules of Crim. Proc. and Rule 47(e) of the Ariz. Rules of Civ. Proc., No. R-21-0020 (Ariz. filed Apr. 12, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9457 [https://perma.cc/VK9R-SNWM].

278. Id.

279. Id. (quoting BWG Proposal, supra note 42, app. A at 2).

> "Hey, you're a bigot" . . . . And I've been a trial judge. I don't think that's any easier.[280]

Outside of the formal comment system, criticism of the BWG reform proposal as "too woke" gained traction. Judge Swann recalled that the "wokeness" critique surfaced even within the BWG meetings:

> [I]t's so laden with connotations that I don't use [the term "woke"] anymore. The list of suspect classes kept growing and kept looking more and more slanted, if not in a raw political sense, at least in a cultural sense. It was slanted toward protecting certain groups and not others. And then we actually had people lobbying to protect their group in the list. What if you have a physical disability? Should that be included? I think there was a growing sense on the Working Group that the more you tried to do to prevent holes in the rule . . . the more difficulty they got into with drafting.[281]

Kevin Heade heard similar feedback as the proposals circulated: Many judges privately described the "Washington model," backed by the ACLU and NLG, as "too woke."[282] Prosecutors lauded the "goal" of eliminating bias as "commendable" but blasted the BWG's proposal as necessitating "intrusive questioning."[283] Because "[g]ender is not the same as sex," a prosecutors' group cautioned, "questions would need to be asked of each juror about their gender identification and sexual preference as well."[284] The "impracticable" reforms urged by the BWG, the Mohave County judges warned, only exacerbated the problem: "Virtually all prospective

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280. Brutinel Interview, supra note 245. A similar dynamic arose in California as A.B. 3070 advanced through the Legislature. After adamantly opposing the peremptory reform effort, attacking it as "an outrageous attempt to tell judges how to interpret the Constitution," a group of California judges later signaled their support for the wholesale elimination of peremptory strikes as "an actual solution" worth pursuing. Compare Letter from Directors, All. of Cal. JJ., to William J. Murray, Jr., Member, Cal. Jud. Council's Crim. L. Advisory Comm. (May 22, 2020) (on file with the *Columbia Law Review*), with Letter from Steve White, President, All. of Cal. JJ., to Anthony Rendon, Speaker, Cal. Assemb., and Shirley Weber, Mark Stone & Reggie Jones-Sawyer, Members, Cal. Assemb. (June 10, 2020) (on file with the *Columbia Law Review*).

281. Swann Interview, supra note 245. Chief Justice Brutinel confirmed that the scope of the reform proposal worried some: "Frankly, the *Batson* Working Group wanted to expand it to any suspect classification, and I suspect at least in Arizona that was going to be a bridge too far." Brutinel Interview, supra note 245. On the shifting meaning(s) of "woke," see, e.g., David Remnick, What Does "Woke" Mean, and How Did the Term Become So Powerful?, New Yorker: Pol. Scene Podcast (Jan. 30, 2023), https://www.newyorker.com/podcast/political-scene/what-does-woke-mean-and-how-did-the-term-become-so-powerful (on file with the *Columbia Law Review*); Aja Romano, A History of "Wokeness", Vox (Oct. 9, 2020), https://www.vox.com/culture/21437879/stay-woke-wokeness-history-origin-evolution-controversy [https://perma.cc/XN6H-96RH].

282. Heade Interview, supra note 237.

283. Comment of the APAAC, supra note 219, at 1.

284. Id. at 4; see also Vick, supra note 259, at 5–6.

jurors are members of the 'protected group' which suggests all peremptory strikes will be motivated for inappropriate reasons."[285] Gradually, the cleaner, simpler, and facially colorblind proposal to eliminate peremptory strikes—which didn't require judges to grapple with "implicit, institutional, and unconscious biases"—became comparatively appealing.[286]

Another flash point became the BWG's list of "presumptively invalid reasons" for a given strike,[287] which some stakeholders saw as lopsided and unlikely to capture discriminatory strikes advanced by defense counsel against white jurors.[288] For example, modeled on the frameworks adopted in Washington and California, the BWG proposal declared presumptively invalid a strike justified on the grounds that the prospective juror reported "past unfavorable experiences with law enforcement officers" or "a close relationship with people who have been stopped, arrested, or convicted of a crime."[289] But if such rationales were off-limits because they closely correlated with race, should a defense-initiated strike against a white prospective juror who reports *positive* experiences (or close family relationships) with law enforcement officials be similarly suspect? Chief Justice Brutinel emphasized that the appearance of such a double standard dampened support for the BWG reforms:

> "I've got a cousin in prison who's been arrested for the same offense, but I can be impartial." That's a hard one because likely they *can* be fair, but . . . [laughs]. You know, the State Bar petition had those specific questions, and you [would] not [be] allowed to ask those things anymore. And if you do, that's evidence of racial animus. But they didn't include [a rule against striking prospective jurors who disclose] "all [their] relatives are cops."[290]

The Maricopa County Attorney mocked the categorical restrictions: "We are told these are reasons that have been 'associated with improper discrimination' at some point. Annual petitions will no doubt follow to add new reasons to this list anytime a new law review article identifies another

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285. Kip Anderson, Comment of the Mohave County Superior Judges in Opposition at 1, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed Apr. 16, 2021), https://www.azcourts.gov/Rules-Forum/aft/1196 [https://perma.cc/3KAS-K86E].

286. BWG Proposal, supra note 42, app. A at 1; see also Beety Interview, supra note 246 ("Judges that I talked to felt that elimination [of peremptory strikes] was so much easier. They didn't want to have to deal with [assessing implicit bias].").

287. BWG Proposal, supra note 42, app. A at 4.

288. See Jacobs Interview, supra note 239 (noting strong opposition to the idea of "prohibited questions"); see also Swann Interview, supra note 245 ("When we got to 'what kinds of questions should be asked,' . . . it came to feel like we were watching MSNBC . . . . Everything was directed to bad experiences with police, and that's a big problem, but that's not the universe of problematic questions.").

289. BWG Proposal, supra note 42, at 1–2, app. A at 4.

290. Brutinel Interview, supra note 245.

objective fact that might be associated with discrimination somewhere in some context."[291]

A turning point came in May 2021, however, when jury selection data demonstrating large racial disparities in the use of peremptory strikes in the Maricopa County superior court emerged.[292] In official comments on the rule-change petitions, prosecutors had repeatedly emphasized that there were no Arizona-specific data supporting the allegations of racial bias in the selection of juries.[293] This position became untenable in the face of new data demonstrating that, in 2019, prosecutors "disproportionately struck [Black people] from juries 40% more than their population in the venire, and Native Americans 50% more than their population in the venire."[294] According to Andrew Jacobs, a BWG member who was instrumental in mobilizing State Bar support for the reform effort, the stark data "coming a year after the murder of George Floyd[] really took the legs out" of the opposition; the dramatic numbers bolstered the "moral force" of the reform effort in a way that was difficult to deny.[295]

The new data also bolstered the case for elimination (as opposed to reform), albeit in an unanticipated way: The numbers showed bias against white prospective jurors by defense attorneys.[296] Under *Georgia v. McCollum*, a defendant's use of a racially-motivated peremptory strike offends the Equal Protection Clause no less than a prosecutor's racially-motivated strike against a nonwhite juror,[297] but the data demonstrated that "[b]oth sides of every case . . . were using peremptories in a discriminatory manner."[298] The BWG reform proposal was crafted primarily to address racial bias by prosecutors that resulted in the overstriking of nonwhite jurors. But the competing petition anticipated that "evidence strongly suggests that race-based strikes [against white jurors] are used by defense counsel as well," and argued that abolition (as opposed to reform) would be "the fairest way to end the practice across the board."[299]

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291. Vick, supra note 259, at 8 (quoting BWG Proposal, supra note 42, app. A at 4).

292. Jacobs Interview, supra note 239; Superior Ct. of Ariz. in Maricopa Cnty., Racial and Ethnic Representation Through the Jury Selection Process 2 (2021), https://napco4courtleaders.org/wp-content/uploads/2021/06/Jury-Representation-Study-Superior-Court-in-Maricopa-County-May-2021.pdf [https://perma.cc/H2P4-97BG] [hereinafter Maricopa Cnty. Jury Selection Report].

293. See, e.g., Vick, supra note 259, at 2.

294. BWG Reply, supra note 228, at 1; see also Maricopa Cnty. Jury Selection Report, supra note 292, at 2.

295. Jacobs Interview, supra note 239.

296. Swann Interview, supra note 245; see also Maricopa Cnty. Jury Selection Report, supra note 292, at 2.

297. 505 U.S. 42, 55, 59 (1992).

298. Swann Interview, supra note 245.

299. Swann & McMurdie Petition, supra note 8, at 5; see also Swann Interview, supra note 245 (expressing skepticism that the Arizona Supreme Court would adopt a proposal that "just scolded prosecutors," noting that abolition "seemed more even-handed").

D. *Deliberations and Aftermath*

In August 2021, the Arizona Supreme Court met privately for their annual conference to consider petitions for new rules.[300] Many petitions prove uncontroversial, "go[ing] by without any debate at all," according to Chief Justice Brutinel.[301] Deliberation on the dueling jury selection petitions "was not like that; there was considerable debate."[302] Unlike other state supreme courts—some of which issue majority opinions, concurrences, and dissents with rule changes—the Arizona Supreme Court traditionally announces rule changes without explanation (or vote counts).[303] Thus, the momentous announcement came in the form of a brief order dated August 30, 2021, signed only by Chief Justice Brutinel, announcing the end of peremptory strikes, effective January 1, 2022.[304] The decision to do away with peremptory strikes, however, "was not unanimous."[305]

Those closest to the process identify a host of motivations for the ultimate adoption of the abolition proposal. The unrealized "promise of *Batson*," of course, loomed large: The court "certainly recognized that there was a perception at least that people of color were being stricken off juries in greater numbers" than they should be.[306] As much as this implicated the rights of defendants to receive a fair trial, the rights of the excluded jurors came to dominate the debate:

> In terms of effectuating people's constitutional rights to be able to *serve* on a jury, which is really what I think *Batson* is about, in order to make that process more effective and more efficient, [eliminating peremptory strikes] just makes a lot of sense. And I think that was probably the driving motivation; it certainly was for me, and [I suspect] for a number of my colleagues.[307]

Abandoning peremptory strikes would promote other forms of diversity too. Judge Swann noted that judges and lawyers (and medical

300. Brutinel Interview, supra note 245.

301. Id.

302. Id.

303. Compare, e.g., Rule XX Resolution, La. Sup. Ct. (Mar. 1999), https://www.lasc.org/Supreme_Court_Rules?p=RuleXXResolution499 [https://perma.cc/KL3L-MSBR] (containing six separate opinions on a rule change), with Order Amending Rule 34, Rules of the Arizona Supreme Court, on a Permanent Basis, No. R-12-0002 (Ariz. filed Sept. 2, 2016), https://www.azcourts.gov/Portals/20/2016%20Rules/R-12-0002.pdf [https://perma.cc/52S2-TPGD] (changing a rule without commentary).

304. Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. filed Aug. 30, 2021), https://fingfx.thomsonreuters.com/gfx/legaldocs/egvbkkwkrpq/R-21-0020%20Final%20Rules%20Order.pdf [https://perma.cc/6HFH-2P4P].

305. Brutinel Interview, supra note 245.

306. Id.

307. Id.; see also Jacobs Interview, supra note 239 (emphasizing the importance of "fairness, equity, and citizenship rights of jurors, not just criminal defendants").

professionals in certain civil cases) rarely made it on to juries and speculated that broadening jury service in both racial and nonracial terms "resonated" with some of the justices when his proposal was adopted.[308] "We had been excluding swaths of people based not only on their race, based not only on their gender," Chief Justice Brutinel explained, but also "based on life experience[,] [which should be] the reason for the jury system, not a disqualifying factor."[309] Finally, issues of efficiency were a "throughline" for the entirety of the proposal process.[310] As Chief Justice Brutinel explained: "It was the timing . . . . We'd already effectively done it with an administrative order [limiting peremptory strikes during the pandemic]; the question is do we go back or do we go forward. We chose to go forward, at least in my view."[311]

Not everyone regarded the new rule as "going forward." In the state legislature, a group of nine Republican state representatives (with strong backing from prosecutors) promptly introduced H.B. 2413, an "emergency measure" to repeal the Arizona Supreme Court's rule and reinstate peremptory strikes.[312] By a vote of 28-29 (with three abstentions), the measure came up short in February 2022.[313] Had the measure passed, however, it would have precipitated a direct clash between coordinate branches, as the Arizona Constitution assigns to the Arizona Supreme Court (not the legislature) the "[p]ower to make rules relative to all procedural matters in any court."[314] Chief Justice Brutinel expressed skepticism that the legislative measure could have lawfully restored peremptory strikes: "If they came to me and said, 'We want to change your rules with regard to jury selection,' probably our response would be, 'That's of questionable constitutionality, that's going to get litigated . . . . So are you sure you want to go that direction?'"[315]

While the legislative repeal effort eventually failed, the heated debate underscores the uphill battle that reformers would have faced if those seeking to eliminate peremptory strikes had required the approval of the

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308. Swann Interview, supra note 245.

309. Brutinel Interview, supra note 245; see also id. ("The assertion that all [lawyers] want to do is pick a fair jury I always thought was laughable, because I've picked a number of juries, and that's not what I wanted at all!").

310. Heade Interview, supra note 237.

311. Brutinel Interview, supra note 245.

312. H.R. 2413, 55th Leg., 2d Reg. Sess. (Ariz. 2022); see also Valena Beety, Henry F. Fradella, Jessica M. Salerno, Cassia C. Spohn & Shi Yan, Opinion, Arizona Will Would End an Effort to Stop Racial Bias in Jury Selection Before It Begins [sic], AZ Central (Feb. 22, 2022), https://www.azcentral.com/story/opinion/op-ed/2022/02/22/arizona-bill-allowing-peremptory-challenges-would-stop-reform/6871234001 [https://perma.cc/AKB5-NAWF].

313. See Bill History for HB2413, Ariz. State Legislature, https://apps.azleg.gov/BillStatus/BillOverview [https://perma.cc/GM26-AZPA] (last visited Sept. 26, 2023).

314. Ariz. Const. art. VI, § 5(5).

315. Brutinel Interview, supra note 245.

Arizona Senate, House, and Governor. Of course, the Arizona Supreme Court could have announced a new framework for peremptory strikes while deciding a *Batson* appeal, perhaps construing Section 13 or Section 24 of Arizona's Declaration of Rights as requiring new procedures.[316] Indeed, defendants unsuccessfully proposed as much in cases that came before the Court in 2020[317] and 2021,[318] but Chief Justice Brutinel worried that such a move would have been asking too much of the constitutional text: "[S]aying as a matter of Arizona constitutional law that we have to get rid of peremptory strikes . . . might be on shaky ground."[319] And even if the legislature had the authority to enact equivalent reforms, political opposition from prosecutors and other trial attorneys would complicate efforts.[320] Legislators "are responsive to a number of constituents," Judge Swann explained, which reduces the chances of passing new measures that would upset the status quo.[321] The rulemaking process, on the other hand, offered the court a "cleaner" way to achieve the same ends.[322]

IV. STATE SUPREME COURTS' RULEMAKING AUTHORITY AND THE JURY

The unexpected abolition of peremptory strikes in Arizona, coupled with the recent movement to reform jury selection in other jurisdictions, presents an obvious question: Where else might rulemaking provide an avenue to remake the American jury system? Although it has become customary to think of the American jury as defined by landmark Supreme Court cases like *Batson* that establish a baseline federal constitutional floor—for example, *Duncan v. Louisiana* (incorporating a right to jury trial for non-petty offenses),[323] *Williams v. Florida* (authorizing six-person

316. Ariz. Const. art. II, § 13 ("No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."); id. art. II, § 24 ("In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."); cf. Miller-El v. Dretke, 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring) (arguing that the elimination of peremptory strikes is required by the Equal Protection Clause of the U.S. Constitution); Batson v. Kentucky, 476 U.S. 79, 102–08 (1986) (Marshall, J., concurring) (same).

317. See State v. Gentry, 449 P.3d 707, 710–11 (Ariz. Ct. App. 2019), review denied (Jan. 7, 2020) (invoking stare decisis to decline the defendant's request for the adoption of a Washington-style approach to peremptory challenges).

318. See State v. Porter, 491 P.3d 1100, 1106–07 (Ariz. 2021) (declining to amend the state's *Batson* framework to require express findings that the prosecutor's race-neutral reasons were "credible and non-pretextual").

319. Brutinel Interview, supra note 245.

320. See Hessick et al., supra note 195, at 191–92 (examining the success rates of procedural legislation with prosecutor support and opposition).

321. Swann Interview, supra note 245.

322. Brutinel Interview, supra note 245.

323. 391 U.S. 145, 157–58 (1968).

juries),[324] *Taylor v. Louisiana* (announcing the fair-cross-section requirement),[325] and *Ramos v. Louisiana* (mandating unanimity for conviction)[326]—state court rulemaking has long played a major and underappreciated role in shaping the jury's contours, even before the recent reforms. State supreme courts can, and do, promulgate rules establishing how many jurors sit on a petit jury[327] or grand jury.[328] They establish who has the requisite qualifications and impartiality to sit as a juror,[329] how bias is probed,[330] and whether jury pools adequately reflect the demographics of the community.[331] (In Georgia, for example, a now-repealed court rule mandated that the representation of women and racial minorities on jury lists deviate by no more than five percent from that group's representation in the most recent county census.)[332] And court rules can shape seemingly more mundane, but critically important, aspects of the jury, including what materials jurors can[333] and cannot[334] bring into

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324. 399 U.S. 78, 86 (1970).

325. 419 U.S. 522, 530 (1975).

326. 140 S. Ct. 1390, 1397 (2020).

327. See, e.g., Fla. R. Crim. P. 3.270 (providing for six-person juries for all noncapital criminal cases).

328. See, e.g., State v. Brown, 528 N.E.2d 523, 529–30 (Ohio 1988) (holding that Ohio Crim. R. 6(A), stating that grand juries shall consist of nine members, supersedes conflicting statutes requiring fifteen-person grand juries).

329. Compare, e.g., Iowa R. Crim. P. 2.18(5) (providing that "[a]ffinity or consanguinity, within the fourth degree" provides valid basis for "challenge for cause"), with Minn. R. Crim. P. 26.02(5)(1)(5) (providing "consanguinity or affinity, within the ninth degree" disqualifies a potential juror).

330. See, e.g., People v. Jackson, 371 N.E.2d 602, 603, 606 (Ill. 1977) (invalidating voir dire statute permitting parties to conduct voir dire as unconstitutional encroachment by the legislature upon the judicial branch and its conflicting Rule 234).

331. See Colo. R. Crim. P. 24(c)(4) ("At any time before trial, . . . the court may declare a mistrial in a case on the ground that a fair jury pool cannot be safely assembled in that particular case due to a public health crisis or limitations brought about by such crisis."); Ga. Unified Appeal Proc. R. II(C)(6), II(E) (repealed 2012); see also State v. Elbert, 424 A.2d 1147, 1150 (N.H. 1981) (requiring "all future jury lists . . . to be chosen at random from voter checklists," notwithstanding contrary statutes, based on the court's "administrative authority under N.H. Const., pt. II, art. 73-A").

332. See Williams v. State, 699 S.E.2d 25, 26 n.1 (Ga. 2010) (describing Rules II(C)(6) and II(E) of the Georgia Unified Appeal Procedure prior to amendment); see also Ricks v. State, 800 S.E.2d 307, 310 (Ga. 2017) (discussing the "forced balancing" system under those rules). Georgia jury selection is now governed by an exceptionally detailed set of rules first promulgated in 2012. See Ga. Jury Composition R.; *Ricks*, 800 S.E.2d at 320–23 (holding that the county's use of "legacy data," attempts to eliminate potential duplicate records, and efforts to remove "inactive" names through a national change-of-address database violated the Jury Composition Rule).

333. E.g., Ariz. R. Crim. P. 18.6(d)(3) (requiring juror access to notes and notebooks during recesses and deliberations).

334. E.g., State v. Weigle, 447 P.3d 930, 934 (Idaho 2019) (rejecting the argument that jurors improperly considered a demonstrative exhibit during deliberations in violation of Idaho Code § 19-2203 because that statute "encroaches on this Court's constitutional authority to establish the procedural rules for Idaho's courts").

the room when they deliberate. State supreme courts' authority over jury-related matters can even generate rules that starkly limit actors in other branches: A Minnesota court rule, for example, prohibits prosecutors from downgrading misdemeanors without the defendant's consent when doing so would sidestep the availability of a jury trial.[335]

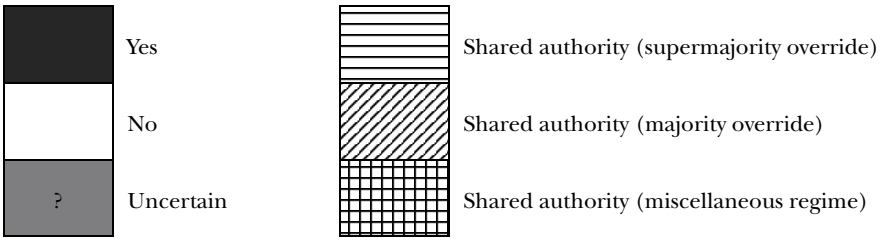
The states that have overhauled how peremptory strikes can be wielded, it turns out, are not exceptional in terms of the rulemaking authority of their state supreme courts (although the landscape is far from uniform). Exploring the feasibility of reforms to peremptory strikes along the lines of those enacted in Washington and Arizona offers a useful case study for exploring the intricacies, contradictions, and ambiguities of state court rulemaking. In his study of rulemaking's role shaping the law of plea bargaining, Andrew Manuel Crespo recently offered the first fifty-state review of judicial rulemaking powers in many decades.[336] Our analysis is indebted to and builds off his meticulous work (although, as noted in the following subsections and in our Appendix's footnotes, we differ as to our assessment of several jurisdictions when it comes to rulemaking concerning the jury). Overall, we find that state supreme court rulemaking has the potential to reshape jury selection in a large majority of states. And while certain aspects of this analysis are particular to peremptory strikes, much of it applies with equal force to criminal procedure generally, should an ambitious or assertive state supreme court seek to undertake such efforts.

Table 1 reflects the current source of authority for peremptory strikes under state law; the source of rulemaking authority in the state; and the authors' assessment of judicial rulemaking power to unilaterally implement Washington-style reform, to eliminate peremptory strikes, and to thwart legislative override attempts. Asterisks are used when a state's law leaves the answer to one of these questions unclear or particularly nuanced. For a more detailed explanation, see the expanded version of this Table (with accompanying footnotes) in Appendix A.

335. Minn. R. Crim. P. 23.04; see also State v. Johnson, 514 N.W.2d 551, 552–56 (Minn. 1994) (enforcing Minn. R. Crim. P. 23.04 even though it conflicts with a state statute). For a federal rule that similarly restricts prosecutors' traditionally unfettered discretion to drop charges, see Frampton, Rule 48(a) Dismissals, supra note 76, at 29.

336. See Crespo, supra note 23, at 1382–85; see also Donna J. Pugh, Chris A. Korbakes, James J. Alfini & Charles W. Grau, Judicial Rulemaking: A Compendium, at v (1984) (studying the rulemaking power of each state's high court).

TABLE 1. JUDICIAL POWER OVER PEREMPTORY STRIKES BY STATE



	Peremptory Challenges (Criminal)		Source of Rulemaking Authority			Washington-Style Reform?	Elimination?	Judicial Override?
	Court Rule	Statute	Constitution (express)	Inherent or Implied	Statute			
AL	✓	✓	✓	✓	✓		?	?
AK	✓		✓					
AZ	✓		✓	✓	✓			?
AR		✓	✓					
CA		✓	✓*					
CO	✓	✓	✓	✓	✓	?	?	
CT	✓	✓		✓	✓		?	?
DE	✓		✓		✓			
FL	✓	✓	✓		*			
GA		✓	✓	*	✓			
HI	✓	✓	✓	✓	✓			?
ID	✓	✓		✓	✓			
IL	✓	✓	✓	✓	✓			
IN	✓	✓		✓				
IA	✓			✓	✓			
KS	*	✓	✓	✓	✓			
KY	✓	*	✓	✓				?
LA		✓	✓			?		
ME	✓	*		✓	✓			
MD	✓	✓	✓					?
MA	✓			✓	✓			?
MI	✓	✓	✓		✓			
MN	✓			✓	✓			

	Peremptory Challenges (Criminal)		Source of Rulemaking Authority			Washington-Style Reform?	Elimination?	Judicial Override?
	Court Rule	Statute	Constitution (express)	Inherent or Implied	Statute			
MS	✓	✓		✓	*			
MO		✓	*					
MT		✓	✓					
NE		✓	✓					
NV	✓	✓		✓	✓			
NH	✓	✓	✓	✓	✓			
NJ	✓	✓	✓					
NM	✓	✓	✓	✓	✓			
NY		✓	*		*			
NC		✓	✓		✓			
ND	✓	✓	✓		✓			
OH	✓	✓	✓					
OK		✓		✓	✓	?		
OR		✓			*			
PA		✓	✓					
RI	✓				✓			
SC	✓	✓	✓		✓			
SD		✓	✓	✓	✓			?
TN	✓	✓		✓	✓			
TX		✓	✓		*			
UT	✓		✓		✓			
VT	✓	✓	✓		✓			?
VA		✓	✓		✓			
WA	✓			✓	✓			
WV	✓	✓	✓	✓	✓			
WI		✓			✓			?
WY	✓	✓		✓	✓			

A. *Washington-Style Reforms*

State supreme courts in at least thirty-five states possess the authority to unilaterally promulgate rules that could sharply limit or radically alter how peremptory strikes are wielded. Most often, this power derives from an explicit grant of such rulemaking power in a state constitution. The Article creating the judiciary in the Colorado Constitution is typical: It provides that "[t]he supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases."[337] In many states, the authority to promulgate rules is (additionally or alternatively) described by courts as "inherent,"[338] inferred from a positive grant of "administrative and supervisory authority" over subordinate courts,[339] or implied from general separation-of-powers principles.[340] In addition to these constitutional powers, many state legislatures have passed enabling statutes that delegate or "confirm" the rulemaking authority of their state supreme courts.[341]

The states that have abandoned the traditional *Batson* framework by state supreme court rulemaking illustrate each of these models. Arizona's constitution expressly grants its supreme court the "[p]ower to make rules relative to all procedural matters in any court."[342] As discussed earlier, New Jersey also has a long tradition of judicial supremacy, based on a constitutional grant of power to "make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts" (with "subject to the law" interpreted narrowly to mean "substantive" law only).[343] The Washington Constitution is silent as to rulemaking authority, but the Supreme Court of Washington has long held that "the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process."[344] This

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337. Colo. Const. art. VI, § 21; see also Mich. Const. art. VI, § 5 ("The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."); Pa. Const. art. V, § 10 ("The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant . . . .").

338. See, e.g., State v. Delaney, 52 So. 3d 348, 351 (Miss. 2011); Newell v. State, 308 So. 2d 71, 76 (Miss. 1975).

339. See, e.g., Ill. Const. art. VI, § 16; see also Okla. Const. art. VII, § 6 (providing vague "administrative authority" language).

340. See, e.g., State v. Mitchell, 672 P.2d 1, 8 (Kan. 1983).

341. See, e.g., Conn. Gen. Stat. Ann. § 51-14 (West 2023); Del. Code tit. 11, § 5121 (2023); Haw. Rev. Stat. Ann. § 602-11 (West 2023); Ind. Code Ann. § 34-8-2-1 (West 2023); N.H. Rev. Stat. Ann. § 490:4 (2023).

342. Ariz. Const. art. VI, § 5.

343. N.J. Const. art. VI, § 2, para. 3; see also supra notes 83–87 and accompanying text.

344. State v. Smith, 527 P.2d 674, 677 (Wash. 1974) (holding court rule governing post-conviction bail trumps contrary statute).

robust understanding of the court's power is supplemented by a statutory delegation confirming the supreme court's power "to prescribe, from time to time" rules of pleading, practice, and procedure in order to "simplif[y]" the legal process and "promote the speedy determination of litigation on the merits."[345] Connecticut lacks a constitutional rulemaking provision, though the Connecticut legislature has authorized its judiciary to engage in rulemaking since at least 1821.[346]

A small number of jurisdictions qualify this judicial rulemaking authority by expressly conditioning validity on acquiescence by the legislature during a review period of specified length.[347] In Connecticut, "[a]ny rule or any part thereof disapproved by the General Assembly by resolution" during the session after the rule's reporting is rendered "void and of no effect";[348] in Iowa, a "legislative council" can temporarily delay the effective day of a proposed rule within sixty days, but a rule cannot be blocked unless the General Assembly passes a bill (signed by the Governor) doing so.[349] Ohio requires both houses of its legislature to pass resolutions to block a proposed rule,[350] which has occurred on several occasions for proposed rules of evidence.[351] Alaska,[352] Florida,[353] and Utah[354] submit proposed rules to the legislature, too, but only a two-thirds supermajority in both houses can block implementation. And in Arkansas, a two-thirds vote of each house can "annul[] or amend[]" court-promulgated rules governing certain subject matter, but this provision does not extend to court rules governing criminal procedure.[355] In each of these states, though, the judiciary—acting entirely on its own—would still have the authority to radically reshape through rulemaking how juries are constituted.

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345. Wash. Rev. Code Ann. § 2.04.190 (West 2023).

346. See 1821 Conn. Pub. Acts 137, § 5; see also In re Dattilo, 72 A.2d 50, 51 (Conn. 1950) (surveying Connecticut history). But see Heiberger v. Clark, 169 A.2d 652, 656 (Conn. 1961) ("The constitution of our state, adopted in 1818, divides the powers of government into three distinct departments . . . . Article fifth, § 1, states: 'The judicial power of the state shall be vested in a supreme court of errors['] . . . . Irrespective of legislation, the rule-making power is in the courts." (quoting Conn. Const. art. V, § 1 (amended 1982))).

347. See, e.g., Mont. Const. art. VII, § 2, para. 3 ("Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.").

348. Conn. Gen. Stat. Ann. § 51-14 (West 2023).

349. Iowa Code § 602.4202 (2023).

350. Ohio Const. art. IV, § 5(B).

351. See Walton v. Elftman, 410 N.E.2d 1282, 1284 (Ohio Ct. C.P. 1980).

352. Alaska Const. art. IV, § 15.

353. Fla. Const. art. V, § 2(a).

354. Utah Const. art. VIII, § 4.

355. See Ark. Const. amend. LXXX, § 9; see also Op. Att'y Gen. No. 2003-030, at 14 (Ark. Feb. 21, 2003) (omitting rules of criminal procedure from the list of rules that the legislature can modify).

Because there are only a few states in which this general authority does not enable rulemaking reforms to the peremptory strike process, it is worth exploring the exceptions in greater detail. In Missouri, the state constitution affords its supreme court procedural rulemaking authority but expressly prohibits the promulgation of rules "relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal."[356] (And, indeed, the Missouri Supreme Court has held that its own rules "must be held to have no efficacy" when they impermissibly relate to trial by jury.)[357] The constitutions of New York,[358] North Carolina,[359] and Texas[360] assign rulemaking power to their legislatures, which can delegate authority over rules of criminal procedure to the judiciary, although no such delegations have occurred. And in California—where the legislature preempted the push for new rules by passing A.B. 3070—the California Supreme Court acting *alone* would have lacked the power to pass a Washington-style rule; there, rulemaking authority resides with a "Judicial Council" (which consists of judges, legislators, and appointees from the State Bar).[361]

The possibility for further Washington-style reforms through judicial rulemaking would likely face an additional hurdle in California, and the same obstacle might prohibit the Louisiana Supreme Court from promulgating Washington-style rules there. In both states, there is an explicit legal prohibition on judiciary-promulgated rules that conflict with statutes.[362] Many jurisdictions have such a rule, and ordinarily this proviso would do little to limit a Washington-style rule reforming the process by which peremptory strikes are exercised: There is no "inconsistency" between a rule sharply curtailing *how* or *when* a peremptory strike can be wielded and a statute fixing the total number of such strikes. But in Louisiana (and now, post–A.B. 3070, in California[363]), an unusually detailed statutory scheme governs peremptory strikes, and such legislative enactments might preempt the field.[364] Louisiana's "codification" of *Batson* seems calculated to impose no restrictions greater than the bare constitutional minimum demanded by the Equal Protection Clause (and, in fact, purports to

356. Mo. Const. art. V, § 5.

357. State v. McClinton, 418 S.W.2d 55, 62 (Mo. 1967).

358. N.Y. Const. art. VI, § 30.

359. N.C. Const. art. IV, § 13(2).

360. Tex. Const. art. V, § 31(c).

361. Cal. Const. art. VI, § 6(a), (d).

362. Id. § 6(d) ("The rules adopted [by the Judicial Council] shall not be inconsistent with statute."); La. Const. art. V, § 5(A) ("[The supreme court] may establish procedural and administrative rules not in conflict with law . . . .").

363. See supra text accompanying notes 170–178.

364. See La. Code Crim. Proc. Ann. art. 795 (2023).

authorize practices that plainly violate *Batson* and its progeny).[365] Such legislative frameworks make it hard to imagine how a G.R. 37–type rule could be "consistent" with what the legislature has established.

B. *Eliminating Peremptory Strikes*

A trickier question is whether a particular state supreme court possesses the authority to entirely eliminate peremptory strikes by court rule, as the Arizona Supreme Court did. To be sure, the more expansive powers required to abolish peremptory strikes are rarer than those required to reform the peremptory strike process, but in our analysis, the elimination of peremptory strikes could be accomplished through judicial rulemaking in at least thirty states.

A primary reason a state supreme court might possess the power to reform, but not abolish, is the aforementioned requirement that court rules be "consistent" with state statutes. In dozens of states, statutes currently fix the number of peremptory strikes allocated to the parties, sometimes standing alone and sometimes in parallel with a similar court rule. In the subset of jurisdictions with such statutes *and* "consistency" requirements, rulemaking could produce reforms that radically restricted the use of peremptory strikes—but a court rule reducing peremptory challenges to zero would create an impermissible conflict. Such frameworks would block rulemaking to end peremptory strikes in jurisdictions like Georgia, Hawaii, Nebraska, Oklahoma, Vermont, and Virginia.[366]

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365. Under a recent version of La. Code Crim. Proc. Ann. art. 795(C) (2016), judges were directed *not* to solicit a race-neutral or sex-neutral explanation for a dubious peremptory strike, prima facie case of discrimination notwithstanding, if "the court is satisfied that such reason is apparent from the voir dire examination of the juror." See 2019 La. Sess. Law Serv. Act 235 (West) (eliminating this text from the statute). The Supreme Court summarily reversed a Louisiana conviction in 2016 where this occurred, with four Justices explaining that *Batson* was concerned with the actual subjective motivations of prosecutors, not "judge-supplied reasons" for why the prosecutor might have acted. See Williams v. Louisiana, 136 S. Ct. 2156, 2157 (2016) (Ginsburg, J., concurring in the decision to grant certiorari, vacate, and remand). Similarly, although the U.S. Supreme Court has directed that "all of the relevant facts and circumstances" be considered when evaluating the existence of a prima facie case at Step One, see, e.g., Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019), the Louisiana statute provides that courts are barred from considering a prosecutor's dubious peremptory strike (for any purpose) if the defendant simultaneously asks for the juror's removal. See La. Code Crim. Proc. Ann. art. 795(D) (2023). Thus, the most suspicious peremptory strikes by prosecutors—those where the minority juror seemed so pro-prosecution that the defendant is happy to have the juror dismissed—cannot be evidence that supports the inference of discrimination when assessing the prosecutors' *other* challenged strikes. See State v. McCoy, 218 So. 3d 535, 589 (La. 2016), rev'd on other grounds, 138 S. Ct. 1500 (2018). This issue has arisen repeatedly in recent high-profile cases, but so far, the U.S. Supreme Court has declined to grant certiorari on the issue. See, e.g., Petition for a Writ of Certiorari at i, McCoy v. Louisiana, 138 S. Ct. 53 (2017) (No. 16-8255), 2017 WL 4310769 (presenting the simultaneous strikes question); *McCoy*, 138 S. Ct. at 53–54 (only granting certiorari on a different question).

366. See infra Appendix A.

A separate issue that could hamstring such rulemaking is the diverse approaches states have adopted to evaluating whether rules touching upon peremptory strikes are "procedural" or "substantive."[367] As noted earlier,[368] state courts have come to different conclusions when compelled "to enter the logical morass" that is "distinguishing between substantive and procedural rules,"[369] particularly when it comes to rules impacting the jury. Most states regard such rules—including those involving peremptory strikes—as "procedural" in nature, and therefore within the domain of judicial rulemaking. The Supreme Court of Pennsylvania, for instance, has held that "[t]he right to trial by jury is not a 'substantive right,' but a right of procedure through which rights conferred by substantive law are enforced."[370] As a result, courts with exclusive procedural rulemaking power have struck down jury-related statutes—for example, a statute creating the right to a jury trial for cases of indirect criminal contempt[371] or a statute requiring a prosecutor to assent to a defendant's waiver of a jury[372]—as unconstitutional. Likewise, in 2013, an appellate court in Kentucky heard a constitutional challenge to Kentucky's court rule fixing the number of peremptory strikes allotted to defendants; the court rejected the argument "that the question of peremptory strikes is one of substantive law and therefore beyond the 'practice and procedure' authority granted to the Supreme Court in § 116 of the Kentucky Constitution."[373] Ohio's supreme court, however, has held that while a rule setting forth "the time and manner as well as the number of times such [a] right may be exercised" is "procedur[al]," the underlying right to peremptory strikes is "substantive."[374] Thus, under Ohio law, a rule akin to Washington's would likely pass constitutional muster, but a rule that is "so restrictive as to constitute a *de facto* abrogation or modification of the right itself" (for example, the elimination of peremptory strikes through court

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367. In this regard, although it has apparently been forgotten, it is notable that the U.S. Supreme Court modified the (statutory) allocation of peremptory strikes when it first promulgated the Federal Rules of Criminal Procedure in 1944. Compare Fed. R. Crim. P. 24(b) (1946) (entitling both prosecution and defense to twenty peremptory challenges in capital cases), with 28 U.S.C. § 424 (1940) (only entitling the prosecution to six peremptory challenges in capital cases). As should now be clear, however, the fact that a particular rule might be "procedural" for purposes of the federal Rules Enabling Act does not guarantee that a state supreme court would categorize it the same way.

368. See supra notes 88–91 and accompanying text.

369. Mistretta v. United States, 488 U.S. 361, 392 (1989) (citing Sun Oil Co. v. Wortman, 486 U.S. 717 (1988)).

370. Commonwealth v. McMullen, 961 A.2d 842, 847–48 (Pa. 2008) (internal quotation marks omitted) (quoting Commonwealth v. Sorrell, 456 A.2d 1326, 1329 (Pa. 1982)).

371. Id.

372. *Sorrell*, 456 A.2d at 1328–29.

373. Spencer v. Commonwealth, 2012-CA-000996-MR, 2013 WL 4033897, at *2 (Ky. Ct. App. Aug. 9, 2013).

374. State v. Greer, 530 N.E.2d 382, 395 (Ohio 1988).

rule) would likely fail.[375] Alaska has drawn a similar line to Ohio's when faced with challenges to the state's system of challenging judges.[376]

In Colorado—where (1) reform efforts are well underway[377] and (2) judicial rulemaking has a long and robust history[378]—the procedure/substance issue might also complicate any movement to abolish peremptory strikes (even if a Washington-style reform is well within the Colorado Supreme Court's power). Lower courts have split over whether court rules governing the *number* of peremptory strikes alter "substance" or "procedure."[379] The latest modification to Colorado's Rule 24, which governs peremptory strikes and other jury-related matters, was upheld in 2022;[380] an appellate court ruled that a new amendment authorizing the court to "declare a mistrial in a case on the ground that a fair jury pool cannot be safely assembled" due to the pandemic was "procedural in nature."[381] There is thus, at minimum, some uncertainty about the viability of a court rule seeking to eliminate peremptory strikes in Colorado.

C. *Conflict*

But what might happen if a state legislature challenged a state supreme court's (re)assertion of a robust rulemaking authority? In Arizona, such a conflict nearly occurred, when the legislature's attempt to reinstate peremptory challenges by statute fell short by a single vote.[382]

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375. Id. at 396.

376. In Alaska, both a statute and a court rule grant parties one peremptory challenge to an assigned judge. Alaska Stat. § 22.20.022 (2023); Alaska R. Crim. P. 25(d). The right to a peremptory challenge is a "substantive right," the Alaska Supreme Court has explained, but the court rule governing how such challenges are exercised is "procedural." Gieffels v. State, 552 P.2d 661, 667–68 (Alaska 1976) (emphasizing that a court rule may permissibly "regulate[] the means or method by which a party's peremptory challenge takes effect" but may "not infringe upon the substantive right created by statute"). Importantly, however, the legislature has not enacted an analogous statutory provision conferring a substantive right to challenge jurors; in Alaska, the peremptory strike of a juror is purely a creature of court rule.

377. See supra notes 190–198 and accompanying text (describing these efforts).

378. See McCormick, supra note 80, at 664–68 (describing this history).

379. Compare People v. Hollis, 670 P.2d 441, 442 (Colo. App. 1983) ("Concluding that the right to peremptory challenges is substantive, and not merely procedural, we hold that the statute controls."), with People v. Reynolds, 159 P.3d 684, 689 (Colo. App. 2006) ("It could be argued that, contrary to *Hollis*, the number of peremptory challenges afforded in a criminal case is in fact a matter of procedure, in which the rule rather than the statute controls. . . . However, we do not decide that issue here . . . ."). See also People v. Montoya, 942 P.2d 1287, 1296 (Colo. App. 1996) (holding that the trial court erred in applying the court rule, as opposed to the statute, related to the replacement of jurors).

380. See People v. Eason, 516 P.3d 546, 553 (Colo. App. 2022) (rejecting a constitutional challenge to a court rule governing jury selection during a public health emergency).

381. Id. at 551, 553.

382. See Bill History for HB2413, supra note 313; see also H.B. 2413, 55th Leg., 2nd Reg. Sess. (Ariz. 2022).

Had the vote gone otherwise, a constitutional conflict would have unfolded—perhaps the judiciary would have declared the law to be an unconstitutional usurpation of the judiciary's authority,[383] or perhaps the court would have repromulgated a superseding rule. Would state law permit such pushback? The answer, of course, is hugely consequential for any effort by a state supreme court to undertake criminal procedure reform outside of the legislative or adjudicatory process. Though they have largely flown under the radar in contemporary legal scholarship, such state-level crises *have* occasionally surfaced in recent decades. And again, unsurprisingly, a careful examination of state law reveals a wide diversity of approaches to resolving such conflicts. Still, while aspects of our assessment are necessarily more speculative here, state supreme courts could both make and defend substantial changes to their state's criminal procedure (even in the face of unified legislative opposition) in a surprisingly high number of jurisdictions.

Consider the results in two states, Arkansas and Florida, that witnessed such rulemaking conflicts in more recent years. The Arkansas Supreme Court and General Assembly were recently embroiled in a decade-long battle over "tort reform," and specifically a package of new laws known as the Civil Justice Reform Act of 2003 (CJRA), which cleared the legislature with near-unanimous bipartisan support.[384] Business groups and insurers hailed the Act, which limited liability mainly through procedural changes: It heightened pleading requirements for medical malpractice claims, fixed venue for such actions to the place of the alleged act or omission, eliminated joint liability and introduced nonparty fault, and limited both compensatory and punitive damages.[385] In earlier cases, the Arkansas Supreme Court had recognized that "there is a crepuscular, or twilight, zone which makes it difficult to determine whether the legislature or the judiciary should establish some procedures."[386] But in the wake of the CJRA, the Arkansas Supreme Court adopted a far more capacious view of its own powers. The court gradually gutted core provisions of the CJRA, emphasizing that the court's procedural rules, not those imposed by the legislature, governed civil litigation.[387] Irate legislators responded by proposing constitutional amendments to strip the judiciary of rulemaking

383. See supra text accompanying note 315.

384. See Ark. Code Ann. §§ 16-55-201 to -220 (2023).

385. Id.

386. Curtis v. State, 783 S.W.2d 47, 48 (Ark. 1990); see also Citizens for a Safer Carroll Cnty. v. Epley, 991 S.W.2d 562, 564 (Ark. 1999) (holding that a procedural statute might trump a rule "when the statutory rule [was] based upon a fixed public policy which [was] legislatively or constitutionally adopted and ha[d] as its basis something other than court administration" (citing *Curtis*, 783 S.W.2d at 47)).

387. Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 141–42 (Ark. 2009) (invoking amendment 80 to declare unconstitutional a nonparty liability provision); see also Broussard v. St. Edward Mercy Health Sys., Inc., 386 S.W.3d 385, 387 (Ark. 2012) (declaring unconstitutional a statutory provision requiring that "proof in medical-malpractice cases

authority.[388] While this retaliatory response ultimately stalled in the General Assembly,[389] the agitation compelled the Arkansas Supreme Court to appoint a "Special Task Force" to study the wisdom of reforms contained in the CJRA.[390] The court eventually adopted several new rules mirroring those it had previously struck down[391] but chastised "those interested in these issues" for their "failure" to participate in the court's ordinary rulemaking process.[392]

Florida's recent rulemaking conflict, involving criminal rules, followed a similar trajectory. Under Florida law, although the legislature can repeal any rule of the Florida Supreme Court by a two-thirds vote, it lacks authority to enact laws relating to procedure on its own.[393] In 2000, however, the legislature unanimously passed a bill prohibiting "nonmonetary pretrial release" for those charged with misdemeanor domestic violence at their first appearance hearing.[394] To do so, the act partially repealed two court-promulgated bail rules and amended an existing statute to limit bail eligibility for those charged with misdemeanor domestic violence.[395] The Florida Supreme Court acknowledged that the unanimous repeal of its rules was proper, but because the statutory amendments were procedural in nature, the adoption of new statutory language represented an unconstitutional encroachment on the court's power.[396]

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must be made by expert testimony by 'medical care providers of the same specialty as the defendant'" (quoting Ark. Code Ann. § 16-114-206(a) (2012))); Bayer CropScience LP v. Schafer, 385 S.W.3d 822, 831 (Ark. 2011) (declaring unconstitutional, on other grounds, statutory cap on punitive damages); Summerville v. Thrower, 253 S.W.3d 415, 416 (Ark. 2007) (declaring unconstitutional the requirement that medical-malpractice complaints include "an affidavit of reasonable cause within thirty days of filing a complaint" under amendment 80).

388. See Sevawn Foster, Note, Constitutional Law—Arkansas's Current Procedural Rulemaking Conundrum: Attempting to Quell the Political Discord, 37 U. Ark. Little Rock L. Rev. 105, 115–16 (2014) (discussing a state senator's proposal to bestow Arkansas's General Assembly with the power "to enact laws that adopt, amend, affect or supersede the court's rules").

389. As a compromise measure, state senators passed a nonbinding resolution calling on the Arkansas Supreme Court "to adopt policies and procedures to implement the tort reforms" akin to those in the CJRA. See S. Res. 30, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

390. In re The Appointment of a Special Task Force on Prac. & Proc. in Civ. Cases, 2013 WL 3973978, at *1 (Ark. Aug. 2, 2013) (per curiam) ("The extended debate in the recent session of the Arkansas General Assembly over both the substance of court rules and changes to this court's constitutional . . . authority to promulgate those rules . . . has revealed the need for review and/or revision of some sections of the Arkansas Rules of Civil Procedure.").

391. Id. at *2; In re Special Task Force on Prac. & Proc. in Civ. Cases, 2014 Ark. LEXIS 439, at *2 (Ark. Aug. 7, 2014) (adopting rules proposed by task force with modifications).

392. *In re The Appointment of a Special Task Force*, 2013 WL 3973978, at *2.

393. In re Clarification of Fla. Rules of Prac. & Proc., 281 So. 2d 204, 204 (Fla. 1973).

394. State v. Raymond, 906 So. 2d 1045, 1051 & n.3 (Fla. 2005).

395. Id.

396. Id. at 1051.

This ruling, however, created "a vacuum" in the bail law: Given the lawful repeal of the old bail rules and the judicial invalidation of the statute, there was now nothing in Florida law dictating "when [if ever] trial judges may consider these defendants for nonmonetary pretrial release."[397] To fill the gap, the court announced that it was re-adopting the just-repealed rules "in their entirety," notwithstanding the fact that the legislature had just unanimously (and constitutionally) rejected them.[398] As in Arkansas, the court signaled that it was willing to undertake a new rulemaking study that "reflect[ed] the Legislature's intent," but the judiciary also refused to be rushed: "We are particularly concerned that we be fully informed as to the policy concerns of the Florida Legislature before we take any final action on these rules."[399] Almost two years later, the court amended the bail provisions of the Florida Rules of Criminal Procedure, effectively implementing the rejected statute.[400]

In both states, state supreme courts demonstrated a willingness to defend their primary authority over an expansive realm of "procedural" matters, even when addressing controversial subject matter, and even when confronting overwhelming legislative opposition. To be sure, while jealously guarding their procedural rulemaking authority, these judiciaries ultimately accommodated many of their legislatures' policy preferences in subsequent promulgated rules. But traditions of comity and collaboration do not always reign. Probably the most "extreme" example in modern times comes from Mississippi, where in 1982 the state's high court simply announced that its new Rules of Civil Procedure were law, notwithstanding the legislature's express rejection of the package.[401] The legislature had passed a detailed enabling act to govern the rulemaking process, one that

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397. Id.

398. Id.

399. Id. at 1051–52.

400. See In re Fla. Rules Crim. Proc. 3.131 & 3.132, 948 So. 2d 731, 733 (Fla. 2007) (adding language from the rejected statute to Rule 3.131). The recent fight over bail reform in Illinois involved similar separation-of-powers issues. There, in 2021, the General Assembly passed a host of criminal justice reforms, including provisions that "dismantled and rebuilt Illinois's statutory framework for the pretrial release of criminal defendants." Rowe v. Raoul, No. 129248, 2023 WL 4566587, at *1 (Ill. July 18, 2023). Prosecutors and other law enforcement officials challenged the constitutionality of the reforms, arguing (inter alia) that "because bail is an administrative matter for the courts, the legislature encroached upon the authority of the judiciary." Id. at *4. This argument prevailed below, but in July 2023 the Illinois Supreme Court reinstated the law, recognizing a cooperative role for the legislature in regulating the bail system. Id. at *9–10.

401. William H. Page, Constitutionalism and Judicial Rulemaking: Lessons From the Crisis in Mississippi, 3 Miss. Coll. L. Rev. 1, 2 (1982) (citing Order Adopting the Mississippi Rules of Civil Procedure (Miss. May 26, 1981)); see also Leslie Southwick, Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony, 23 Miss. Coll. L. Rev. 1, 3 (2003) ("The impasse may have been the kind that could be broken by compromise and the passage of time. The supreme court was only briefly inclined to find out.").

envisioned a cooperative process of shared responsibility over rulemaking, but the court simply ignored it.[402] Threats of budget cuts[403] and impeachment[404] immediately followed, but legislators "[f]inally . . . relented," and since then "the principle of supreme court absolute rule-making authority in Mississippi [has not been] open to debate."[405] (The court similarly ratified Rules of Criminal Procedure, without legislative approval, in 2016.)[406] In many other states, courts of last resort have unambiguously held that their rules prevail over any conflicting statute.[407]

At the other end of the spectrum are jurisdictions where the legislature's authority to modify court-promulgated rules is firmly established. Alabama's constitution, for instance, provides that court "rules may be changed by a general act";[408] the Hawaii Supreme Court has held that "legislative fiat would prevail over a contrary rule interpretation";[409] and Nebraska considered giving its supreme court "unrestricted" procedural rulemaking power at its 1920 constitutional convention but ultimately rejected that approach, opting instead to allow legislative override.[410] Few of these jurisdictions have had to directly consider what might happen if a

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402. Southwick, supra note 401, at 2–3 (discussing 1975 Miss. Laws 501, § 19 (codified at Miss. Code Ann. § 9-3-69 (2023))).

403. Id. at 3.

404. See Hall v. State, 539 So. 2d 1338, 1365 (Miss. 1989) (Hawkins, P.J., dissenting) ("Had I had any inkling then that this Court would some day assert the [even broader rulemaking] power the majority does now, I would have saved [the legislature] the trouble of [an impeachment] hearing. I would have walked over and pleaded guilty."); Page, supra note 401, at 6 (discussing rumors of the "removal of pro-Rules justices . . . using a near-forgotten provision of the state constitution" (citing Miss. Const. art. IV, § 53)).

405. Southwick, supra note 401, at 3, 7. But some are, in fact, still actively debating and contesting this perceived usurpation. See Channing J. Curtis & Christopher R. Green, Forty Years Across the Rubicon, 92 Miss. L.J. 681, 686 (2023) ("[T]he Mississippi Rules of Court were all adopted unconstitutionally. Their adoption, without the constitutional authority to do so and against the constitutional prohibition of exercising the powers of another branch, has muddied the procedural process in Mississippi."). Channing Curtis and Professor Christopher Green identify several areas in which the Mississippi Code and court rules currently conflict, and cite recent litigation involving these "contradictions," suggesting the issue remains very much live in Mississippi. Id. at 715–24.

406. See William L. Waller, Jr., A Message From Chief Justice William L. Waller, Jr., *in* Supreme Court of Mississippi 2016 Annual Report (2016), https://courts.ms.gov/research/reports/SCTAnnRep2016.pdf [https://perma.cc/HYC2-KYGZ] ("Years of study of criminal rules concluded on December 15, 2016, with the Supreme Court's unanimous adoption of the Mississippi Rules of Criminal Procedure.").

407. See infra Appendix A; see also People v. Jackson, 371 N.E.2d 602, 603, 606 (Ill. 1977) (invalidating a statute that "encroache[d] upon the rulemaking power of th[e] court"); State v. Mitchell, 672 P.2d 1, 9 (Kan. 1983) ("[W]hen court rules and a statute conflict . . . the court's constitutional mandate [to enact rules of procedure] must prevail.").

408. Ala. Const. art. VI, § 150 (formerly art. VI, § 6.11).

409. Burpee v. Garibay, No. 25421, 2006 WL 457861, at *2 (Haw. Feb 23, 2006); see also Funger v. Mayor of Somerset, 223 A.2d 168, 173 (Md. 1966) (noting that "the Legislature may rescind, change or modify a rule of this Court").

410. Peck v. Dunlevey, 172 N.W.2d 613, 615–16 (Neb. 1969).

state supreme court chose to repromulgate its previous court rule in response to a statutory change—effectively what the Florida Supreme Court did when it reissued its bail rules[411]—but the general thrust of the case law is that the rulemaking power is ultimately "subordinate to the General Assembly" in cases of conflict.[412]

Between these two poles are those states that have underdeveloped case law or that have gone out of their way to avoid direct conflict. Sometimes this conflict aversion produces odd results. In *Foster v. Overstreet*, a high-profile capital murder case, the Kentucky Supreme Court agreed with the defendant that a procedural statute governing the challenging of a judge for bias "represents an encroachment by the legislature on the power of the judiciary to make rules" and therefore held that the law was unconstitutional.[413] In the next sentence, however, the court announced that it would "extend[] comity to the legislature" out of "'deference and respect'" and allow the unconstitutional law to stand.[414] (Comity is warranted, the Kentucky Supreme Court unhelpfully elaborated, whenever the statute is a "'statutorily acceptable' substitute" for the court rule.)[415] Wisconsin law "envision[s] the legislature and judiciary exercising shared power" over criminal procedure rulemaking, and the Wisconsin Supreme Court has upheld statutes that do not "undu[ly] burden or substantial[ly] interfere[] with judicial powers."[416] The court has not specified, however, when a statute revising a court rule *would* unduly burden or substantially interfere with judicial powers.[417] And in some jurisdictions, legislatures retain the power to amend a court rule by statute, but a subsequently enacted court rule literally amends the legislature's statute.[418] Thus, the South Dakota Supreme Court has, by rule, amended the statute governing peremptory strikes in civil cases.[419] How a full-blown

411. See In re Fla. Rules of Crim. Proc. 3.131 & 3.132, 948 So. 2d 731, 733 (Fla. 2007) (adding language from the rejected statute to Rule 3.131).

412. See Stokes v. Denmark Emergency Med. Servs., 433 S.E.2d 850, 852 (S.C. 1993).

413. 905 S.W.2d 504, 506 (Ky. 1995).

414. Id. (quoting O'Bryan v. Hedgespeth, 892 S.W.2d 571, 577 (Ky. 1995)); see also State v. Leonardis, 375 A.2d 607, 614 (N.J. 1977) (noting the authority that the New Jersey legislature and judiciary both have over the rules of pretrial intervention).

415. *Foster*, 905 S.W.2d at 507. The Court's "deference and respect" was qualified, however; the Court "reserve[d] the right to review in the future this procedure and present refinements or alterations to it," id., perhaps in cases with less notorious defendants.

416. Demmith v. Wis. Jud. Conf., 480 N.W.2d 502, 508 (Wis. 1992).

417. See id. at 509 (noting that the legislature's standards may "not infringe on the judiciary's power" without expounding further).

418. See, e.g., S.D. Const. art. V, § 12 ("These rules may be changed by the Legislature."); see also S.D. Sup. Ct. R. 97-40 (amending S.D. Codified Laws § 23A-20-26 (1997)).

419. S.D. Sup. Ct. R. 97-40 (amending S.D. Codified Laws § 23A-20-26).

conflict between the judiciary and the legislature in one of these last-in-time jurisdictions might ultimately play out is difficult to gauge.

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Much of the foregoing assumes, of course, that past case law will dictate future outcomes. But another important way in which state supreme courts vary from one another (and often their federal counterpart) is in their willingness to strike down legislative enactments and overrule past decisions.[420] Institutional design (particularly judicial selection and retention laws), changes in personnel,[421] local political pressures, and a host of other considerations might prompt a state supreme court to depart from past practice. If anything, though, this indeterminacy supports our thesis: The landscape of state supreme court rulemaking is extraordinarily diverse and extraordinarily consequential. And in many jurisdictions, judicial rulemaking is a viable path toward fundamentally rewriting the rules of the American jury.

CONCLUSION

The willingness of state supreme courts to revisit *Batson*—and, as significantly, to address racial exclusion through a paradigm that decenters subjective discriminatory intent—marks a noteworthy shift in American criminal procedure. The fact that these reforms are occurring not through the development of new constitutional doctrine or legislation but mainly through judicial rulemaking represents another significant development. But this recent wave of reform should be historicized: The new rules reshaping jury selection represent just the latest chapter in a long-standing

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420. Lindquist, supra note 221, at 84 ("The data [in a study of all state supreme court decisions between 1995 and 1998] revealed substantial variation across the state courts in terms of their propensity to invalidate a state statute."); id. at 101 ("From a descriptive standpoint, the data . . . reveals considerable variation across state supreme courts in terms of their respective propensities to overrule precedent.").

421. See, e.g., Nick Corasaniti, Left-Leaning Wisconsin Groups Challenge the State's Political Maps, N.Y. Times (Aug. 2, 2023), https://www.nytimes.com/2023/08/02/us/politics/wisconsin-maps-protasiewicz.html (on file with the *Columbia Law Review*) ("A day after a seismic ideological shift on the Wisconsin Supreme Court, a coalition of voting rights groups and left-leaning law firms filed a legal challenge to the state's legislative districts . . . ."); Jordan Smith, The Florida Supreme Court Is Radically Reshaping Death Penalty Law, The Intercept (Dec. 30, 2020), https://theintercept.com/2020/12/30/florida-supreme-court-death-penalty-law/ [https://perma.cc/X482-RSD5] ("Over the last year, th[e] newly conservative [Florida Supreme Court] has devoted a good amount of time to undoing precedents that provide safeguards to capital defendants . . . ."); Michael Wines, North Carolina Gerrymander Ruling Reflects Politicization of Judiciary Nationally, N.Y. Times (Apr. 28, 2023), https://www.nytimes.com/2023/04/28/us/north-carolina-supreme-court-gerrymander.html (on file with the *Columbia Law Review*) (last updated May 2, 2023) ("On Friday, the same court led by a newly elected Republican majority looked at the same facts, reversed itself and said it had no authority to act.").

tug-of-war for control over criminal procedure between state judiciaries and legislatures.

And if rulemaking can eliminate peremptory strikes in a jurisdiction like Arizona, it might be worth considering how additional reforms could further reshape the law of the jury. How much skepticism of police and prosecutors (or sensitivity to structural racism) should be countenanced before a juror is disqualified from service "for cause"?[422] As Justice Goodwin Liu (joined by Justice Mariano-Florentino Cuéllar) highlighted in California, recent focus on *Batson* notwithstanding, "there is significant evidence that removal of jurors for cause is an equally if not more significant contributor to the exclusion of Black jurors" than peremptory strikes.[423] The "current standards and processes for excusal of prospective jurors for cause [and how they] contribute to racial disparities in jury selection and to implicit biases in the resulting petit juries," they argue, should also be a target for reformers.[424] From rules regulating the demographics of jury pools to rules governing how many jurors it takes to comprise a "jury,"[425] rulemaking (rather than constitutional litigation[426]) may be the more promising path forward.

Or consider criminal procedure more broadly. For those looking to the U.S. Supreme Court to meaningfully address the many pathologies of our criminal legal system, and the racial disparities it reflects and reproduces, the constitutional landscape appears bleak. In recent terms, the Court's conservatives have repeatedly signaled a willingness to revisit landmark decisions, from *Miranda v. Arizona* to *Gideon v. Wainwright*.[427]

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422. See, e.g., DeVaughn v. State, 769 S.E.2d 70, 74 (Ga. 2015) (holding that *Batson* does not govern for cause strikes and a juror's "bad experiences with police and prosecutors" sufficed for a for cause strike); Lindsey v. State, 916 N.E.2d 230, 236 (Ind. Ct. App. 2009) (upholding a for cause strike of a juror with negative police experiences as neither illogical nor arbitrary); Commonwealth v. Williams, 116 N.E.3d 609, 612–13 (Mass. 2019) (discussing for cause dismissal of juror based on her belief that "the system is rigged against young African American males").

423. People v. Suarez, 471 P.3d 509, 567 (Cal. 2020) (Liu, J., concurring); accord Frampton, For Cause, supra note 94, at 788 (stating that "equivalent racial disparities" as exist in peremptory strikes "pervade the exercise of challenges for cause").

424. *Suarez*, 471 P.3d at 568 (Liu, J., concurring).

425. See supra notes 327–335 and accompanying text.

426. See Khorrami v. Arizona, 143 S. Ct. 22, 23 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (urging Court to revisit precedent holding that a twelve-member jury "'is not a necessary ingredient' of the Sixth Amendment right to trial by jury" (quoting Williams v. Florida, 399 U.S. 78, 86 (1970))).

427. See Vega v. Tekoh, 142 S. Ct. 2095, 2106 n.5 (2022) (suggesting that the Court lacks "the authority to create constitutionally based prophylactic rules [like those announced in Miranda v. Arizona, 384 U.S. 436 (1966)] that bind both federal and state courts"); Flowers v. Mississippi, 139 S. Ct. 2228, 2269 (2019) (Thomas, J., dissenting) (suggesting that *Batson* was wrongly decided); Garza v. Idaho, 139 S. Ct. 738, 756–59 (2019) (Thomas, J., dissenting) (attacking the Court's right-to-counsel jurisprudence, including Gideon v. Wainwright, 372 U.S. 335 (1963), as inconsistent with the Sixth Amendment's original meaning); Berghuis v. Smith, 559 U.S. 314, 334 (2010) (Thomas, J., concurring)

And key features of the Court's already-anemic Equal Protection Clause jurisprudence are in flux.[428] But just as laws are often "stupid but constitutional,"[429] so too may a rule of procedure be "prudent but not constitutionally required." Throughout the United States, little but imagination restrains a motivated state supreme court from wielding its rulemaking power, regardless of the direction in which the U.S. Supreme Court takes constitutional criminal procedure in the coming years.

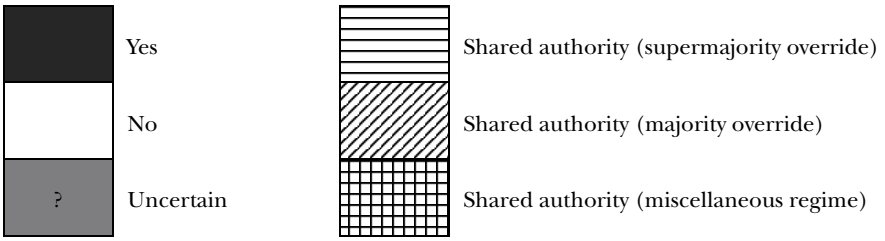
("[I]n an appropriate case I would be willing to reconsider our precedents articulating the 'fair cross section' requirement.").

428. See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2167 (2023) ("The interests that respondents seek [through racial diversity], though plainly worthy, are inescapably imponderable."). But see id. at 2248 (Sotomayor, J., dissenting) ("[The newly constituted Court] strikes at the heart of [its own precedent] by holding that racial diversity is an 'inescapably imponderable' objective that cannot justify race-conscious affirmative action, . . . even though respondents' objectives simply 'mirror the "compelling interest" this Court has approved' many times in the past." (first quoting id. at 2167 (majority opinion); then quoting Fisher v. Univ. of Tex., 579 U.S. 365, 382 (2016))).

429. Jennifer Senior, In Conversation: Antonin Scalia, N.Y. Mag. (Oct. 4, 2013), https://nymag.com/news/features/antonin-scalia-2013-10/ (on file with the *Columbia Law Review*) ("[T]hey ought to pass out to all federal judges a stamp, and the stamp says—*Whack!* [*Pounds his fist.*]—STUPID BUT CONSTITUTIONAL. *Whack!* [*Pounds again.*] STUPID BUT CONSTITUTIONAL!" (quoting Justice Antonin Scalia)).

APPENDIX A

Appendix A reflects the current source of authority for peremptory strikes under state law; the source of rulemaking authority in the state; and the authors' assessment of judicial rulemaking power to unilaterally implement Washington-style reform, to eliminate peremptory strikes, and to thwart legislative override attempts. Asterisks are used when a state's law leaves the answer to one of these questions unclear or particularly nuanced.



	Peremptory Challenges (Criminal)		Source of Rulemaking Authority			Washington-Style Reform?	Elimination?	Judicial Override?
	Court Rule	Statute	Constitution (express)	Inherent or Implied	Statute			
AL[430]	✓	✓	✓	✓	✓		?	?
AK[431]	✓		✓					
AZ[432]	✓		✓	✓	✓			?
AR[433]		✓	✓					
CA[434]		✓	✓*					
CO[435]	✓	✓	✓	✓	✓	?	?	
CT[436]	✓	✓		✓	✓		?	?
DE[437]	✓		✓		✓			
FL[438]	✓	✓	✓		*			
GA[439]		✓	✓	*	✓			
HI[440]	✓	✓	✓	✓	✓			?
ID[441]	✓	✓		✓	✓			
IL[442]	✓	✓	✓	✓	✓			
IN[443]	✓	✓		✓				

	Peremptory Challenges (Criminal)		Source of Rulemaking Authority			Washington-Style Reform?	Elimination?	Judicial Override?
	Court Rule	Statute	Constitution (express)	Inherent or Implied	Statute			
IA[444]	✓			✓	✓			
KS[445]	*	✓	✓	✓	✓			
KY[446]	✓	*	✓	✓				?
LA[447]		✓	✓			?		
ME[448]	✓	*		✓	✓			
MD[449]	✓	✓	✓					?
MA[450]	✓			✓	✓			?
MI[451]	✓	✓	✓		✓			
MN[452]	✓			✓	✓			
MS[453]	✓	✓		✓	*			
MO[454]		✓	*					
MT[455]		✓	✓					
NE[456]		✓	✓					
NV[457]	✓	✓		✓	✓			
NH[458]	✓	✓	✓	✓	✓			
NJ[459]	✓	✓	✓					
NM[460]	✓	✓	✓	✓	✓			
NY[461]		✓	*		*			
NC[462]		✓	✓		✓			
ND[463]	✓	✓	✓		✓			
OH[464]	✓	✓	✓					
OK[465]		✓		✓	✓	?		
OR[466]		✓			*			
PA[467]		✓	✓					
RI[468]	✓				✓			
SC[469]	✓	✓	✓		✓			
SD[470]		✓	✓	✓	✓			?
TN[471]	✓	✓		✓	✓			

	Peremptory Challenges (Criminal)		Source of Rulemaking Authority			Washington-Style Reform?	Elimination?	Judicial Override?
	Court Rule	Statute	Constitution (express)	Inherent or Implied	Statute			
TX[472]		✓	✓		*			
UT[473]	✓		✓		✓			
VT[474]	✓	✓	✓		✓			?
VA[475]		✓	✓		✓			
WA[476]	✓			✓	✓			
WV[477]	✓	✓	✓	✓	✓			
WI[478]		✓			✓			?
WY[479]	✓	✓		✓	✓			

430. **Peremptory Challenges (Criminal)**: Ala. Code § 12-16-100 (2023); Ala. R. Crim. P. 18.4. **Source of Rulemaking Authority**: Ala. Const. art. VI, § 150 ("The supreme court shall make and promulgate rules governing the . . . practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify the substantive right of any party . . . . These rules may be changed by a general act of statewide application."); Ala. Code § 12-2-7 ("The Supreme Court shall have authority . . . [t]o make and promulgate rules governing the administration of all courts and . . . [the] practice and procedure in all courts; provided, that such rules shall not abridge, enlarge, or modify the substantive right of any party . . . ."); Williams v. Knight, 169 So. 871, 876 (Ala. 1936) ("This court has the right to make rules in the exercise of its inherent power . . . ."). **Washington-Style Reform**: See Alabama Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: Some uncertainty regarding elimination stems from Clark v. Container Corp. of Am., 589 So. 2d 184, 196 (Ala. 1991), and Jawad v. Granade, 497 So. 2d 471, 476–77 (Ala. 1986), which express skepticism toward "attempt[s] to judicially abolish, curtail, or diminish the constitutional right to trial by jury." *Jawad*, 497 So. 2d at 476. There might exist a nonfrivolous argument that wholesale elimination of peremptory strikes offends the constitutional and statutory provisions "preserv[ing]" trial by jury from judicial rulemaking. Id. **Judicial Override**: The legislature plainly has the right to "change[] by a general act of statewide application" a rule promulgated by the judiciary. Ala. Const. art. VI, § 150. But subsequently promulgated procedural rules generally supersede statutes under Alabama law. See Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc., 895 So. 2d 225, 236 (Ala. 2004); Op. of the Justs. No. 229, 342 So. 2d 361, 361 (Ala. 1977); see also Ala. Code § 12-1-1 (providing that a statutory procedural provision "shall apply only if the procedure is not governed by . . . [a] rule of practice and procedure as may be adopted by the Supreme Court of Alabama").

431. **Peremptory Challenges (Criminal)**: Alaska R. Crim. P. 24. **Source of Rulemaking Authority**: Alaska Const. art. IV, § 15 ("The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts."). **Washington-Style Reform**: See Alaska Constitution governing courts' rulemaking authority cited above. **Elimination**:

Case law on Alaska's practice of allowing peremptory strikes *of judges* suggests judicial rulemaking is appropriate to regulate the *procedure* of how peremptory strikes are exercised but indicates that the right itself is *substantive*, implying that elimination through rulemaking would not be permissible. See Gieffels v. State, 552 P.2d 661, 667–68 (Alaska 1976). This "substantive" right to challenge judges, however, was created by statute. See id.; see also Alaska Stat. § 22.20.022 (2023). No analogous statutory provision governs peremptory strikes of jurors. **Judicial Override**: Court rules "may be changed by the legislature by two-thirds vote of the members elected to each house." Alaska Const. art. IV, § 15.

432. **Peremptory Challenges (Criminal)**: Ariz. R. Crim. P. 18.4. **Source of Rulemaking Authority**: Ariz. Const. art. 6, § 5(5); Ariz. Rev. Stat. Ann. § 12-109 (2023); Ariz. Podiatry Ass'n v. Dir. of Ins., 422 P.2d 108, 110 (Ariz. 1966) ("Since the amendment of Article 6, § 5, of the constitution, . . . this court not only has the inherent power to make rules, but it has this power under the constitution, and this power may not now be reduced or repealed by the legislature."). **Washington-Style Reform**: See Arizona Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: 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, supra note 304. **Judicial Override**: See, e.g., State v. Bigger, 492 P.3d 1020, 1030 (Ariz. 2021) ("The legislature may not enact a statute that conflicts with our rulemaking authority."). During the 2022 debate, however, some legislators contended that a statute reinstating peremptory strikes would be *substantive* rather than *procedural*; had H.B. 2413, 55th Leg., 2nd Reg. Sess. (Ariz. 2022), passed, that (open) issue would have been before the Arizona Supreme Court. See Brutinel Interview, supra note 245.

433. **Peremptory Challenges (Criminal)**: Ark. Code Ann. § 16-33-305 (2023); Ark. R. Crim. P. 32.2 (referencing voir dire and peremptory strikes, but only in passing). **Source of Rulemaking Authority**: Ark. Const. amend. LXXX, § 3 ("The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution."). **Washington-Style Reform**: See Arkansas Constitution governing courts' rulemaking authority cited above. **Elimination**: Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 141 (Ark. 2009) ("[R]ules regarding pleading, practice, and procedure are solely the responsibility of this court."). **Judicial Override**: Under Amendment LXXX, § 9, while the legislature may repeal certain court-promulgated rules by a two-thirds vote, this mechanism would not apply to a rule of criminal procedure. Ark. Const. amend. LXXX, § 3.

434. **Peremptory Challenges (Criminal)**: Cal. Civ. Proc. Code § 231.7 (2023); Cal. Penal Code § 1046 (2023) (referencing civil jury rules). **Source of Rulemaking Authority**: Rulemaking authority is vested with the Judicial Council rather than the Supreme Court of California. See Cal. Const. art. VI, § 6(d) ("[T]he council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, [and] adopt rules for court administration, practice and procedure . . . . The rules adopted shall not be inconsistent with statute."). **Washington-Style Reform, Elimination, Judicial Override**: Rulemaking authority is vested with a Judicial Council that does not consist entirely of the judiciary. See Cal. Const. art. VI, § 6(a), (d).

435. **Peremptory Challenges (Criminal)**: Colo. Rev. Stat. § 16-10-104 (2023); Colo. R. Crim. P. 24(d). **Source of Rulemaking Authority**: Colo. Const. art. VI, § 21 ("The supreme court shall make and promulgate rules governing the administration of all courts and . . . [the] practice and procedure in civil and criminal cases, except that the general assembly shall have the power to provide simplified procedures in county courts for the trial of misdemeanors."); Colo. Rev. Stat. § 13-2-109 (2023); Kolkman v. People, 300 P. 575, 584–85 (Colo. 1931). **Washington-Style Reform**: See Colorado Constitution, statute, and case law governing courts' rulemaking authority cited above. Although the Colorado Supreme Court is currently contemplating a new Washington-style reform, lower appellate courts have reached different conclusions as to whether peremptory strikes are procedural or substantive in nature. Compare People v. Hollis, 670 P.2d 441, 442 (Colo. App. 1983) (deeming peremptory strikes a substantive right), with People v. Reynolds, 159 P.3d 684, 689

(Colo. App. 2006) (suggesting that, "contrary to *Hollis*, the number of peremptory challenges afforded in a criminal case [may be] a matter of procedure, in which the rule rather than the statute [would] control[]"). **Elimination**: Whether judicial rulemaking could be used to eliminate peremptory strikes turns on the same procedural–substantive issue discussed above. **Judicial Override**: Assuming rulemaking concerning peremptory strikes is procedural, Colorado law is clear that "in cases of conflict, the court's procedural rule would necessarily control a procedural statute." J.T. v. O'Rourke ex rel. Tenth Jud. Dist., 651 P.2d 407, 410 n.2 (Colo. 1982).

436. **Peremptory Challenges (Criminal)**: Conn. Gen. Stat. Ann. § 54-82g (West 2023); Conn. Super. Ct. R. § 5-12. **Source of Rulemaking Authority**: Conn. Gen. Stat. Ann. § 51-14(a) (West 2023); In re Dattilo, 72 A.2d 50, 52 (Conn. 1950) ("Apart from legislative authority, courts acting in the exercise of common-law powers have an inherent right to make rules governing procedure in them."). **Washington-Style Reform**: See Connecticut statute and case law governing courts' rulemaking authority cited above. **Elimination**: While the recent adoption of a Washington-style reform fits within Connecticut's embrace of "concurrent legislative authority" over aspects of criminal procedure, see Bartholomew v. Schweizer, 587 A.2d 1014, 1018 (Conn. 1991), a statute sets forth the number of peremptory strikes in criminal cases, making elimination through rulemaking a tougher lift. Conn. Gen. Stat. Ann. § 54-82g. On the "confusing" state of Connecticut law in this regard, see James F. Sullivan, The Scope of Procedural Rule-Making in Connecticut: Further Confusion in *State v. James* and *Bartholomew v. Schweizer*, 65 Conn. Bar J. 411, 425–26 (1991) (noting the court's "strained and confusing interpretations of procedural statutes in order to reconcile such statutes with the plain meaning of parallel court rules"); see also Peters, supra note 78, at 1554–55 ("In Connecticut, . . . hegemony over court procedures has long been a troublesome issue."). **Judicial Override**: Earlier case law asserted a strong version of judicial supremacy, but the Supreme Court of Connecticut has since deferred to the legislature in many criminal procedure settings. Compare State v. Clemente, 353 A.2d 723, 731 (Conn. 1974) (invalidating a discovery statute), with State v. Rodriguez, 429 A.2d 919, 921 (Conn. 1980) (upholding a statute governing juror qualifications), and State v. Olds, 370 A.2d 969, 976–78 (Conn. 1976) (upholding a statute providing for six-person juries). See also Peters, supra note 78, at 1556–57 (noting a return to the "historical deference of Connecticut courts to legislative authority"); Sullivan, supra, at 425–26 (exploring "confusion" in Connecticut case law).

437. **Peremptory Challenges (Criminal)**: Del. Super. Ct. Crim. R. P. 24. **Source of Rulemaking Authority**: Del. Const. art. IV, § 13(1); Del. Code tit. XI, § 5121(a) (2023). **Washington-Style Reform**: See Delaware Constitution and statute governing courts' rulemaking authority cited above. **Elimination**: Elimination of peremptory strikes would be straightforward because peremptory strikes are a creature of court rule, not statute, in Delaware. See Del. Super. Ct. Crim. R. P. 24. **Judicial Override**: The legislature has recognized that court rules trump conflicting statutes. See Del. Code tit. XI, § 5122 ("Any inconsistency or conflict between any rule of court . . . and any . . . statute of this State, dealing with practice and procedure in criminal actions in the Superior Court, shall be resolved in favor of such rule of court.").

438. **Peremptory Challenges (Criminal)**: Fla. Stat. Ann. § 913.08 (West 2023); Fla. R. Crim. P. 3.350. **Source of Rulemaking Authority**: Fla. Const. art. V, § 2(a). This express constitutional grant of rulemaking authority has made it unnecessary to determine the precise scope of the statutory rulemaking authorization now found at Fla. Stat. Ann. § 25.032 (West 2023) (authorizing rulemaking concerning certified questions "and similar laws"). **Washington-Style Reform**: See Florida constitutional provision governing courts' rulemaking authority cited above. **Elimination**: While a statute (along with a rule) currently fixes the number of peremptory strikes, statutes yield to contrary court rules. See, e.g., Abdool v. Bondi, 141 So. 3d 529, 538 (Fla. 2014) (upholding a statutory amendment in part because it "does not directly change, alter, or abolish any procedural rules of this Court"). **Judicial Override**: The legislature may repeal a procedural rule by a vote of two-thirds of both houses of the legislature. Fla. Const. art. V, § 2(a). Moreover, although a super-majority

may repeal a court rule, this power does not extend to modifying or superseding a procedural rule. See id.; State v. Raymond, 906 So. 2d 1045, 1051 (Fla. 2005) (finding that the legislature overreached in altering the procedural rules governing defendants' pretrial release timing); Johnson v. State, 308 So. 2d 127, 129 (Fla. Dist. Ct. App. 1975) (striking down a statute because it infringed upon the rulemaking power of the Florida Supreme Court), aff'd, 346 So. 2d 66 (Fla. 1977) (per curiam).

439. **Peremptory Challenges (Criminal)**: Ga. Code Ann. § 15-12-165 (2023); Ga. Unif. Super. Ct. R. 11 (referencing time limits on the exercise of peremptory strikes). **Source of Rulemaking Authority**: Ga. Const. art. VI, § IX, para. 1; Ga. Code Ann. § 15-2-18. The Supreme Court of Georgia has on occasion also cited an "inherent power" that exists "[e]ven if the legislature had not expressly provided this authority" to engage in rulemaking. Waldrip v. Head, 532 S.E.2d 380, 385 (Ga. 2000). But recently, the court has cast doubt on the breadth of this proposition. See Duke v. State, 829 S.E.2d 348, 358 (Ga. 2019) ("*Waldrip* 'constitutes blatant judicial usurpation of the legislative function, and cannot be considered to be the legitimate exercise of inherent judicial authority.'" (quoting *Waldrip*, 532 S.E.2d at 389 (Carley, J., dissenting))). **Washington-Style Reform**: See Georgia Constitution, statute, and case law governing courts' rulemaking authority cited above. Judicially promulgated rules "shall not take effect until they have been ratified and confirmed by the General Assembly by an Act or resolution thereof." Ga. Code Ann. § 15-2-18(b). **Elimination, Judicial Override**: Peremptory strikes are authorized by statute, "and in case of conflict[,] [the Uniform Rules] must yield to[] Georgia's statutory law." Hendry v. Hendry, 734 S.E.2d 46, 50 n.5 (Ga. 2012).

440. **Peremptory Challenges (Criminal)**: Haw. Rev. Stat. Ann. §§ 635-29, -30 (West 2023); Haw. R. Penal P. 24(b). **Source of Rulemaking Authority**: Haw. Const. art. VI, § 7; Haw. Rev. Stat. Ann. § 602-11 (West 2023); Farmer v. Admin. Dir. of Ct., 11 P.3d 457, 466 (Haw. 2000). **Washington-Style Reform**: See Hawaii Constitution, statutes, and case law governing courts' rulemaking authority cited above. **Elimination**: Although older cases indicate that "the rule of the Hawai'i Supreme Court prevails" when it is "inconsistent with a prior act of the legislature governing the same," State v. Sorino, 117 P.3d 847, 851 (Haw. Ct. App. 2005) (citing Kudlich v. Ciciarelli, 401 P.2d 449, 455 (Haw. 1965)), rev'd on other grounds, 118 P.3d 645 (Haw. 2005), more recent cases adopt the opposite position, see State v. Obrero, 517 P.3d 755, 763 (Haw. 2022) (stating that statutes supersede court rules where there is a conflict and litigants' substantive rights are at stake); Brutsch v. Brutsch, 390 P.3d 1260, 1272 (Haw. 2017) ("We reiterate that there is significant case precedent holding court rules inapplicable where they conflict with legislative mandates."). **Judicial Override**: The Hawaii Supreme Court has adopted an expansive definition of substantive rights, under which it has invalidated rules of procedure that conflict with statutes. It remains unclear, though, whether the statute would trump a court rule if the matter were deemed purely procedural. See, e.g., *Obrero*, 517 P.3d at 763; Bank of Haw. v. Shinn, 200 P.3d 370, 377 (Haw. 2008); In re Doe Child., 17 P.3d 217, 218–19 (Haw. 2001).

441. **Peremptory Challenges (Criminal)**: Idaho Code § 19-2016 (2023); Idaho Crim. R. 24(d). **Source of Rulemaking Authority**: Idaho Const. art. V, §§ 2, 13 (referencing "judicial power" but making no express reference to rulemaking); Idaho Code § 1-212 (2023) ("The inherent power of the Supreme Court to make rules governing procedure in all the courts of Idaho is hereby recognized and confirmed."); R.E.W. Constr. Co. v. Dist. Ct. of the Third Jud. Dist., 400 P.2d 390, 397 (Idaho 1965) (recognizing inherent rulemaking power). **Washington-Style Reform**: See Idaho statute and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: State v. Weigle, 447 P.3d 930, 934 (Idaho 2019) ("If a statutory provision that is procedural in nature is in conflict with the Idaho Criminal Rules, the rules govern.").

442. **Peremptory Challenges (Criminal)**: 725 Ill. Comp. Stat. Ann. 5/115-4(e) (West 2023); Ill. Sup. Ct. R. 434(d). **Source of Rulemaking Authority**: Ill. Const. art. VI, § 16; 735 Ill. Comp. Stat. Ann. 5/1-104 (West 2023); People ex rel. Chi. Bar Ass'n v. Goodman, 8 N.E.2d 941, 944 (Ill. 1937) ("The power to regulate and define the practice of law is a prerogative of the judicial department as one of the three divisions of the government

created by article 3 of our Constitution."). **Washington-Style Reform**: See Illinois Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: People v. Walker, 519 N.E.2d 890, 893 (Ill. 1988) ("[W]here such a legislative enactment directly and irreconcilably conflicts with a rule of this court on a matter within the court's authority, the rule will prevail."); People v. Jackson, 371 N.E.2d 602, 606 (Ill. 1977) (invalidating a statute that provided for broader voir dire than that provided for under Rule 234).

443. **Peremptory Challenges (Criminal)**: Ind. Code Ann. §§ 35-37-1-3, -4 (West 2023); Ind. Jury R. 18(a). **Source of Rulemaking Authority**: See Augustine v. First Fed. Sav. & Loan Ass'n of Gary, 384 N.E.2d 1018, 1020 (Ind. 1979) ("The procedural rules and cases decided by this Court take precedence over any conflicting statutes."); State ex rel. Blood v. Gibson Cir. Ct., 157 N.E.2d 475, 477 (Ind. 1959) ("[T]he power to make rules of procedure in Indiana is neither exclusively legislative nor judicial."). **Washington-Style Reform**: See Indiana case law governing courts' rulemaking authority cited above. **Elimination**: In re Pub. L. No. 305 & Pub. L. No. 309 of Ind. Acts of 1975, 334 N.E.2d 659, 662 (Ind. 1975) ("The procedural rules and the cases decided by the courts take precedence over any statute enacted concerning a procedural matter."). **Judicial Override**: *In re Pub. Law No. 305*, 334 N.E.2d at 662; Key v. State, 48 N.E.3d 333, 339 (Ind. Ct. App. 2015) ("It is a fundamental rule of Indiana law that when a procedural statute conflicts with a procedural rule adopted by the supreme court, the [procedural rule] shall take precedence.").

444. **Peremptory Challenges (Criminal)**: Iowa R. Crim. P. 2.18(10). **Source of Rulemaking Authority**: Iowa's constitution assigns responsibility to the legislature to create a "general system of practice" in Iowa courts. Iowa Const. art. V, § 14. But other sources of law recognize some "inherent" power of the judiciary when the legislature has failed to act. See Iowa C.L. Union v. Critelli, 244 N.W.2d 564, 568–69 (Iowa 1976); see also Iowa Code § 602.4201 (2023) (delegating authority to the Iowa Supreme Court). **Washington-Style Reform**: See Iowa Constitution, statute, and case law governing courts' rulemaking authority cited above. A "legislative council" has the authority to delay the effective date of a promulgated rule by up to fourteen months, during which the general assembly can enact a bill that supersedes the provision. Iowa Code §§ 602.4201–.4202. **Elimination**: See the Iowa statute establishing "legislative council" power cited above. **Judicial Override**: That rulemaking power is delegated from the legislature to the judiciary suggests the primacy of the legislature in case of conflict; the statutory delegation of rulemaking authority additionally provides that a bill may "supersede[]" a proposed rule (although is technically silent as to the effect of judicial override of existing statute). Id.

445. **Peremptory Challenges (Criminal)**: Kan. Stat. Ann. § 22-3412 (West 2023). The Kansas Supreme Court has also adopted "Standards Relating to Jury Use and Management" that provide "guidelines" governing the use of strikes. Standards Relating to Jury Use and Management, pt. B at 4 (Kan. 1983), https://www.kscourts.org/kscourts/media/kscourts/rules/standards-relating.pdf?ext=.pdf?r1=rules+relating+to+district+courts&r2=403 [https://perma.cc/9SF4-ZMNC]. **Source of Rulemaking Authority**: Kan. Const. art. III, § 1; Kan. Stat. Ann. § 20-321 (West 2023); State v. Mitchell, 672 P.2d 1, 8 (Kan. 1983) (holding that the "Federal Constitution guarantees the separation of powers to the states under the guaranty clause," which in turn implies broad procedural rulemaking authority vested in the Kansas Supreme Court). **Washington-Style Reform**: See Kansas Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: Although peremptory strikes are currently provided for by statute, "[j]ury selection is a part of court procedure[] [and] [a]s such it falls within the ambit of this Court's rulemaking authority." *Mitchell*, 672 P.2d at 9. Under Kansas law, the judiciary "can acquiesce in legislative action in this area of the judicial function," but "when court rules and a statute conflict . . . the court's constitutional mandate must prevail." Id.

446. **Peremptory Challenges (Criminal)**: Ky. Rev. Stat. Ann. § 29A.290 (West 2023) ("The number of peremptory challenges shall be prescribed by the Supreme Court."); Ky. R. Crim. P. 9.40. **Source of Rulemaking Authority**: Ky. Const. § 116. Before the Kentucky Constitution was amended to include section 116 in 1976, the Kentucky Supreme Court

would on occasion "draw upon the reserve of [its] inherent power . . . to carry out the purposes of the Constitution." Burton v. Mayer, 118 S.W.2d 547, 549 (Ky. 1938). **Washington-Style Reform**: See Kentucky Constitution and case law governing courts' rulemaking authority cited above. **Elimination**: Although Ky. Rev. Stat. Ann. § 29A.290 seems to imply the existence of peremptory strikes, court rules generally trump. See Manns v. Commonwealth, 80 S.W.3d 439, 443–44 (Ky. 2002) (explaining that state courts have the power to preempt statutes dealing with court procedure); see also Spencer v. Commonwealth, 2012-CA-000996-MR, 2013 WL 4033897, at *2 (Ky. Ct. App. Aug. 9, 2013) (rejecting the argument that "[t]he number *and existence* of peremptory challenges, if different from the common law, must be established by the General Assembly" (emphasis added)). **Judicial Override**: In cases of direct conflict, the Supreme Court of Kentucky has taken the unusual step of allowing "unconstitutional" statutes modifying criminal procedure to stand, in the interest of "[c]omity[,] . . . deference[,] and respect." See, e.g., Foster v. Overstreet, 905 S.W.2d 504, 506 (Ky. 1995) (internal quotation marks omitted) (quoting O'Bryan v. Hedgespeth, 892 S.W.2d 571, 577 (1995)). Such precedent creates uncertainty regarding how a direct conflict might be resolved here.

447. **Peremptory Challenges (Criminal)**: La. Code Crim. Proc. art. 795 (2023). **Source of Rulemaking Authority**: La. Const. art. V, § 5(a) ("The supreme court has general supervisory jurisdiction over all other courts. It may establish procedural and administrative rules not in conflict with law . . . ."). **Washington-Style Reform**: See Louisiana Constitution governing courts' rulemaking authority cited above. Though the Louisiana Constitution grants it the power, the Louisiana Supreme Court has not promulgated rules of civil or criminal procedure. More problematic is the unusually detailed statutory scheme governing peremptory strikes found at La. Code Crim. Proc. art. 795. Because the Supreme Court's rulemaking power is limited to "rules not in conflict with law," La. Const. art. V, § 5(a), it is unclear whether even a Washington-style reform would be permissible. **Elimination, Judicial Override**: Because the Supreme Court's rulemaking power is limited to "rules not in conflict with law," id., elimination through rulemaking is likely impossible and the legislature could override any rule modifying peremptory strikes.

448. **Peremptory Challenges (Criminal)**: Me. Rev. Stat. Ann. tit. 15, § 1258 (West 2023) ("The Supreme Judicial Court shall by rule provide the manner of exercising all challenges, and the number and order of peremptory challenges."); Me. R. Crim. P. 24. **Source of Rulemaking Authority**: Me. Rev. Stat. Ann. tit. 4, § 9 (West 2023); Cunningham v. Long, 135 A. 198, 199 (Me. 1926) ("[T]he Supreme Judicial Court may establish, and cause to be recorded, rules not repugnant to law, respecting the modes of trial and conduct of business in suits at law and in equity."). **Washington-Style Reform**: See Maine statute and case law governing courts' rulemaking authority cited above. **Elimination**: The Supreme Judicial Court's rules currently govern peremptory challenges, and in any event, "there can be no doubt of [the Supreme Judicial Court's] power to override any procedural statutes that might be in conflict with [its] rules." Eaton v. State, 302 A.2d 588, 592 (Me. 1973). **Judicial Override**: While a statute overrides a contrary court rule on "substantive matters," peremptory challenges have traditionally been governed exclusively by court rule, and the Supreme Judicial Court has claimed broad inherent authority in jury-related matters. See State v. Schofield, 895 A.2d 927, 937 (Me. 2005) ("Although state law does not specifically provide for a jury trial on sentencing facts, our recognition of such a procedure is well within our inherent judicial power to 'safeguard and protect . . . the fundamental principles of government vouchsafed to us by the State and Federal Constitutions.'" (quoting Morris v. Goss, 83 A.2d 556, 565 (Me. 1951))).

449. **Peremptory Challenges (Criminal)**: Md. Code Ann., Cts. & Jud. Proc. § 8-420 (West 2023); Md. R. 4-313. **Source of Rulemaking Authority**: Md. Const. art. IV, § 18 ("The Supreme Court of Maryland . . . shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate . . . [and] other courts . . . which shall have the force of law until rescinded, changed or modified by the Supreme Court of Maryland or otherwise by law."). **Washington-Style Reform**: See Maryland Constitution governing courts' rulemaking authority cited above. **Elimination**: A rule adopted by the

Supreme Court of Maryland generally applies despite a prior statute to the contrary and until a subsequent statute repeals or modifies the rule. See Johnson v. Swann, 550 A.2d 703, 705 (Md. 1988) ("The Maryland Rules of Procedure generally apply despite a prior statute to the contrary and until a subsequent statute would repeal or modify the rule."); Simpson v. Consol. Constr. Servs., 795 A.2d 754, 763–66 (Md. Ct. Spec. App. 2002). **Judicial Override**: The Maryland Constitution plainly contemplates the legislative abrogation of a judicial rule, Md. Const. art. IV, § 18, but a Rule of Procedure "generally appl[ies] despite a prior statute to the contrary." *Swann*, 550 A.2d at 705. The result is a last-in-time regime of concurrent authority, which leaves uncertain how a full-blown conflict might be resolved.

450. **Peremptory Challenges (Criminal)**: Mass. R. Crim. P. 20(c). **Source of Rulemaking Authority**: Mass. Const. art. XXX (providing that "the judicial [branch] shall never exercise legislative . . . powers"); Mass. Gen. Laws Ann. ch. 213, § 3 (West 2023) (allowing the courts to "make and promulgate uniform codes of rules" to regulate court practice "in cases not expressly provided for by law"); Op. of the Justs. to the Senate, 376 N.E.2d 810, 822 (Mass. 1978). **Washington-Style Reform**: See Massachusetts Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: In the absence of any statutory provision governing peremptory strikes, the judiciary's authority to eliminate strikes via court rule is straightforward. See Mass. Gen. Laws Ann. ch. 213, § 3 (giving courts authority to promulgate rules regulating court practice unless otherwise provided for in legislation). **Judicial Override**: Case law is limited. The statutory grant of authority is limited to rules "consistent with law," but some authority suggests that judicial rules take precedence over statutes. See, e.g., *Op. of the Justs.*, 376 N.E.2d at 822 ("[I]f the judicial department promulgates a rule imposing standards higher than or in conflict with those imposed by the legislation, the judicial rule would prevail.").

451. **Peremptory Challenges (Criminal)**: Mich. Comp. Laws Ann. §§ 768.12–.13 (West 2023); Mich. Ct. R. 6.412(E). **Source of Rulemaking Authority**: Mich. Const. art. VI, § 5; Mich. Comp. Laws Ann. § 600.223 (West 2023). Interpreting the Michigan Constitution of 1908, the Michigan Supreme Court held, "It cannot be disputed that this Court has inherent as well as constitutional rulemaking power in the discharge of its general superintending control over all inferior courts." Tomlinson v. Tomlinson, 61 N.W.2d 102, 103 (Mich. 1953). Invocations of this "inherent" power are absent in more recent majority opinions. But see People v. Watkins, 758 N.W.2d 267, 269 (Mich. 2008) (Cavanagh, J., dissenting) (citing *Tomlinson* approvingly). **Washington-Style Reform**: See Michigan Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: People v. Watkins, 818 N.W.2d 296, 309 (Mich. 2012) (explaining that procedural rules prevail over conflicting statutes). **Judicial Override**: See id.; see also Mich. Ct. R. 1.104 (suggesting that supreme court rules supersede contrary statutes).

452. **Peremptory Challenges (Criminal)**: Minn. R. Crim. P. 26.02(6), (7). **Source of Rulemaking Authority**: Minn. Stat. § 480.059 (2023); State v. Willis, 332 N.W.2d 180, 184 (Minn. 1983) (acknowledging "that the judicial function constitutionally empowers the courts to make their own rules of procedure"). **Washington-Style Reform**: See Minnesota statute and case law governing courts' rulemaking authority cited above. **Elimination**: Even if a statute allocated peremptory strikes, a judicial rule would supersede it. State v. Johnson, 514 N.W.2d 551, 554 (Minn. 1994). **Judicial Override**: The statutory rulemaking authority provides that most statutes (exceptions are listed) "shall . . . be of no force and effect" once a superseding rule is promulgated, Minn. Stat. § 480.059(7), while simultaneously reserving the legislature's right to "modify or repeal" any rule with which it disagrees, id. § 480.059(8). The Supreme Court of Minnesota, however, has held that this purported reservation is unconstitutional. See *Johnson*, 514 N.W.2d at 553–54.

453. **Peremptory Challenges (Criminal)**: Miss. Code Ann. § 99-17-3 (2023); Miss. R. Crim. P. 18.3(c). **Source of Rulemaking Authority**: Newell v. State, 308 So. 2d 71, 76 (Miss. 1975) ("The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts."). The Mississippi Supreme Court has effectively ignored the legislature's statutory authorization for rulemaking, claiming broader inherent

constitutional power than the legislature purported to delegate. See Miss. Code Ann. § 9-3-69 (2023); Southwick, supra note 401, at 2 (detailing how the Mississippi Supreme Court has amassed judicial rulemaking power "without legislative involvement"). **Washington-Style Reform**: See Mississippi statute and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: State v. Delaney, 52 So. 3d 348, 351 (Miss. 2011) (explaining that statutes conflicting with court rules are void); see also Southwick, supra note 401, at 2 (discussing the judiciary's aggressive assertion of rulemaking authority).

454. **Peremptory Challenges (Criminal)**: Mo. Ann. Stat. § 494.480 (West 2023). **Source of Rulemaking Authority**: Mo. Const. art. V, § 5 (authorizing rulemaking but prohibiting "rules [that] change . . . the law relating to . . . juries [or] the right of trial by jury"). **Washington-Style Reform, Elimination**: The Missouri Constitution prohibits rulemaking "relating to . . . juries." Id. **Judicial Override**: See id. ("The [court's] rules shall not change substantive rights, or the law relating to . . . juries . . . . Any rule may be annulled or amended in whole or in part by a law limited to the purpose.").

455. **Peremptory Challenges (Criminal)**: Mont. Code Ann. § 46-16-116 (West 2023). **Source of Rulemaking Authority**: Mont. Const. art. VII, § 2(3). The supreme court's statutory basis for its rulemaking authority—Mont. Code Ann. § 3-2-701 (West 2024)—was "impliedly repealed" by this constitutional provision. Coate v. Omholt, 662 P.2d 591, 600 (Mont. 1983). **Washington-Style Reform**: Although the Montana Supreme Court has never promulgated a comprehensive set of rules of criminal procedure, the authority exists pursuant to the Montana Constitution, which vests the state's supreme court with procedural rulemaking authority over "all other courts." See Mont. Const. art. VII, § 2(3). But such rules are "subject to disapproval by the legislature in either of the two sessions following promulgation." Id.; see also In re Formation of E. Branch Irrigation Dist., 186 P.3d 1266, 1267–68 (Mont. 2008) (discussing the "legislative veto" of court rules). **Elimination**: Existing statutory provision notwithstanding, the Montana Supreme Court has held that its rules supersede conflicting statutes. See *In re Formation*, 186 P.3d at 1268. **Judicial Override**: The Montana legislature may exercise a "veto" over court rules; as in Florida, however, "once a legislative veto is exercised, the legislature is not empowered to fill the vacuum by enacting its own legislation governing appellate procedure or lower court procedure." Id. at 1267 (internal quotation marks omitted) (quoting *Coate*, 662 P.2d at 600).

456. **Peremptory Challenges (Criminal)**: Neb. Rev. Stat. § 29-2005 (2023). **Source of Rulemaking Authority**: Neb. Const. art. V, § 25 ("[T]he supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters."). **Washington-Style Reform**: See Nebraska constitutional provision governing the state supreme court's rulemaking authority cited above. **Elimination**: The existence of a statutory provision fixing the number of peremptory strikes precludes elimination by judicial rulemaking. See Peck v. Dunlevey, 172 N.W.2d 613, 615–16 (Neb. 1969) (discussing the rejection of unrestricted judicial rulemaking authority during the state's constitutional convention of 1920). **Judicial Override**: Legislative statutes trump conflicting court rules. Neb. Const. art. V, § 25; *Peck*, 172 N.W.2d at 615–16.

457. **Peremptory Challenges (Criminal)**: Nev. Rev. Stat. Ann. § 175-051 (West 2023); Nev. R. Crim. P. 17(5). **Source of Rulemaking Authority**: Nev. Rev. Stat. Ann. § 2-120 (West 2023); Goldberg v. Eighth Jud. Dist. Ct., 572 P.2d 521, 522–23 (Nev. 1977) (discussing inherent power); see also Nev. Sup. Ct. R., Historical Note Concerning the Supplemental Rules of the Supreme Court of Nevada, https://www.leg.state.nv.us/courtrules/scr.html [https://perma.cc/D8VH-S52P] (last visited Jan. 9, 2024) ("One of the inherent powers of the supreme court, existing independently of statute, is the right . . . to prescribe rules, not inconsistent with law, for its own government . . . ."); Lyft, Inc. v. Eighth Jud. Dist. Ct., 501 P.3d 994, 999 (Nev. 2021) (noting the court's inherent power to prescribe rules necessary to ensure the functioning of the courts). **Washington-Style Reform**: See Nevada statute and case law governing courts' rulemaking authority cited above. **Elimination**: The Nevada Supreme Court possesses inherent power to prescribe rules of procedure. See *Lyft*, 501 P.3d at 999. In the procedural realm, a rule supersedes a conflicting statute. See id. **Judicial Override**: The Nevada legislature "may not enact a procedural statute that conflicts with a

pre-existing procedural rule, without violating the doctrine of separation of powers, and . . . such a statute is of no effect." Id. at 999 (alteration in original) (internal quotation marks omitted) (quoting *State v. Connery*, 661 P.2d 1298, 1300 (Nev. 1983)).

458. **Peremptory Challenges (Criminal)**: N.H. Rev. Stat. Ann. §§ 606:3–:4 (2023); N.H. R. Crim. P. 22(d). **Source of Rulemaking Authority**: N.H. Const. pt. II, art. 73-a; N.H. Rev. Stat. Ann. §§ 490:4, 491:10 (2023); Nassif Realty Corp. v. Nat'l Fire Ins. Co. of Hartford, 220 A.2d 748, 749 (N.H. 1966) (claiming "broad," "comprehensive," and "ancient" inherent rulemaking authority). **Washington-Style Reform**: See New Hampshire Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: The statutory provision likely serves as a bar to elimination through rulemaking because "the statute trumps the rule" unless such a statute "compromises the core adjudicatory functions of the judiciary." State v. Carter, 106 A.3d 1165, 1171 (N.H. 2014) (resolving "any residual tension" between a rule and a statute governing pretrial discovery in favor of the statute). **Judicial Override**: Id. at 1172 ("In sum, just as the legislature possesses the power to enact laws that override this court's common law and statutory construction precedents . . . so also do its statutory enactments prevail over conflicting court rules, unless those enactments compromise the core adjudicatory functions of the judiciary.").

459. **Peremptory Challenges (Criminal)**: N.J. Stat. Ann. § 2B:23-13 (West 2023); N.J. Ct. R. 1:8-3(d). **Source of Rulemaking Authority**: N.J. Const. art. VI, § 2(3) (announcing that the state's high court should "make rules governing the administration of all courts" and, "subject to the law, the practice and procedure in all such courts"). **Washington-Style Reform**: See New Jersey constitutional provision governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: The Supreme Court of New Jersey has long claimed robust rulemaking authority, including the authority to promulgate procedural rules that trump conflicting existing or future statutes. See State v. Leonardis, 375 A.2d 607, 614 (N.J. 1977) (interpreting the state constitution "to give the Court exclusive and plenary power over rules which are procedural in nature" in a case affirming the judiciary's control over pretrial diversion programs via rulemaking); Winberry v. Salisbury, 74 A.2d 406, 414 (N.J. 1950) ("[T]he rule-making power of the Supreme Court is not subject to overriding legislation, but . . . it is confined to practice, procedure and administration as such.").

460. **Peremptory Challenges (Criminal)**: N.M. Stat. Ann. § 38-5-14 (2023); N.M. Dist. Ct. R. Crim. P. 5-606(D). **Source of Rulemaking Authority**: N.M. Const. art. VI, § 3; N.M. Stat. Ann. § 38-1-1; see also Ammerman v. Hubbard Broad., Inc., 551 P.2d 1354, 1358 (N.M. 1976) (interpreting article VI, section 3, as providing the "inherent power to regulate pleading, practice and procedure affecting the judicial branch" (internal quotation marks omitted) (quoting State ex rel. Anaya v. McBride, 539 P.2d 1006, 1008 (N.M. 1975))). **Washington-Style Reform**: See New Mexico Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: Sw. Cmty. Health Servs. v. Smith, 755 P.2d 40, 42 (N.M. 1988) ("[A]ny conflict between court rules and statutes that relate to procedure [is] today resolved by this Court in favor of the rules."); *State ex rel. Anaya*, 539 P.2d at 1008–09 (ruling that the legislature has no power to prescribe rules of practice and procedure and any attempts to do so will be void).

461. **Peremptory Challenges (Criminal)**: N.Y. Crim. Proc. Law § 270.25 (McKinney 2023). **Source of Rulemaking Authority**: N.Y. Const. art. VI, § 30 (authorizing legislature to delegate its rulemaking authority, should it choose to do so, though any rules must be "consistent with the general practice and procedure as provided by statute or general rules"); N.Y. Jud. Law § 211 (McKinney 2023); see also Cohn v. Borchard Affiliations, 250 N.E.2d 690, 695 (N.Y. 1969) ("[T]he language of the Constitution leaves little room for doubt that the authority to regulate practice and procedure in the courts lies principally with the Legislature."). **Washington-Style Reform, Elimination, Judicial Override**: See New York Constitution, statute, and case law governing courts' rulemaking authority cited above. The judiciary has engaged only in minimal rulemaking touching upon criminal procedure, see N.Y. Ct. R. §§ 200–221.3, and express authority to develop such rules has not been delegated by the legislature, as would be required by N.Y. Const. art. VI, § 30.

462. **Peremptory Challenges (Criminal)**: N.C. Gen. Stat. § 15A-1217 (2023). **Source of Rulemaking Authority**: N.C. Const. art. IV, § 13(2); N.C. Gen. Stat. § 7A-34 (2023) (delegating authority to promulgate rules "supplementary to, and not inconsistent with, acts of the General Assembly"). **Washington-Style Reform**: See North Carolina Constitution and statute governing courts' rulemaking authority cited above. **Elimination**: The statutory allocation of peremptory strikes likely precludes elimination through rulemaking. See N.C. Gen. Stat. § 7A-34 (requiring court rules to be "[]consistent with . . . acts of the General Assembly"); State v. Rorie, 500 S.E.2d 77, 79 (N.C. 1998) (recognizing the validity of the legislature's statutory restriction of courts' rulemaking authority), superseded by statute on other grounds, Act of May 8, 2001, ch. 81, secs. 1, 3, 2001 N.C. Sess. Laws 163, 163–65. **Judicial Override**: *Rorie*, 500 S.E.2d at 79; see also State v. Campbell, 188 S.E.2d 558, 559 (N.C. Ct. App. 1972) ("The General Assembly [has] the final word on rules of procedure and practice in the trial courts of our State.").

463. **Peremptory Challenges (Criminal)**: N.D. Cent. Code § 29-17-30 (2023); N.D. R. Crim. P. 24(b)(2). **Source of Rulemaking Authority**: N.D. Const. art. VI, § 3 (granting "authority to promulgate rules of procedure" without limitation and authority to promulgate rules governing attorney practice "unless otherwise provided by law"); N.D. Cent. Code §§ 27-02-08 to -09 (2023); see also State v. Hanson, 558 N.W.2d 611, 615 (N.D. 1996) ("Under [N.D. Const. art. VI, § 3], a procedural rule adopted by this court must prevail in a conflict with a statutory procedural rule."). **Washington-Style Reform**: See North Dakota Constitution, statutes, and case law governing courts' rulemaking authority cited above. **Elimination**: A North Dakota statute provides that previous legislative enactments must yield to subsequently enacted rules. See N.D. Cent. Code § 27-02-09 ("All statutes relating to pleadings, practice, and procedure in civil or criminal actions, remedies, or proceedings, enacted by the legislative assembly, have force and effect only as rules of court and remain in effect unless and until amended or otherwise altered by rules promulgated by the supreme court."); see also N.D. R. Crim. P. 59 (noting that rules promulgated by the supreme court supersede any statute that conflicts with them). **Judicial Override**: Courts regard subsequently enacted statutes designed to repeal or modify court rules as invalid. See State v. Brown, 771 N.W.2d 267, 279 (N.D. 2009); City of Fargo v. Ruether, 490 N.W.2d 481, 483 (N.D. 1992).

464. **Peremptory Challenges (Criminal)**: Ohio Rev. Code Ann. § 2945.21 (2023); Ohio Crim. R. 24(D). **Source of Rulemaking Authority**: Ohio Const. art. IV, § 5(B) ("The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right . . . [and] shall take effect on the following first day of July, unless . . . the general assembly adopts a concurrent resolution of disapproval [beforehand]."). **Washington-Style Reform**: See Ohio constitutional provision governing courts' rulemaking authority cited above. **Elimination**: While rules altering the number, method, and rules pertaining to the exercise of peremptory strikes are likely "procedural" (and, hence, within the scope of the judiciary's rulemaking authority), the basic right to exercise peremptory strikes is "substantive," suggesting an attempt to eliminate them altogether would be impermissible. See State v. Greer, 530 N.E.2d 382, 395 (Ohio 1988). **Judicial Override**: A rule trumps an inconsistent procedural statute. See, e.g., State v. Brown, 528 N.E.2d 523, 530 (Ohio 1988) (holding court rule, not statute, controls the number of grand jurors); see also Ohio Const. art. IV, § 5(B). A rule even invalidates a "subsequently enacted statute[] purporting to govern procedural matters." Hiatt v. S. Health Facilities, Inc., 626 N.E.2d 71, 72 (Ohio 1994). But the "legislative veto" built into the Ohio Constitution means the legislature could block any reforms from going into effect in the first instance, provided a concurrent resolution of disapproval is passed within the required timeframe. Ohio Const. art. IV, § 5(B).

465. **Peremptory Challenges (Criminal)**: Okla. Stat. tit. 22, § 655 (2023). **Source of Rulemaking Authority**: Okla. Stat. tit. 12, § 74 (2023); Eberle v. Dyer Constr. Co., 598 P.2d 1189, 1192–93 (Okla. 1979) (interpreting Okla. Const. art. VII, § 6 as providing the court with rulemaking power so long as the rules do not conflict with the constitution or a statute); see also Okla. Stat. tit. 20, §§ 23, 24 (2023). **Washington-Style Reform**: See Oklahoma

statutes and case law governing courts' rulemaking authority cited above. There also appears to be statutory (and implied constitutional) authority for rulemaking akin to Washington's G.R. 37. See Okla. Stat. tit. 12, § 74; *Eberle*, 598 P.2d at 1192–93. But the Oklahoma Supreme Court has not previously engaged in rulemaking governing criminal procedure and historically has undertaken rulemaking in particular areas chiefly when prompted to do so by the legislature. See, e.g., Okla. Stat. tit. 20, § 25 (directing the promulgation of rules to promote "transparency of the judicial selection process"); Okla. Stat. tit. 12, § 990A(C) (directing the Supreme Court to promulgate rules governing aspects of appellate procedure). **Elimination, Judicial Override**: While in some older cases the Supreme Court of Oklahoma invalidated statutes that sought to "supplant exercise of sound judicial discretion," Puckett v. Cook, 586 P.2d 721, 723 (Okla. 1978), the judiciary's rulemaking power is generally understood to be limited to rules "required to carry into effect the provisions of [the Oklahoma] Code, and . . . consistent therewith." Okla. Stat. tit. 12, § 74. The court has also shown a historical unwillingness to pass rules inconsistent with existing statute. See Keel v. Wright, 890 P.2d 1351, 1354 (Okla. 1995) ("We decline to readopt a rule similar to the pre-1991 Rule 1.11(d) in light of current legislation contrary to such a rule.").

466. **Peremptory Challenges (Criminal)**: Or. Rev. Stat. § 136.230 (West 2023). **Source of Rulemaking Authority**: While the legislature has expressly authorized judicial rulemaking with respect to rules of civil procedure, see Or. Rev. Stat. §§ 1.002, .735 (West 2023), it has not done so with respect to rules of criminal procedure. **Washington-Style Reform, Elimination, Judicial Override**: See Oregon statutes governing courts' rulemaking authority cited above.

467. **Peremptory Challenges (Criminal)**: 234 Pa. Stat. and Cons. Stat. Ann. § 634 (West 2023). **Source of Rulemaking Authority**: Pa. Const. art. V, § 10(c) ("The Supreme Court shall have the power to prescribe general rules governing practice, procedure . . . if such rules . . . neither abridge, enlarge nor modify the substantive rights of any litigant . . . . All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions."); see also In re 42 Pa. C. S. § 1703, 394 A.2d 444, 447 (Pa. 1978) ("[T]he Source of that authority [to engage in rulemaking], after 1968 [when the Judiciary Article of the state constitution was amended], is unquestionably the Constitution."). **Washington-Style Reform**: See Pennsylvania Constitution and case law governing courts' rulemaking authority cited above. **Elimination**: The Supreme Court of Pennsylvania has held that "the right to trial by jury is not a 'substantive right,' but a right of procedure through which rights conferred by substantive law are enforced," and has struck down statutes related to the jury as an unconstitutional encroachment on its authority, even in the absence of a direct conflict with an existing rule. Commonwealth v. McMullen, 961 A.2d 842, 847–48 (Pa. 2008) (internal quotation marks omitted) (quoting Commonwealth v. Sorrell, 456 A.2d 1326, 1329 (1982)). **Judicial Override**: Pa. Const. art. V, § 10(c) ("All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.").

468. **Peremptory Challenges (Criminal)**: R.I. Super. Ct. R. Crim. P. 24(b). **Source of Rulemaking Authority**: 8 R.I. Gen. Laws §§ 8-6-2, -4 (2023). **Washington-Style Reform**: See Rhode Island statute governing courts' rulemaking authority cited above. **Elimination**: The absence of any statutory provision governing peremptory strikes makes the possibility of elimination straightforward. **Judicial Override**: Judicial rules "have the force and effect of a statute and supersede any statutory regulations with which they conflict." State v. Pacheco, 481 A.2d 1009, 1019 (R.I. 1984).

469. **Peremptory Challenges (Criminal)**: S.C. Code Ann. §§ 14-7-1110, -9-200 (2023); S.C. R. Crim. P. 132. **Source of Rulemaking Authority**: S.C. Const. art. V, §§ 4, 4A (authorizing a supermajority of the legislature to veto a proposed rule); S.C. Code Ann. § 14-3-640 ("The court may establish and promulgate such rules and regulations as may be necessary to carry into effect the provisions of this article and to facilitate the work of the court."). **Washington-Style Reform**: See South Carolina Constitution and statute governing courts' rulemaking authority cited above. A 1985 amendment to the South Carolina Constitution provides that the legislature may block the promulgation of a court rule if, within ninety days of submission, "three-fifths of the members of each House present and voting" disapprove of the provision. S.C. Const. art. V, § 4A. **Elimination**: The judicial

rulemaking power is "[s]ubject to the statutory law," id.; the supreme court has recognized the relevant constitutional clause as "establish[ing] the intent to subordinate to the General Assembly the Court's rulemaking power in regard to practice and procedure." Stokes v. Denmark Emergency Med. Servs., 433 S.E.2d 850, 852 (S.C. 1993). **Judicial Override**: See *Stokes*, 433 S.E.2d at 852 (holding that a subsequently enacted statute trumps a rule).

470. **Peremptory Challenges (Criminal)**: S.D. Codified Laws § 23A-20-20 (2023). **Source of Rulemaking Authority**: S.D. Const. art. V, § 12 ("The Supreme Court shall have general superintending powers over all courts and may make rules of practice and procedure and rules governing the administration of all courts. . . . These rules may be changed by the Legislature."); S.D. Codified Laws §§ 16-3-2 to -3 (2023) ("The Supreme Court of South Dakota has power to make all rules of practice and procedure which it shall deem necessary for the administration of justice in all civil and criminal actions . . . ."); City of Sioux Falls v. Ewoldt, 568 N.W.2d 764, 768 n.5 (S.D. 1997) ("This Court has inherent power to regulate procedure in the courts of this state."). **Washington-Style Reform**: See South Dakota Constitution, statutes, and case law governing courts' rulemaking authority cited above. **Elimination**: Under South Dakota law, the judiciary can literally amend (or repeal) an existing statute by court rule. See, e.g., In re Repeal of SDCL 15-39-59, Rule 00-6 (S.D. Mar. 10, 2000), https://ujs.sd.gov/uploads/sc/rules/00-6.pdf [https://perma.cc/328S-L3YL] (repealing civil procedure statute governing removal of civil claims from magistrate court for jury trial); In re Amendment of SDCL 23A-20-26, Rule 97-40 (S.D. Mar. 17, 1997), http://ujs.sd.gov/uploads/sc/rules/97-40.pdf [https://perma.cc/M3AW-NJWQ] (amending statute governing peremptory strikes in civil cases). The judiciary's unusual legislative power suggests that elimination by rulemaking is a possibility in South Dakota notwithstanding a statutory provision governing peremptory strikes. See S.D. Codified Laws § 23A-20-20. **Judicial Override**: While case law is sparse, South Dakota appears to have a last-in-time regime: A court rule may amend or repeal a statute, as discussed above, but article V, section 12, of the South Dakota Constitution provides that judicial rules "may be changed by the Legislature." This framework leaves uncertain how a full-blown conflict between the judiciary and legislature might eventually be resolved.

471. **Peremptory Challenges (Criminal)**: Tenn. Code Ann. § 40-18-118 (2023); Tenn. R. Crim. P. 24(e). **Source of Rulemaking Authority**: Tenn. Code Ann. § 16-3-402 to -408 (2023); Corum v. Holston Health & Rehab. Ctr., 104 S.W.3d 451, 454 (Tenn. 2003) ("[I]t is well settled that the Tennessee Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state."). **Washington-Style Reform, Elimination, Judicial Override**: Tennessee appears to be unique insofar as both its constitution and state law recognize judicial rulemaking authority, but no proposed rule can take effect absent affirmative approval by a majority of both houses of the legislature. See Tenn. Code Ann. § 16-3-404. It is therefore not a jurisdiction where the judiciary, acting alone, can effect any change in the law of the jury.

472. **Peremptory Challenges (Criminal)**: Tex. Code Crim. Proc. Ann. art. 35.15 (West 2023). **Source of Rulemaking Authority**: Tex. Const. art. V, § 31 (providing that the "Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state" and that the "legislature may delegate . . . the power to promulgate such other rules as may be prescribed by law or this Constitution"); Eichelberger v. Eichelberger, 582 S.W.2d 395, 398–99 & n.1 (Tex. 1979) ("The inherent powers of a court are those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity."). The legislature has delegated rulemaking authority only with respect to "rules of posttrial, appellate, and review procedure," Tex. Gov't Code Ann. § 22.108 (West 2023), evidence, id. § 22.109, and electronic filing in capital cases, id. § 22.1095(a), but not criminal procedure. **Washington-Style Reform, Elimination, Judicial Override**: As discussed above, pursuant to article V, section 31, of the Texas Constitution, the legislature may delegate rulemaking authority regarding criminal procedure to the judiciary. Because the legislature has (mainly) declined to do so, the judiciary would be unable to implement any type of reforms to the law of the jury.

473. **Peremptory Challenges (Criminal)**: Utah R. Crim. P. 18(d). **Source of Rulemaking Authority**: Utah Const. art. VIII, § 4 ("The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state . . . . The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses . . . ."); Utah Code § 78A-3-103 (2023) (containing similar language). **Washington-Style Reform**: See Utah Constitution and statute governing courts' rulemaking authority cited above. **Elimination**: Elimination is straightforward given the absence of any statutory provision governing peremptory strikes; even if such a statute existed, "rules of procedure are not necessarily subordinate to the provisions of state statutes." See Maxfield v. Herbert, 284 P.3d 647, 652 (Utah 2012). **Judicial Override**: The constitutional grant of judicial rulemaking authority (added in 1985) provides that the "Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature." Utah Const. art. VIII, § 4; see also Bell Canyon Acres Homeowners Ass'n v. McLelland, 443 P.3d 1212, 1216–17 (Utah 2019) (requiring, in addition to a two-thirds vote, both a legislative reference to the rule and a clear expression of the legislature's intent to modify the rule).

474. **Peremptory Challenges (Criminal)**: Vt. Stat. Ann. tit. 12, § 1941 (2023); Vt. R. Crim. P. 24. **Source of Rulemaking Authority**: Vt. Const. ch. II, § 37 ("The Supreme Court shall make and promulgate rules governing . . . practice and procedure in civil and criminal cases in all courts. Any rule adopted by the Supreme Court may be revised by the General Assembly."); Vt. Stat. Ann. tit. 12, § 1 (authorizing procedural rulemaking not affecting substantive rights but allowing the legislature to revise, modify, or repeal such rules). **Washington-Style Reform**: See Vermont Constitution and statute governing courts' rulemaking authority cited above. **Elimination**: Although there is a statute codifying peremptory strikes, a procedural rule "supersedes and impliedly repeals" a conflicting statute. See Pabst v. Lathrop, 376 A.2d 49, 50 (Vt. 1977). **Judicial Override**: Using similar language, both the Vermont Constitution and the statutory authorization for rulemaking provide that the General Assembly may revise a court rule with which it disagrees. See Vt. Const. ch. II, § 37; Vt. Stat. Ann. tit. 12, § 1. The statute goes on to provide: "[The General Assembly's] action [in modifying a rule] shall not be abridged, enlarged, or modified by subsequent rule." Vt. Stat. Ann. tit. 12, § 1. This language is conspicuously absent from chapter II, section 37, of the Vermont Constitution, however, and the Vermont Supreme Court has never been called upon to evaluate its constitutionality.

475. **Peremptory Challenges (Criminal)**: Va. Code Ann. § 19.2-262 (2023). **Source of Rulemaking Authority**: Va. Const. art. VI, § 5; Va. Code Ann. § 8.01-3 (2023) ("The Supreme Court . . . may prepare a system of rules for . . . all courts . . . . The General Assembly may . . . modify or annul any [such] rules . . . . In the case of any variance between a rule and a[] [legislative] enactment . . . such variance shall be construed so as to give effect to such enactment."). **Washington-Style Reform**: See Virginia Constitution and statute governing courts' rulemaking authority cited above. Though the Virginia Supreme Court has not engaged in rulemaking regarding peremptory strikes in criminal cases, it has promulgated rules regarding voir dire and challenges for cause. See Va. Sup. Ct. R. 1:21, 3A:14. **Elimination**: A rule eliminating peremptory strikes would conflict with an existing statute. See Va. Code Ann. § 19.2-262. Virginia law provides that "[i]n the case of any variance between a rule and an enactment of the General Assembly such variance shall be construed so as to give effect to such enactment." Va. Code Ann. § 8.01-3(E). **Judicial Override**: See Virginia statutes governing elimination cited above.

476. **Peremptory Challenges (Criminal)**: Wash. Super. Ct. Crim. R. 6.4(e). **Source of Rulemaking Authority**: Wash. Rev. Code Ann. § 2.04.190 (West 2023) ("The supreme court shall have the power to . . . regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all . . . proceedings of whatever nature by the supreme court, superior courts, and district courts of the state."); State v. Templeton, 59 P.3d 632, 641 (Wash. 2002) ("[T]his court acquires its rule-making authority from the Legislature and from its inherent power to prescribe rules of procedure and practice."); State v. Fields, 530 P.2d 284, 285–86 (Wash. 1975) (interpreting Wash.

Const. art. IV, § 1, to supply inherent rulemaking power). **Washington-Style Reform**: See Washington statute and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: Although no statutory provision requires peremptory strikes, section 2.04.200 of the Revised Code of Washington provides that "[w]hen and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect." Wash. Rev. Code Ann. § 2.04.200.

477. **Peremptory Challenges (Criminal)**: W. Va. Code Ann. § 62-3-3 (LexisNexis 2023); W. Va. R. Crim. P. 24(b). **Source of Rulemaking Authority**: W. Va. Const. art. VIII, § 3 ("The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law."); W. Va. Code Ann. § 51-1-4 (LexisNexis 2023) ("The Supreme Court of Appeals may . . . promulgate general rules and regulations governing pleading, practice and procedure in . . . [all] courts of record of this State. All statutes relating to pleading, practice and procedure shall have force and effect . . . unless . . . modified, suspended or annulled by rules promulgated pursuant to . . . this section."); Boggs v. Settle, 145 S.E.2d 446, 452 (W. Va. 1965) (explaining that this statutory provision simply reiterates the court's inherent power). **Washington-Style Reform**: See West Virginia Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: While West Virginia currently has a statute allocating peremptory strikes, such statutes "shall have force and effect only as rules of court and shall remain in effect unless and until modified, suspended or annulled by rules promulgated pursuant to the provisions of this section." W. Va. Code Ann. § 51-1-4; see also State v. Arbaugh, 595 S.E.2d 289, 293 (W. Va. 2004) ("[W]e have long recognized that our judicially promulgated rules of practice are constitutionally based and supersede any conflicting statutory provisions."). **Judicial Override**: West Virginia's Supreme Court of Appeals has made clear that it views "the West Virginia Rules of Criminal Procedure [as] the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect." *Arbaugh*, 595 S.E.2d at 293 (alteration in original) (internal quotation marks omitted) (quoting State v. Wallace, 517 S.E.2d 20, 21 (W. Va. 1999) (case syllabus)); see also In re Mann, 154 S.E.2d 860, 864 (W. Va. 1967) (holding that the legislature cannot abridge the rulemaking authority of the courts).

478. **Peremptory Challenges (Criminal)**: Wis. Stat. & Ann. § 972.03 (2023). **Source of Rulemaking Authority**: Wis. Stat. & Ann. § 751.12 (2023) ("The state supreme court shall, by rules . . . , regulate . . . procedure . . . in all courts . . . . All statutes relating to . . . procedure may be modified or suspended by [such] rules . . . . This section shall not abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure."). **Washington-Style Reform**: See Wisconsin statute governing courts' rulemaking authority cited above. **Elimination**: Provided the Wisconsin Supreme Court holds "a public hearing" regarding the proposal, a rule eliminating peremptory strikes could "modify[] or suspend[]" a conflicting statute. Id. § 751.12(2). **Judicial Override**: Wisconsin's statutory rulemaking scheme expressly allows the Wisconsin Supreme Court to "suspend[]" a conflicting statute by court rule, id., while simultaneously reiterating "the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure," id. § 751.12(4). The result is a last-in-time regime where the outcome of any conflict would be uncertain.

479. **Peremptory Challenges (Criminal)**: Wyo. Stat. Ann. § 7-11-103 (2023); Wyo. R. Crim. P. 24(d). **Source of Rulemaking Authority**: Wyo. Stat. Ann. §§ 5-2-114 to -116 (2023); State ex rel. Frederick v. Dist. Ct. of the Fifth Jud. Dist., 399 P.2d 583, 584 n.1 (Wyo. 1965) ("It is well recognized generally and particularly in this jurisdiction that the courts have inherent rights to prescribe rules, being limited only by their reasonableness and conformity to constitutional and legislative enactments."). **Washington-Style Reform**: See Wyoming statutes and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: Once a procedural rule takes effect, "all laws in conflict therewith shall be of no further force or effect." Wyo. Stat. Ann. § 5-2-116.