Foundations of Constitutional Discrimination/Understanding *Batson v. Kentucky*

Presenter: *Michael W. Streily, Esquire*

At a fundamental level, ***Batson*** regulates how litigants: prosecutor, defendant, and plaintiff, both criminal and civil, exercise ***peremptory challenges.***

42 Pa.C.S.A. § 4502. Qualifications of jurors

(a) General rule.--Every citizen of this Commonwealth who is of the required minimum age for voting for State or local officials and who resides in the county shall be qualified to serve as a juror therein unless such citizen:

(1) is unable to read, write, speak and understand the English language;

(2) is incapable, by reason of mental or physical infirmity, to render efficient jury service; or

(3) has been convicted of a crime punishable by imprisonment for more than one year and has not been granted a pardon or amnesty therefor.

(b) Definition.--For purposes of this section, **"convicted of a crime punishable by imprisonment for more than one year"** does not include a conviction for any offense under or violation of the former act of May 1, 1929 (P.L. 905, No. 403),[1] known as The Vehicle Code, or the former act of April 29, 1959 (P.L. 58, No. 32),[2] known as The Vehicle Code, which offense or violation, if it had been committed after July 1, 1977:

(1) would have been substantially similar to an offense currently graded as a summary offense under 75 Pa.C.S. (relating to vehicles); or

(2) would not have been a violation of law.

42 Pa.C.S.A. § 4503. Exemptions from jury duty

(a) General rule.--No person shall be exempt or excused from jury duty except the following:

(1) Persons in active service of the armed forces of the United States or of the Commonwealth of Pennsylvania.
(2) Persons who have served within three years next preceding on any jury except a person who served as a juror for fewer than three days in any one year in which case the exemption period shall be one year.
(3) Persons demonstrating to the court undue hardship or extreme inconvenience may be excused permanently or for such period as the court determines is necessary, and if excused for a limited period shall, at the end of the period, be assigned to the next jury array.
(4) Spouses, children, siblings, parents, grandparents and grandchildren of victims of criminal homicide under 18 Pa.C.S. § 2501 (relating to criminal homicide).
(5) Persons who have previously served for a term of 18 months on a Statewide investigating grand jury, including any extensions thereof, who opt not to serve.
(6) Persons 75 years of age or older who request to be excused.
(7) Judges and magisterial district judges of the Commonwealth and judges of the United States as defined in 28 U.S.C. § 451 (relating to definitions).
(8) Breastfeeding women who request to be excused.

(b) Challenges.--This subchapter shall not affect the existing practice with respect to peremptory challenges and challenges for cause.

42 Pa.C.S.A. § 4524. Selection of jurors for service

Except as otherwise provided in section 4525 (relating to equipment used for selection of jurors), the jury selection commission shall maintain a master list or jury wheel and shall place therein the names of persons included on the list of qualified jurors. Upon receipt of a court order pursuant to section 4531 (relating to issuance of court orders for jurors), the commission shall publicly select at random from the master list or jury wheel such number of names of persons as may be required to be summoned for assignment to jury arrays. A separate list of names and addresses of persons assigned to each jury array shall be prepared and made available for public inspection

at the offices of the commission no later than 30 days prior to the first date on which the array is to serve.

42 Pa.C.S.A. § 4526. Challenging compliance with selection procedures

(a) Challenge to array.--Within ten days after publication of the array a party to a matter on a then published list of cases scheduled for jury trial may petition the court to stay the proceedings in the case where he is a party and to select a new jury array, or for other appropriate relief, on the ground of failure to substantially comply with this subchapter.

(b) Hearing on petition.--At the hearing on the petition filed under subsection (a), the moving party is entitled to present in support of the petition the testimony of the jury commissioners or their clerks, any relevant records and papers not public or otherwise available used by the jury commissioners or their clerks and any other relevant evidence. If the court determines that in selecting persons to fill the array the commissioners have failed to substantially comply with this subchapter, the court shall stay the proceedings requiring the service of jurors pending the selection of a new array in conformity with this subchapter or may grant other appropriate relief.

(c) Exclusive remedy.--Unless and until suspended or superseded by general rules, the procedures prescribed by this section are the exclusive means by which a person accused of a crime, the Commonwealth or a party in a civil case may challenge an array of jurors on the ground that the array was not selected in conformity with this subchapter.

(d) Records.--The contents of any records or papers used by the jury commissioners or their clerks in connection with the selection process and not made public under this subchapter shall not be disclosed (except in connection with the preparation or presentation of a petition filed under subsection (a)) until after the list of qualified jurors or jury wheel has been emptied and refilled and all persons selected to serve as jurors before the list of qualified jurors or jury wheel was emptied have been discharged.

(e) Challenge to panel of jurors.--A jury panel for the trial of any case may be challenged only on the grounds that it was not selected at random from the array. Such challenge must be made by a party immediately after the panel of jurors has been selected by the administrative staff of the court and before interrogation of jurors commences.

(f) Other challenges.--Nothing in this subchapter shall affect the existing practice with respect to peremptory challenges and challenges for cause.

******Subsection (a) is suspended by Pa.R.Crim.P. Rule 625, 42 Pa.C.S.A. as being inconsistent with paragraphs (b)(1) and (2) of said rule.******

Rule 625. Juror Qualification Form, Lists of Trial Jurors, and Challenge to the Array

(A) Juror Qualification Form and Lists of Trial Jurors.
(1) The officials designated by law to select persons for jury service shall:

(a) devise, distribute, and maintain juror qualification forms as provided by law;
(b) prepare, publish, and post lists of the names of persons to serve as jurors as provided by law;
(c) upon the request of the attorney for the Commonwealth or the defendant's attorney, furnish the list containing the names of prospective jurors prepared pursuant to paragraph (A)(1)(b); and
(d) make available for review and copying copies of the juror qualification forms returned by the prospective jurors.

(2) The information provided on the juror qualification form shall be confidential and limited to questions of the jurors' qualifications.
(3) The original and any copies of the juror qualification form shall not constitute a public record.

(B) Challenge to the Array.
(1) Unless opportunity did not exist prior thereto, a challenge to the array shall be made not later than 5 days before the first day of the

week the case is listed for trial of criminal cases for which the jurors have been summoned and not thereafter, and shall be in writing, specifying the facts constituting the ground for the challenge.
(2) A challenge to the array may be made only on the ground that the jurors were not selected, drawn, or summoned substantially in accordance with law.

Comment: The qualification, selection, and summoning of prospective jurors, as well as related matters, are generally dealt with in Chapter 45, Subchapters A-C, of the Judicial Code, 42 Pa.C.S. §§ 4501-4503, 4521-4526, 4531-4532. "Law" as used in paragraph (B)(2) of this rule is intended to include these Judicial Code provisions. However, paragraphs (B)(1) and (2) of this rule are intended to supersede the procedures set forth in Section 4526(a) of the Judicial Code and that provision is suspended as being inconsistent with this rule. *See* PA. CONST. art. V, § 10; 42 Pa.C.S. § 4526(c). Sections 4526(b) and (d)-(f) of the Judicial Code are not affected by this rule.

Paragraph (A) was amended in 1998 to require that the counties use the juror qualification forms provided for in Section 4521 of the Judicial Code, 42 Pa.C.S. § 4521. It is intended that the attorneys in a case may inspect and copy or photograph the jury lists and the qualification forms for the prospective jurors summoned for their case. The information on the qualification forms is not to be disclosed except as provided by this rule or by statute. This rule is different from Rule 632, which requires that jurors complete the standard, confidential information questionnaire for use during *voir dire*.

VOIRE DIRE: French legal term "to speak the truth." Pretrial process of examining jurors to obtain fair, competent, impartial, and unprejudiced jury; provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.

According to the Pennsylvania appellate courts, the ultimate goal of the jury selection process is to ensure that defendant is tried by a fair and impartial jury of his/her peers.

There are 2 methods to further this goal (removing unsuitable jurors):

a. **challenges for cause;**
b. **peremptory challenges**

CHALLENGES FOR CAUSE are unlimited and used when:

a. prospective juror's conduct or responses demonstrate a likelihood of prejudice; or
b. prospective juror has such a close financial, family, or situational relationship with parties, counsel, victims, or witness that the court will presume a likelihood of prejudice.

PEREMPTORY CHALLENGES are limited by the Rules of Criminal and Civil Procedure:

1. In Pennsylvania, peremptory challenges in criminal cases are provided for in Pa.R.Crim.P. 634 **Number of Peremptory Challenges**.

2. **Rule 634. Number of Peremptory Challenges**
   (A) Trials Involving Only One Defendant:

   (1) In trials involving misdemeanors only and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 5 peremptory challenges.

   (2) In trials involving a non-capital felony and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 7 peremptory challenges.

   (3) In trials involving a capital felony and when there is only one defendant, the Commonwealth and the defendant shall each be entitled to 20 peremptory challenges.

   (B) Trials Involving Joint Defendants:

   (1) In trials involving joint defendants, the defendants shall divide equally among them that number of peremptory challenges that the defendant charged with the highest grade of offense would have received if tried separately;

provided, however, that each defendant shall be entitled to at least 2 peremptory challenges. When such division of peremptory challenges among joint defendants results in a fraction of a peremptory challenge, each defendant shall be entitled to the next highest number of such challenges.

(2) In trials involving joint defendants, it shall be within the discretion of the trial judge to increase the number of peremptory challenges to which each defendant is entitled up to the number of peremptory challenges that each defendant would have received if tried alone.

(3) In trials involving joint defendants, the Commonwealth shall be entitled to peremptory challenges equal in number to the total number of peremptory challenges given to all of the defendants.

Rule 221. Peremptory Challenges

Each party shall be entitled to four peremptory challenges, which shall be exercised in turn beginning with the plaintiff and following in the order in which the party was named or became a party to the action. In order to achieve a fair distribution of challenges, the court in any case may

(a) allow additional peremptory challenges and allocate them among the parties;

(b) where there is more than one plaintiff or more than one defendant or more than one additional defendant, consider any one or more of such groups as a single party.

Note that, despite being part of our country's and state's jurisprudence, they are not required by either the state or federal constitution.

a. primary function is to allow parties to strike prospective jurors who they have good reason to believe might be biased but who are not so clearly and obviously partial that they could otherwise be excluded for cause;

b. historically, peremptory challenges were for a defendant's benefit. The theory was that prejudices and impressions are formed upon bare looks and gestures and that a defendant should have a good opinion about each juror; also, if a juror is unsuccessfully challenged for cause, s/he might be resentful.

HISTORICALLY:

1. peremptory challenges appear to have been used in Rome as early as 104 B.C.;

2. at common law, only the defendant was permitted peremptory challenges. The Commonwealth could ask any prospective juror to "stand aside" until the entire venire panel had been questioned and the defendant had exercised his peremptory challenges. Only if a deficiency of jurors remained after the whole venire panel had been exhausted were the venire persons who had been asked to "stand aside" recalled for jury service;

3. in 1790 the US Congress enacted legislation for federal courts giving 35 peremptory challenges in trials for treason and 20 in trials for other felonies punishable by death;

4. In Pennsylvania, the right to exercise peremptory challenges was first extended to the Commonwealth by an 1860 statute which allowed 4 peremptory challenges to the prosecution and 20 peremptory challenges to the defense in trials for certain serious felonies;

5. In 1901 the PA legislature equalized the number of peremptory challenges afforded the Commonwealth and the defense, and abolished the traditional practice of "standing aside" jurors;

If you leave this presentation with only one thought, it should be this:

a. in exercising peremptory challenges, both the Commonwealth and defendant must not challenge potential jurors solely on the basis of their race, gender, religion, or ethnicity or on the assumption that because a potential juror is of a particular race, gender, religion, or ethnicity he or she will be unable to impartially consider the evidence and reach a fair verdict.

Batson requires that you not act on any preconceived notions about types of people, until a juror gives you cause to believe that he or she actually possess a certain belief or predisposition that they can't put aside, and that the belief would interfere with their ability to be impartial and follow the law.

As lawyers, you have a vested interest in seeing that the requirements of ***Batson*** are followed, not only because of due process concerns, but because in ***Rice v. Collins, 126 S.Ct. 969 (2006)***, Justices Breyer and Souter again asked the Court to consider abolishing peremptory challenges, as a way to honor the Constitution's command that racial discrimination play no role in our system of justice and government. In the past, former Chief Justice Nix, former Chief Justice Zappala, and former Justice Papadakos have all made the same suggestion. Being circumspect in how you select juries, will help to ensure that peremptory challenges remain a tool for litigants.

An interesting twist in this area is that **at the appellate level, there is no harmless error review when an appellate court finds that a DA committed a Batson violation. Defendant is entitled to a new trial. PA Supreme Court held in *Commonwealth v. Basemore, this* isn't the type of prosecutorial misconduct which necessitates the ultimate remedy of double jeopardy.**

But, harmless error can be applied in reviewing a trial court's remedy after seating a juror for a perceived *Batson* violation. For example, assume that a trial court *sua sponte* raises an issue

about a defendant challenging a juror, decides that the defense attorney's explanation is not race neutral, and orders the juror seated. An appellate court will require a defendant to show that he was prejudiced-i.e, make a showing that the particular juror was biased or incompetent in some way to serve as a juror.

Not all members of the US Supreme Court believe that ***Batson and its progeny*** were correctly decided.

Former Chief Justice Burger, Former Chief Justice Rehnquist and former Justice Scalia have accused the Court of trying to make reparations to the principle of equality by sacrificing unfettered challenges in an act of judicial apology.

Those Justices have argued that a DA should be able to strike blacks in cases involving black defendants if they also strike whites in cases involving white defendants, Hispanic jurors in cases involving Hispanic defendants, Asian jurors in cases involving Asian defendants, female jurors in cases involving female defendants, etc.

Justice Thomas, along with Rehnquist and Scalia, has stated that race and sex are different and that sexual differences produce differences in outlook that should be allowed to be acted upon by challenges based on presumptions founded solely on gender.

The Justices who think that ***Batson*** was wrongly decided and wrongly extended beyond race, do so on the belief that, at a minimum, a defendant should be allowed to have the utmost faith in his jury, and if that means giving that defendant the right to discriminate by striking people he doesn't feel comfortable with, then that is okay.

They believe that the Court has falsely created issues of standing, by arguing that the Commonwealth can assert the interests of jurors, the community, and the judiciary.

They believe that the Court is trying to compensate for the history of prejudice that has been a part of our heritage by acting as a legislative body.

I mention this because it is very likely that changes in the Court will prompt a re-evaluation of ***Batson.***

1. ***A prima facie case of racial discrimination has three elements:***
    i. ***the defendant's membership in a cognizable racial group;***

    ii. ***the prosecutor's use of peremptory strikes to exclude members of that group; and***

    iii. ***an inference arising under the totality of circumstances that the prosecutor used the strikes to exclude venire persons on account of race.***

If a defendant makes a prima facie showing of discrimination, the burden then shifts to the prosecutor to justify his decision to strike minority jurors.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant factors.

To understand ***Batson,*** you need to understand what was occurring prior to the Court's decision in 1986. And to understand the entire judicial landscape, it is important to start with the phenomenon of jury trials.

Duncan v. Louisiana, 88 S.Ct. 1444 (1968): does 14th Amendment due process clause include the 6th Amendment right to a jury trial?

Test: Is it a fundamental principle of liberty and justice that lies at the base of our civil and political institutions? Is it basic to our system of jurisprudence and is it essential to a fair trial?

THE COURT shifts its inquiry from asking if a civilized system could be imagined that did not accord the particular protection and focuses on the reality that systems are in place, and we need to ask whether a procedure is fundamental/necessary to a regime of ordered liberty.

THE COURT references BLACKSTONE and England's Declaration and Bill of Rights of 1689 in saying there is a two fold barrier between liberties of people and the prerogatives of the Crown:

1) Presentment; and

2) Trial by jury.

THE COURT notes that the origin of the due process clause is Chapter 39 of Magna Carta which declares,

"No free man shall be taken, outlawed, banished, or in any way destroyed nor will we proceed against or prosecute him, except by the lawful judgment of his peers and the law of the land."

Jury Trial-intended to protect the accused from oppression by the government.

A. protects against unfounded criminal allegations intended to get rid of enemies;

B. protects against corrupt, biased or eccentric judges as well as those too responsive to higher political authority;

C. safeguards against corrupt and overzealous prosecutors.

Court notes 2 objectives of a Tyrant:

a. make the legislature subservient to his will;

b. abolish jury trials so that civilians cannot turn to their countrymen for freedom.

COURT: jury trials are lamps of freedom that provide a defense against arbitrary law enforcement, and thus qualify for protection under the 14th Amendment due process clause. Court recognizes that there is potential for misuse in that untrained laymen determine facts.

Court: petty crimes don't require a jury but serious crimes (penalty is more than 6 months incarceration) do require jury trials.

-court says that the penalty authorized by the law of the locality may be taken as a gauge of its social and ethical judgments.

-court notes there are possible consequences to defendants from convictions of petty offenses, but these are insufficient to outweigh the benefits to efficient law enforcement

and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.

The Court notes the historical importance of jury trials:

1. First Congress of American Colonies ("Stamp Act Congress") on October 19, 1765, in stating the most essential rights and liberties of colonists: Trial by jury is inherent and invaluable right of every British subject in the Colonies;

2. First Continental Congress in Resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for crimes alleged to be committed in Colonies. Colonists are entitled to the privilege of being tried by their peers of the vicinage.

3. Declaration of Independence objected to the King making judges dependent on his will alone for their tenure in office, salary, depriving trial by jury and transporting Colonists to England for trials.

4. US Constitution-Article III, §2-Trials of all Crimes, except in Impeachment, shall be by jury, and such trial shall be held in States where Crimes have been committed.

A. First mention of jury trials:

1. According to Western Classical tradition one of first jury trials was a trial where the jurors were Gods and Goddesses presiding over the charge of murder against Ares (God of War, son of Zeus and Hera, brother of Athena). It was conducted on the Aeropagus (meeting hill of the Council of Elders "Aeropagus" who held judicial and legislative powers). Ares was alleged to have murdered Halirrhothius, son of Poseidon, for raping Ares's daughter, Alcippe. He asserted a justification defense and was acquitted.

2. According to Western Classical tradition the first jury trial that involved humans as jurors was also held at the Aeropagus. The defendant was Orestes-son of Agammenon and Clytaemestra. He was

charged with killing his mother. The procedural/factual history of the case is diabolical:

House of Atreus

Pelops (King)
|
Atreus (son) -----Thyestes (son) Thyestes seduces Atreus' wife and They quarrel over the throne. He is driven out of Kingdom.

1. Atreus feigns reconciliation and invites Thyestes and his children to a feast. He kills all of the children except for one son (Aegisthus). He serves the children to their father as the feast. He then tells Thyestes he has eaten his children. Thyestes and Aegisthus flee.

Agammenon (son of Atreus) …. Menelaus (son of Atreus)
a. Marries Clytaemestra a. Marries Helen
They have three children:
1. Iphigenia, Electra, and Orestes

Paris abducts Helen and takes her to Troy

Menelaus and Agammenon assemble the Greek fleet and prepare to siege Troy. The Goddess Artemus (hunting/wilderness) gets angry because Agammenon killed one of her sacred deer and then bragged about how he was a better hunter than she. Artemus orders all the winds to cease blowing and the Greek fleet gets stranded. A prophet, Calchas, tells Agammenon and his Generals that the Goddess is angry and that the only way to restore the winds is by Agammenon sacrificing his daughter, Iphigenia. He refuses to sacrifice her until the Generals decide that he must be removed from Command. He then sacrifices her and the winds return to take the Greeks to Troy.

3. Troy is defeated and Agammenon returns to Argos with a mistress-Cassandra (Princess and Prophetess of Troy; She was a beautiful and

talented woman whom Apollo wanted to bed. He gave her the gift of prophecy in order to entice her. She took it and then refused his advances. He then cursed her-her prophecies would always be true and always ignored. A storm sunk all his ships except one. In the meantime, Aegisthus had returned to Argos and became lover of Clytaemestra, who sent Orestes out of the Kingdom. Clytaemestra kills Agammenon while he is bathing and then kills Cassandra. She defends her actions and remains Queen. Orestes returns however, disguised as a traveler, bringing fake news of his own death (Apollo issued an Oracle saying he must kill the slayer of his father or suffer a lifetime of tragedy, himself). Orestes' sister Electra is still living there, and she welcomes him in. With the encouragement of the God Apollo, he kills Clytaemestra and Aegisthus. The Furies (Eumenides) (spirits of retribution) pursue Orestes. He flees to Delphi where he attempts to purify himself. The Furies refuse his absolution and he eventually flees to the rock of Athens and seeks refuge with Athena. Apollo and the Furies ask Athena to be his Judge. She finds the case too difficult for one person, even a Goddess, and appoints jurors from Athens to hear the case. Their verdict is a tie and she casts the deciding vote in Orestes' favor. She then gives the Furies (they will bless those who do good deeds for others and punish evil doers) a place of honor as tutelary spirits in Athens, in order to appease their anger.

a. With the fall of Rome and the Dark Ages, the administration of justice loses most of the trappings of due process. Jurys begin to reappear with the Vikings but not in the tradition that we know them. The Vikings would appoint 12 minor Nobles to investigate alleged criminal matters. It was their job to gather evidence and develop the case.

b. In the 12th Century King Henry II of England introduced the system of land dispute resolution that used 12 free men as jurors (assizes) to investigate claims. He also created the "Grand Jury" which consisted of a group of free men who were tasked with investigating crimes and reporting their findings to the Royal Judge or Magistrate.

c. Throughout the Middle Ages Trials by Ordeals were adopted. The belief at the time was that God was very interested in human affairs and human justice/injustice and would divinely intercede to help the innocent who were wrongly accused of a crime by performing a miracle and punish the guilty.

Trials by Ordeal were usually conducted at a church. In a trial by Ordeal guilt or innocence was determined by subjecting a person to painful and dangerous experiences. Survival and injuries that quickly healed were signs of innocence. Examples of ordeals:

By combat

By fire

By water

Hot water

Cold water

By cross

d. C**olonial America/United States:**

1. First Congress of American Colonies (Stamp Act Congress) on October 19, 1765 in stating the most essential rights and liberties of colonists:

> Trial by jury is inherent and invaluable right of every British subject in these colonies.

2. First Continental Congress in Resolve of October 14, 1774 objected to trial before judges dependent upon the Crown alone for their salaries and to trials in England for crimes alleged to be committed in the Colonies; stating that the colonies are entitled to the privilege of being tried by their peers of the vicinage.

3. Declaration of Independence objects to the King making judges dependent on his will alone for their tenure in office, salary, depriving trial by jury, and transporting them to England for trial.

4. US Constitution, Article III section 2-trial of all crimes, except in Impeachment, shall be by jury, and such trials shall be held in State where crimes have been committed

5. US Constitution, 6th Amendment-In all criminal prosecutions the accused shall enjoy the right to…a public trial, by an impartial jury of the state and district wherein the crime shall have been committed.

> ****NOTE****one proposed Amendment adopted by the House of Representatives in 1789 and sent to the Senate where it was rejected, read:

No State shall infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech or of the press.

6. *Duncan v. Louisiana,* 88 S.Ct. 1444 (1968): does 14th Amendment due process clause include the 6th Amendment right to a jury trial?

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-court says that the penalty authorized by the law of the locality may be taken as a gauge of its social and ethical judgments.

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> and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.

7. Unanimity of verdict: *Ramos v. Louisiana, 590 U.S. (2020)*

Involves laws of Oregon and Louisiana that permitted convictions by non-unanimous verdicts. Issue: Does 6th Amendment, via 14th Amendment, require unanimous verdict to convict on a serious offense?

> Louisiana endorsed non-unanimous verdicts in 1878 as part of a Constitutional Convention aimed at establishing white supremecy (included poll tax, literacy tests, etc.). US Senate had just called for an investigation into Louisiana keeping blacks off juries. The Convention wanted a facially neutral reason to keep black juror service at a meaningless level.
>
> Oregon adopted their law in 1930's, influenced by the rise of the KKK, as an effort to dilute "the influence of racial, ethnic, and religious minorities on Oregon juries."

COURT (Gorsuch): the 6th Amendment "trial by an impartial jury" was based on common law that required unanimous verdict.

LA: draft history of 6th Amendment shows intent to leave unanimity requirement behind as they took out the phrase "unanimity for conviction."

Ct: maybe they did it because it was so obvious unanimity was required and the language was surplusage. At time of adoption the right to a jury meant a trial which required a unanimous verdict. Trial by jury is mentioned twice in the Constitution.

Ct: our decision in *Apodaca (states had legitimate reasons to reject unanimity because it reduced hung juries)* is suspect. It ignores the discriminatory intent and the ancient guarantee of unanimous jury and who is to say that a hung jury is bad?

Stare decisis doesn't control as *Apodaca* didn't command a majority agreement and the swing vote relied on a theory (dual tract incorporation) that was rejected by Court. Plus, it was wrongly decided and won't be a burden to reverse because we are only dealing with two states. This probably isn't retroactive to collateral cases.

THE FOUR PILLARS OF CONSTITUTIONAL DISCRIMINATION:

1. *Dred Scott v. John Sanford,* 60 U.S. 393 (1857)

Ct: "people of the United States" and "citizens" are synonymous terms. When the country was formed blacks were an inferior class of beings subjugated by the dominant race. We don't confuse the right of citizenship a state can create within its own borders with rights of a US citizen.

a. at time of Declaration of Independence, blacks were property and English were the most notorious slave traders.

b. Maryland law (1705): if black or mulatto married a white, the black or mulatto would be forced into slavery and the white forced into servitude for 7 years.

c. Massachusetts law (1786): if a negro or mulatto hits a Christian or Englishman, they are to be whipped. No intermarriage and a $50 fine if you perform a service (immoral, unnatural, and criminal). Children were made bastards because of void marriage. AS LATE as 1836 they had increased punishment to 6 months in jail and $200 fine.

Ct: Declaration of Independence was written by smart men who would not have been hypocrites and said "All men are created equal" if they meant blacks to be included. Founders knew that negroes weren't treated equal and this means they weren't meant to be included in "all men are created equal." PLUS look at US Constitution: states could import slaves until 1808 and states pledged to maintain the right of property by returning runaway slaves. Court says that even emancipated negroes weren't regarded as "free" but still part of slave population.

Ct: slave holding states would not have agreed to let another state give citizenship to blacks so that they could enter a southern state and then be permitted to do anything a white man could do. The power to naturalize resides with the federal government and naturalization is confined to people born outside the country. Given that states didn't want other states to have power to naturalize emigrants how could anyone think they would let states naturalize a population they found dangerous and depraved.

Ct: Articles of Confederation had a provision: "That the free inhabitants of each state shall be entitled to all the privileges and immunities of free citizens in the several states." BUT the Constitution

confined privilege to “citizens” of the state thus excluding foreigners and people not considered to be citizens.

a. First Naturalization Law (1790) confined the right to become a citizen to “aliens being free white persons.”

b. First Militia Law (1792) “free able-bodied white male citizen” shall be enrolled in militia.

c. Law of 1813: until the end of the war with Great Britain “it shall not be lawful to employ, on board of any public or private vessel of the United States, any person or persons except citizens of the United States, or persons of Color, natives of the United States.”

d. Washington D.C. (1820): regulated meetings of free negroes as well as where they could live.

Ct: people can be citizens and still not have equal rights: women and minors.

Justice McLean (dissents):

a. the Plea in Abatement filed in federal district court was deficient. You can be free and still have slave ancestors. Females and minors can sue in federal courts and they are “electors.”

b. Constitution clearly says that federal courts are open to citizens of different states. Several states have given negroes the right to vote. Under recent Treaties with Mexico/France/Spain we made citizens of people in Louisiana and Florida Territories.

a. Slavery is limited to the states that allow it and it is of such nature that no moral or political reason can support it; only positive law enforces it.

b. Relationship between Federal govt. and slavery in states:

1. Slavery is a state institution. Article 1, §9 holds that Congress can’t prohibit importation of slaves until 1808 but can tax importation at $10 a person. Article I also has 3/5th clause. The only connection with federal government is the fugitive slave provision. And he notes that throughout the Constitution slaves are referred to as “persons.” He notes that cotton and sugar farming kept slavery alive. He notes that whites have been slaves throughout history and that slavery is a “power” and not a “right.”

Justice Curtis (dissenting):

1. Jurisdiction is an issue for the Court to decide. Sanford's plea in abatement was insufficient. It alleged evidentiary issues not facts. Descending from ancestors who were slaves doesn't mean Scott is a slave.

US Constitution, Article II, §1 (paragraph dealing with who can be President) uses "a citizen of the US at time of adoption of constitution." These people had been citizens of the US under Articles of Confederation. Citizens of states were citizens of US under Articles of Confederation.

4th Article said all free inhabitants of a state enjoy privileges and immunities of free citizens in other states.

The drafters had rejected effort of S. Carolina to limit it to "free white inhabitants."

When Articles were adopted, all free native-born inhabitants of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those states, but if qualified, had franchise of electors. North Carolina recognized that freemen of color, 21 years old and who paid tax, could vote (this right is later taken away via state law).

Thus free colored people in at least 5 states participated in adoption of new government under the Constitution.

Article II, §1 of Constitution refers to "natural born citizen" (i.e., citizenship is acquired by birth; people born within a state are citizens of the US). One power of Congress is to remove the disability of foreign birth and make someone a citizen. Persons born within several states, who by force of state constitution are citizens of the State, are thereby citizens of the United States.

2. As to claim that Constitution was made for the white race, 5 of 13 original states gave colored people the elective franchise. Opening declaration of the Constitution "We the people of the United States" included freed colored people.

3. As to argument that if blacks are citizens of US then they are entitled to every right of a state citizen, he says:

NO, a naturalized citizen of US can't be President; there are limits on when they could be a US Senator or Representative. Residents of Washington, D.C., don't have all rights of other states' citizens. Many state citizens can't vote because of gender or property qualifications as states determine the qualifications for electors.

4. Judges should not change the law for political purposes. Scott was permitted to marry in the Territory. If he is a slave, Missouri has nullified a rightful marriage and Missouri can't negate a lawful contract entered into in another state. Missouri has adopted the common law on emancipation of slaves taken to another state. Laws of US made him free in Territory. Dr. Emerson consented to the marriage. Consent to marry, while in a state/territory that doesn't recognize slavery, is an act of emancipation. Missouri shouldn't be able to bastardize the children and make them slaves.

Civil Rights Cases, 3 S.Ct. 18 (1883):

Congress passed Civil Rights Act (1878) which prohibited discrimination in Inns, public conveyances and places of amusement based on race, color, or previous servitude. It provided for civil and criminal remedies.

2 defendants had denied blacks the right to stay at their hotel;

2 defendants had denied blacks the right to attend the theater (Grand Opera House in NY and Maguire's Theater in San Francisco.)

1 defendant denied black woman (wife of white man) the right to ride in the Ladies Rail Car, thinking something immoral was afoot since she was with a white man.

ISSUES: Did Congress have the authority to pass this legislation under the 13th and 14th Amendments? Is this a badge of slavery?

COURT: 14th Amendment gave Congress power to void state laws NOT to legislate on issues within the domain of state legislatures. Congress can't create a municipal code to regulate private rights. Congressional law must be founded on a need to react/address an existing state law. There must be a STATE LAW OR ACTION. Congress can't pass general legislation, only corrective legislation.

COURT: 13th Amendment is addressed at evils of slavery. Under Black Codes blacks couldn't use Inns and public conveyances

because this was a good means to prevent escape. It wasn't a part of servitude. We know the badges of slavery:

Compulsory service for a Master

No right to travel, hold property, make contracts, use courts, be a witness against a white person

COURT:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal *status* as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment, (which merely abolishes slavery,) but by force of the Thirteenth and Fifteenth Amendments.

On the whole, we are of opinion that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.

Justice Harlan (dissenting):

I do not contend that the Thirteenth Amendment invests congress with authority, by legislation, to regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several states. But

I hold that since slavery, as the court has repeatedly declared, *Slaughter- house Cases* 16 Wall. 36, Strauder v. West Virginia, 100 U.S. 303, was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the deprivation, *on account of their race*, of any civil rights enjoyed by other freemen in the same State; and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State.

"It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense of the law is the soul."

Harlan asks: what are the legal rights of blacks as to Inns and conveyances?

1. Railroads are public highways and common carriers exercise public duties. Often aided by government actions-eminent domain, municipal corporations. 13th Amendment obliterated the race line so far as the rights fundamental in a state of freedom are concerned.

2. Inns have a special place in our history and England. They are places of entertainment and lodging for all travelers. At common law, if there was room and the guest was of good character and had means to pay, the inn keeper could not refuse them lodging.

3. Places of entertainment-are maintained under license of law and blacks are part of that legal machinery. State is involved with inspections, occupancy permits, etc. When private property is affected with a public interest it ceases to be *juris private* only. Congress has just said that racial discrimination should not influence use of these facilities.

The 14th Amendment made black people citizens of the US and the state where they resided. Thus, under Article 4, §2 of Constitution they were entitled to all privileges and immunities of citizens in the several states. Blacks must be exempt from racial discrimination in respect to any right belonging to a white person.

The national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental right of American citizenship, what it did, with the sanction of this Court, for the protection of slavery and the rights of the masters of fugitive slaves.

PLESSY V. FERGUSON, 16 S.Ct. 1138 (1896)

Homer Plessy was 7/8th white; 1/8th black, and passed for a white man. Louisiana law held that whites and blacks had to be assigned separate seating on trains. Plessy buys a first class ticket in white section but is told that he must move to the blacks-only coach. He refused, was arrested, and jailed. He files a Writ of Prohibition/Certiorari to Louisiana Supreme Court saying the law was unconstitutional. He loses and appeals.

Justice Brown (majority):

1. 1890 law required that Trains had to either have separate rail cars for whites and non-white or divide a car with a partition. Nurses attending children of another race were exempted. $25 fine and 20 days in jail. Train employees were liable if they forced someone into the wrong section.

Ct: no violation of 13th Amendment as that only deals with the institution of slavery. In *Civil Rights Cases* we said that individual action is not state action and that the amendment was not meant to abolish all forms of discrimination. The law acts on both races so it doesn't destroy legal equality or impose involuntary servitude.

Ct: no violation of 14th Amendment. As we discussed in *Slaughterhouse Case* the amendment is aimed at establishing citizenship of the negro/define citizenship of US citizen and state citizen, and protect negroes from state legislation that impacts the rights of US citizens (not rights of state citizens).

14th Amendment sought equality before the law, not social equality. And it wasn't meant to force co-mingling of the races. Laws that

require separation do not imply inferiority. Our schools are separated by race. Women don't have the same rights as men. Children don't have the same rights as adults. Intermarriage can be prohibited despite the fact those laws interfere with right to contract. And this is an intra-state rail line.

PLESSY: reputation of belonging to the dominant race is property.

COURT: if you aren't black, sue the company (state has conceded that the part of the law prohibiting lawsuits was unconstitutional) and if you are black, you weren't deprived of anything.

PLESSY: if states can do this, they can make people walk on the other side of the street, paint their houses certain colors.

COURT: Laws must be reasonable and aimed at public good, not at annoying or oppressing a certain class. The only issue is: IS THIS REASONABLE?

a. legislature can act in reference to established usages and customs and with a view to promote the comfort, peace, and good order of society. Why is this more unreasonable than the law Congress passed to establish separate schools for blacks and whites in Washington, D.C.? This isn't a badge of inferiority. Social prejudice can't be overcome by legislation and any attempt to eradicate racial instincts via laws, will only make it worse.

JUSTICE HARLAN (dissenting):

1. he first notes that older whites w/black servants, can't be attended to. He notes that a railroad is a public highway and serves a public function. Legislature will apply eminent domain to acquire passage over land. Race should not be a factor in law making. 13th Amendment prohibits a badge of slavery. 13th, 14th, and 15th Amendments were meant to erase "the race line from our government systems" and to exempt blacks from legal discrimination implying inferiority in civilized society. No candid person would say that this law wasn't meant to keep blacks from riding with whites. They used the guise of equal discrimination to discriminate.

2. if a white and black want to travel together, the government can't prohibit that. It is their right as citizens. The white race deems itself the dominant race in US but Constitution is color blind and there is no caste

system. This decision is as bad as *Dred Scott*. It will encourage aggression and the belief that government can be used to defeat intent of 13th, 14th, and 15th Amendments. The destinies of the two races are linked and we cannot let the seeds of hatred to be planted under the sanction of law. The real meaning of this law is that blacks are so inferior and depraved that they can't be allowed to sit with whites in public places. We don't permit the Chinese to become citizens but they can ride with whites!

MYRA BRADWELL (Illinois Supreme Court 1869):

1. Her application for a law license was refused because as a married woman, she would not be bound by express contract nor by implied contract, which is the policy of the law to create between attorney and client. Illinois law: married women are not bound by contracts having no relation to their own property.

a. Bradwell: the legislature removed the common law disability of women not being allowed to hold property that isn't derived from their husbands. Therefore, all disabilities in regard to contracts are void including the right to contract their personal services.

b. Court: just because women can contract their own property and earnings doesn't mean they have contract rights. Sex is an independent disqualification. A lawyer is more than an agent. He is an officer of the court. The court establishes admission standards that promote justice and can't admit someone the legislature has disqualified. Courts don't legislate and we follow the common law. England didn't permit female lawyers and it is a general belief that God designed the sexes for different spheres of action and men are meant to make, apply and execute the laws. Women aren't even allowed to vote.

c. Court: if we do this, we will open up all civil and government offices to women. The law is a profession founded on tradition and there is not a cordial acceptance of women by the profession. Women might be able to handle some law duties but the court doubts they are capable of engaging "in the strifes of the bar."

MYRA BRADWELL **(83 U.S. 130 1872):**

Bradwell: I am a US citizen. I was a citizen of Vermont and I am now a citizen of Illinois. I should have all the rights of a male citizen of Illinois.

Court: the practice of law is not a privilege or immunity of a US citizen.

Justice Bradley (concurring): man is woman's protector. Ladies are suited for domestic work. "The paramount destiny and mission of woman is to fulfill the noble and benign offices of wife and mother."

KOREMATSU V. UNITED STATES, 65 S.Ct. 193 (1944):

> [**note, it gets rejected in *Trump v. Hawaii, 138 S.Ct. 2392*, (2018). In 2011 the DOJ released a statement denouncing the Solicitor General (Charles H. Fahy) for hiding evidence that the government had no evidence Japanese citizens were acting as spies and suppressing the racial motivations of General DeWitt]

12/7/41-Pearl Harbor is attacked

12/8/41-US declares war on Japan

2/19/42-President issues Executive Order #9066 allowing Military Commanders to create "military areas" and control movement of people in these areas.

2/20/42-Lt. General DeWitt is designated Commander of Western Defense.

3/2/42- General DeWitt issues Proclamation #1: established 2 military Areas- 1 and 2. Any person of Japanese, German, or Italian ancestry living in Area 1 had to notify military of any change in address. Defendant lived in Area 1.

3/21/42-Congress makes it a crime to disobey Military Area regulations.

3/24/42-DeWitt issues curfew Order for Japanese 8 pm to 6 am. DeWitt also issues Proclamation #4 requiring that all Japanese in Area #1 must remain in this area until further notice.

5/3/42-DeWitt issues Civilian Exclusion Order No. 34 which provided that after May 8, 1942 at noon, all persons of Japanese ancestry were to leave Area #1. Between 5/3 and 5/8 they were to get instructions at the Civil Control Station. On 5/8/42 they were to report to the Assembly Center.

COURT (Justice Black): public necessity (but not racial antagonism) can justify curtailing civil rights, and this is just like the curfew order we upheld

in *Hirabayashi v. U.S.* This is necessary to prevent espionage and sabotage. Hardships are a part of war and citizenship has its responsibilities.

1. defendant wasn't excluded because of hostility towards him or his race but because:

    a. we are at war with Japan;

    b. military feared an invasion and felt safety required temporary segregation of Japanese;

    c. Congress gave the military this power;

    d. There was evidence of disloyalty and we had to act fast.

Justice Frankfurther (concurring): validity of action under war power must be judged in the context of war.

Justice Roberts (Dissenting): This wasn't a curfew, and it isn't a temporary exclusion. It is a case of convicting and punishing a citizen for not submitting to imprisonment in a concentration camp based solely on ancestry. This Court can't shut its eyes to reality….we are putting the defendant into a concentration camp.

Justice Murphy (dissenting): We have fallen into the ugly abyss of racism.

1. we must respect military opinion in time of war but there needs to be substance and support for their actions. We must ask whether the deprivation relates to a public danger that is so immediate, imminent, and impending as not to admit of delay and not permit ordinary constitutional process to alleviate the danger.

    a. this is obvious racial discrimination and deprives equal protection under the 5th Amendment as it deprives people of the right to live and work where they want, to establish a house. There isn't an imminent threat, and this is based on unsupported presumptions. He refers to the Commanding General's Final Report which evidenced racism (Japanese are an enemy race) and was filled with misinformation and half-truths routinely spewed with racial and economic prejudice.

    b. our system is built on individual guilt yet here we are adopting "one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to the discriminatory actions against other minority groups in the passions of tomorrow."

> We should give Japanese individual hearings like those given to Italian and German citizens.
>
> There was never a declaration of martial law.
>
> British government interviewed 74,000 German/Austrian aliens in 6 months. We could do the same with the 70,000 Japanese/American citizens and the 42,000 Japanese aliens.
>
> This is legalized racism. We are all kin to a foreign land.

Justice Jackson (dissenting): the military allowed Germans, Italians, and children of people convicted of treason to remain in Area but not Japanese. Guilt is not inheritable in USA. We can't punish children if their parents commit treason. War requires accommodation and there will sometimes be unconstitutional military Orders but this Court cannot validate those Orders because it would validate racial discrimination.

CONFRONTING DISCRIMINATION IN JURY SELECTION:

STRAUDER V. WEST VIRGINIA, 100 U.S. 303 (1880)

Defendant was a back man indicted for murder. West Virginia had a law saying that only white males over 21 could serve on grand or petite juries.

> It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.
>
> This (14TH Amd.) is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view

the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.

That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of

its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.' It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called 'packing juries.' It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the

apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.

Carter v. Texas, 177 U.S. 442 (1900) (grand jury panel)

Defendant, a black man, was indicted by Grand Jury for murder.

Defendant asserted that Galveston County intentionally excluded blacks from grand jury service. State trial court doesn't allow him to submit proof of Discrimination.

When the case first goes to the Texas appellate court, the court says that under Texas law, any challenge to the composition of the grand jury must be made before the actual jurors are impaneled, not after the indictment, therefore, this challenge was untimely.

Defendant files for reconsideration, arguing that it is unreasonable to expect someone who hasn't even been indicted yet to challenge the composition of a grand jury.

Court agrees that justice and common sense require a post indictment challenge to the composition of the grand jury but engages in further absurdity by holding that the defendant failed to provide a sufficient record on appeal—remember, the trial court had refused his request to submit evidence of discrimination!

US Supreme Court reverses, holding that equal protection clause of 14th Amendment is violated anytime a state, through its legislature, courts, or its executive or administrative officers exclude persons from serving on grand juries because of their race or color. And, that this defendant tried to offer proof of discrimination and wasn't allowed to by Texas Courts.

Hernandez v. Texas, 74 S.Ct. 667 (1954) (14th Amendment just doesn't contemplate whites and blacks):

Defendant, a Mexican American is indicted for murder and moves to quash the indictment, alleging that persons of Mexican descent were systematically excluded from service as jury commissioners, grand jurors, and petit jurors.

US Supreme Court rejects Texas' argument that there are only 2 classes-white and negro-within the contemplation of the 14th Amendment. It reminds Texas that in ***Strauder***, it noted that discriminating against blacks was just as bad as discriminating against "Celtic Irishmen."

The Court discusses the defendant's burden of proving discrimination and how he accomplished that task:

1. defendant had to prove that persons of Mexican descent constituted a separate class in Jackson, Texas, distinct from "whites."

He did it by showing the attitude of the community. He introduced testimony that residents in the community personally distinguished between whites and Mexicans, that persons of Mexican descent had only a slight presence in business and community groups, that children of Mexican descent were required to attend a segregated school for the 1st four years of education; some restaurants displayed signs announcing "No Mexicans served"; on courthouse grounds there were two toilets, one was unmarked and the other marked "Colored Men" and "Hombres Aqui" (Men here).

2. defendant (after proving existence of a class) had to prove discrimination.

He did it by the "rule of exclusion"-he showed that 14% of population were people with Mexican surnames, that 11% of total male population had such names, but for the last 25 years, no person with a Mexican surname had served on a jury.

SWAIN V. ALABAMA, 85 S.Ct. 824 (1965)

Defendant was a 19-year-old black man who was convicted of rape and sentenced to death. There hadn't been a black citizen on a jury in Talladega County since at least 1950. Eight black citizens were in the venire, 2 were exempted and the prosecutor struck the remaining six.

Relying on *Strauder v. West Virginia,* he says the state intentionally denied him the opportunity to have blacks on his jury.

Court: we agree that government can't deprive blacks or other identifiable groups from jury service. The ISSUE is: Quantum of proof.

Black males over 21 yrs. Make up 26% of county population but no black person has served on a jury since 1950. In this case, 8 blacks were on the venire panel. 2 were excused and 6 were struck by the prosecutor. In Alabama, the three member jury commission of a county decides which males over 21 yrs. are honest, intelligent, good moral character. The court notes that this will result in less blacks on a venire but no one has the right to a proportional jury. The jury system is haphazard and imperfect but not purposeful discrimination.

Court: peremptory challenges can include presumptions based on group affiliations. 14th Amendment is only violated if in case after case, whatever the crime or circumstance, blacks are struck from juries. If a state never sits a black juror, the presumption protecting the prosecutor might be overcome.

Prosecutor says: if a negro defendant wanted any negroes on the jury, I might allow it if circumstances were right but striking is different depending on the race of the victim and defendant. AND THE COURT SAYS: THAT DOES NOT DEMONSTRATE DISCRIMINATION!

Court says there is a presumption that the state won't engage in discrimination and the nature of peremptory challenges mean that they can be used for racial or religious reasons when those characteristics are relevant to their case.

This is a case which stresses the importance of peremptory challenges. Court says "[t]he essential nature of peremptory challenges is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control…the peremptory challenge permits rejection for a real or imagined particularity[.]"

Court mentions: a juror's bare looks, gestures, habits and associations and states that "the constitution does not require an examination of a prosecutor's reasons for exercise of peremptory challenges in any given case.

Court agrees with Alabama that in a particular case, a party may legitimately strike someone because they were "Negro, Catholic, accountants, or with blue eyes."

> Court notes that peremptories are "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people…."

Court then says "the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be….Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

Court then says: "With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."

> Court will allow strikes based on race because often times it is an acceptable consideration based on the case and parties but if DA "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," is responsible for removing qualified Negroes, a case of discrimination might be made out.
>
> ***dissenters voiced suspicion that blacks are struck from juries in Alabama because the State doesn't want to mix the races.

Carter v. Jury Commission of Greene County, 90 S.Ct. 518 (1970) (citizens who are excluded from jury service because of their race have standing to sue).

Taylor v. Louisiana, 95 S.Ct. 692 (1975) (a criminal defendant has standing to challenge exclusions resulting in a violation of the fair cross section requirement, whether or not he is a member of the excluded class).

a. Louisiana had a law providing that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service. Defendant was a male who objected to the exclusion of women from the venire.
b. Although 53% of persons eligible for jury service were women, females constituted less than 1% of venire
c. Court notes the purpose of a jury trial:

Purpose of jury trial is to guard against the exercise of arbitrary power; to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge.

Community participation in justice system is part of democratic heritage and critical to public confidence in the fairness of system. Juries should reflect the broad representative character of the community. Men and women aren't fungible goods, although you can't say that women will act as a "class" the court notes that women bring a distinct quality to the jury box.

Court says that the time has come to reject the notion that women are not qualified to sit on juries.

****note that Rehnquist dissented, saying that the federal govt. should not force its view of modern life onto the states****

Duren v. Missouri, 99 S.Ct. 664 (1979) (in 6th Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section).

a. 54% of county population was female but only 15% of jury venire was female. Missouri allowed women to opt out of jury service.

Court lays out test for prima facie violation of the fair-cross-section requirement. A defendant must show:

1. that the group alleged to be excluded is a "distinctive" group in the community;

2. that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

3. that this under representation is due to systematic exclusion of the group in the jury-selection process.

Court notes that "exempting all women because of the preclusive domestic responsibilities of some women is insufficient justification for their disproportionate exclusion on jury venires." "It is untenable to suggest these days that it would be a special hardship for each and every women to perform jury service or that society cannot spare any women from their present duties."

BATSON V. KENTUCKY, 166 S.CT. 1712 (1986): court reviews *Swain's* evidentiary burden to prove equal protection violation via states' use of peremptory challenges and finds that it left prosecutors immune from constitutional scrutiny. DA struck all 4 blacks on the venire.

Court: *Strauder v. West Virginia,* established that a state denies equal protection to a black defendant when it excludes blacks from jury service. There is no right to have a jury of your color but defendants have a right to selection using non-discriminatory procedures.

Racial discrimination in jury selection harms the defendant and the juror being excluded as well as the community as public confidence in fairness of our justice system is undermined.

Court says that ***Swain*** established a "crippling burden of proof" and made prosecutors' peremptory challenges immune from constitutional scrutiny.

Court notes that *Swain* required defendants to investigate multiple cases and determine the race of defendants tried, racial composition of venire and petit jury, and the manner in which both parties exercised their peremptory challenges. This is not only an expensive endeavor, many times the court records are simply inadequate as to this information and very few voir dire proceedings are transcribed.

Racial discrimination harms the defendant, the community, and the individual juror.

As to defendants-they have the right to be tried by a jury whose members were selected pursuant to nondiscriminatory criteria. The very idea of a jury is a body … composed of peers or equals of the person

As to excluded juror-jurors as members of the community have the right not to be assumed incompetent on account of race.

As to community-discrimination undermines the public confidence in the fairness of our system of justice.

Court says that discrimination in judicial system is most pernicious because it stimulates discrimination in other areas.

"A single invidiously discriminatory governmental act" is not immunized by the absence of such discrimination on other occasions. To require that several people suffer before one can object is inconsistent with the promise of equal protection to all.

Equal protection forbids a DA from challenging a juror solely on race or assumption that black jurors as a group are unable to impartially consider a case against a black defendant.

In *Swain,* the Court relied on a presumption that a DA will properly exercise challenges in a case but did say that it isn't proper to exclude blacks for reasons wholly unrelated to outcome of the case" or deny blacks the same opportunity to participate in administration of justice enjoyed by whites. Under *Swain,* a black defendant had to show that peremptory challenges were being used to "pervert" the system of justice and it allowed DA's strikes to become immune from constitutional scrutiny.

COURT: to prove 14th Amendment violation a defendant must,

1. prove that he is a member of a racial group capable of being singled out for different treatment;

He can show that members of his race haven' been summoned to serve for a long time (result bespeaks discrimination)

Discrimination in Venire:

a. systematic exclusion or under-representation;

b. the practice used provides opportunity to discriminate.

Court: We don't need a consistent pattern of discrimination. A single equal protection violation is sufficient.

2. defendant must then prove DA used peremptory strike to remove jurors of his race. Defendant can rely on fact that peremptory strikes can be used to discriminate. DA's statements and questions are relevant.

3. once prima facie case is made, burden shifts to DA to provide race neutral reason. Trial judge then determines if strikes were proper.

Batson Court noted that it was hard to prove a history of discrimination as defendants can't access information on number of cases, racial composition of venire and petit and how strikes were handled. And, in the eyes of equal protection, one racially discriminatory strike is one too many. Therefore, a defendant can claim protection for their trial by showing purposeful discrimination.

a. we can't tolerate an assumption that blacks will favor blacks;

b. race based peremptories are not okay just because blacks, whites, Asians, Hispanics are all subject to them. Each discriminatory strike is a constitutional violation, and we don't accept violations because of an agreement that all suffer the same prejudice. Court notes it rejected separate but equal laws prohibiting inter-racial marriages;

c. It isn't okay to say that everyone can suffer improper use of peremptory strike. And such statement ignores the reality of the population and judicial system that show that black defendants and jurors are not treated equally.

A defendant can produce a variety of evidence to support claim that strikes were based on race:

1. statistical evidence about prosecutor's use of strikes against black as compared to whites;

2. evidence of disparate questioning and investigation of jurors;

3. side-by-side comparisons of blacks who were struck and whites who weren't;

4. prosecutor's misrepresentations of the record while defending strikes;

5. relevant history of State's peremptory strikes in past cases;

6. other relevant circumstances bearing on issue of racial discrimination.

Trial judge enforces ***Batson*** as judge has primary responsibility of preventing racial discrimination from seeping into jury selection process.

1. once a prima facie case or racial discrimination is established, prosecutor must give race-neutral reason for strike.

a. trial judge considers explanation in light of all relevant facts, circumstances, arguments of parties, including demeanor and credibility, asking whether reasons were pretextual.

b. Ultimate inquiry: whether the State was motivated in substantial part by discriminatory intent.

For a defendant to show purposeful discrimination in selection of a petit jury:

a. defendant must show s/he is a member of a cognizable racial group and that prosecution used peremptory challenges to remove members of defendant's race from the venire;

b. defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."

c. defendant must show that these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of race.

d. In deciding if defendant made the requisite showing, the trial court shall consider all relevant circumstances.

a. pattern of strikes against black jurors could give rise to inference of discrimination;

b. prosecutor's questions and statements during *voir dire* and in exercising challenges might be considered.

2. Once defendant makes *prima facie* showing the burden shifts to State to provide neutral explanation for challenges

a. explanation doesn't have to rise to level justifying a challenge for cause, but DA just can't say that it was his/her assumption or intuitive judgment that the juror would be partial to defendant because of race; and

b. DA just can't deny discriminatory motive but must articulate a neutral explanation related to the particular case to be tried.

3. Trial judge then decides if defendant established purposeful discrimination.

note that Chief Justice Burger and Rehnquist dissent, arguing that DAs should be able to strike black jurors in cases involving black defendants if they also strike white jurors in cases involving white defendants, Hispanic jurors in cases involving Hispanic defendants, and Asian jurors in cases involving Asian defendants.

Holland v. Illinois, 110 S.Ct. 803 (1990) (the 6th Amendment does not restrict the exclusion of a racial group at the peremptory challenge stage)

i. White defendant challenged prosecutor's strikes against black venire members on the basis of the 6th Amendment. Court notes that the 6th Amendment imposes a "fair-cross-section" requirement, which is derived from the 6th Amendment's "impartial jury" language, but that language doesn't guarantee a "representative jury." Court says that defendant has standing but this issue should have been framed as an equal protection challenge.

Powers v. Ohio, 111 S.Ct. 1364 (1991) (a criminal defendant may object to race based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race).

Defendant is white. DA strikes 7 blacks from jury panel.

Court says that *Batson* had multiple ends only one of which was to protect individual defendants. It also recognized that discriminatory use of peremptory challenges harm the excluded jurors and the community.

1. the opportunity for ordinary people to participate in the administration of justice is one of the principle justifications

for maintaining the jury system. It ensures that people will accept laws.

2. racial discrimination in jury selection casts doubt on integrity of our justice system and places fairness of criminal trials in doubt. It also humiliates jurors struck on account of their race.

3. a jury acts as vital check against wrongful exercise of power by state and prosecutors and discrimination damages the perception of this guarantee;

4. active discrimination by state condones violations of the US Constitution in the very institution entrusted with its enforcement and invites cynicism;

5. a race based challenge is a constitutional violation committed in open court; it is apparent to the jurors who sit, and casts doubt over the obligation of all parties to adhere to the law.

As to standing issue: a litigant can bring an action on behalf of 3rd party when:

1. litigant has suffered an "injury in fact" thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute;
2. litigant must have a close relation to the 3rd party;
3. there must exist some hinderance to the 3rd party's ability to protect his or her own interests.

a. the injuries were discussed above;
b. as to the "close relation" the court says that *voir dire* permits a party to establish a relation, if not a bond of trust, with the jurors; both defendant and jurors have an interest in eliminating racial prejudice and both suffer humiliation and lack of confidence when race is used to exclude;

c. as to hinderance, the court notes that potential jurors can't make a record during selection, it is hard to gather evidence or seek injunctive relief, and the small financial stake and heavy costs militate against jurors pursuing their rights on their own.

Edmonson v. Leesville Concrete Co,Inc., 111 S.Ct. 2077 (1991) (a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race).

Court finds state action because peremptory challenges are creatures of state and federal law and a creation of the government is being used to foster discrimination.

Hernandez v. New York, 111 S.Ct. 1859 (1991) (a neutral explanation in the context of Batson analysis means an explanation based on something other than the race of the juror; impact itself doesn't equal discrimination).

DA challenged 2 Hispanic jurors because he felt they couldn't accept the court interpreter as the final arbiter of what was said by Spanish speaking witnesses. Hesitancy in their answers and lack of eye contact.

"A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reasons offered will be deemed race neutral.

Georgia v. McCollum, 112 S.Ct. 2348 (1992) (the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges).

White defendants are accused of assaulting black victims. After assaults, an effort is made in black community to avoid patronizing defendants' business. Prior to trial the DA asks court to prohibit race based peremptory challenges by defendants. Court denies the motion but certifies the issue for appeal.

Court: regardless of who discriminates, the harm is the same-juror subjected to open and public racial discrimination; court system is the tool for discrimination, racial strikes undermine community confidence in courts and verdicts, especially in race related crimes.

As to defendant as "state actor":

Relevant inquiries

1. has the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority?
    a. peremptory challenges are provided for by law.

2. is the private party charged with the deprivation as a state actor?
    a. extent to which the actor relies on govt. assistance and benefits;

    b. whether actor is performing a traditional govt. function;

    c. whether the injury caused is aggravated in a unique way by the incidents of govt. authority.

As to 2(a): Georgia establishes procedures for compiling juror lists, people get summoned by govt. authority to appear for jury service, govt. pays for their service, govt./courts provide *voir dire* procedures. Thus, a criminal defendant relies on govt. assistance and benefits.

As to 2(b): selection of a jury in a criminal case fulfills a unique and constitutionally compelled govt. function. Because of courtroom setting in which challenges are exercised, regardless of who

precipitated the juror's removal, the perception and reality in a criminal trial will be that the court excused jurors on account of race, an outcome that will attributed to the state.

As to 2(c): the exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense. In exercising a peremptory challenge a criminal defendant is wielding the power to choose a quintessential governmental body-indeed, the institution of govt. on which our judicial system depends. Even though these are private motives, the conduct is "fairly attributable" to the govt.

Does State have standing to assert jurors' interests?

1. state suffers injury when the fairness and integrity of judicial process is undermined;
2. as a party litigator, the state prosecutor has a relationship with jurors;
3. too difficult and costly for jurors to raise these rights by themselves.

Does a defendant's rights trump?

1. peremptory challenges are not constitutionally required;
2. it is an affront to justice to argue that a fair trial includes the right to discriminate;
3. defense attorneys can explain reasons for strikes without revealing trial strategy, in extreme cases they can do it *in camera*

Court: the exercise of a peremptory challenge must not be based on either the race of a juror or racial stereotype held by the party. If the state demonstrates a *prima facie* case of racial discrimination by defense, defense must articulate a racially neutral explanation.

J.E.B. v. Alabama Ex Rel. T.B., 114 S.Ct. 1419 (1994) (intentional discrimination by state actor on the basis of gender violates the equal protection clause).

JEB was father, he gets sued by State of Alabama on behalf of TB, mother of minor child, for paternity and child support.

At jury selection, state uses 9 of 10 peremptory challenges to strike males. JEB uses all but 1 of his to strikes against women while objecting to state's challenges.

Alabama argues that gender discrimination should be tolerated in using peremptory challenges. Court says that our country's long history of sex discrimination warrants the heightened scrutiny afforded gender based classifications today. The harms to the jurors, community, court system are the same as racial harms.

***court also says that because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination.

It does note however that although gender cannot serve as a proxy for bias, strikes based on characteristics that are disproportionately associated with one gender can be appropriate, absent showing of pretext:

Challenging all persons who have had military experience might disproportionately affect men while challenging all persons employed as nurses might disproportionately affect women.

O'Conner concurs but says: we should limit this whole range of law to the State and let civil litigants and criminal defendants do what they want.

Rehnquist, Scalia, and Thomas dissent: gender bias is different than racial bias, sexual differences produce differences in outlook among jurors.

Purkett v. Elem, 115 S.Ct. 1769 (1995) (a "legitimate reason" does not have to make sense as long as it doesn't deny equal protection).

DA's reasons for striking juror: long, unkempt hair, a mustache, and a beard, were race neutral.

Rice v. Collins, 126 S.Ct. 969 (2006) (discusses the need for federal courts, in habeas corpus review, to give deference to factual findings of state courts in context of race neutral reasons for strikes; also note that Justices Breyer and Souter would like the Court to consider the issue of whether peremptory challenges should be abolished due to unresolvable tension between "the arbitrary and capricious peremptory challenge system" and the "Constitution's nondiscrimination command.").

Snyder v. Louisiana, 123 S.Ct. 1203 (2008) (prosecutor's explanation for challenges was implausible and pretextual).

Foster v. Chatman, 136 S.Ct. 1737 (2016)(prosecutor violated Batson)

(CJ Roberts)

DA struck all 4 prospective black jurors. Strikes for cause reduced the jury pool from 90 to 42. One black juror is struck for cause, bringing the total to 41, which included 4 blacks. DA uses peremptories to remove all blacks remaining. Through an open records request the defendant gets access to DA trial file. As to jury venire list:

1. names of black jurors highlighted in green with a "B" by name; lists were passed through DA's office for comments.

2. a draft of an affidavit by a DA investigator that said if one black had to be picked, it should be a particular one. This wasn't the affidavit the DA submitted in court proceedings. The "official one" had the offending language removed.

3. 3 handwritten notes on 3 black jurors "B1" "B2" B3";

4. list of qualified jurors after voir dire had 10 names with "N" by the name, including all 5 blacks (remember, one black was later struck for cause);

5. handwritten list titled "definite NO's" had 6 names on it, including all 5 blacks;

6. handwritten document titled "Church of Christ" had a notation "NO, No Black Church";

7. Juror questionnaire had race of black jurors circled.

8 Both prosecutors denied making highlight marks.

[Under *Batson*, defendant must make prima facie showing that peremptory challenge was exercised on basis of race; DA must offer a race-neutral reason; Judge must determine if defendant has shown purposeful discrimination.]

The Court: the notes were made by someone in DA's office.

Defendant focuses on 2 black jurors: Marilyn Garrett and Eddie Hood.

As to Juror Garrett:

1. DA said he struck her only after the other black juror (Shirley Powell) was struck for cause;
2. she worked with disadvantaged youth as a teacher's aide;
3. she looked at ground during voir dire;
4. she gave short and curt answers during voir dire;
5. she appeared nervous;
6. she was too young;
7. she misrepresented her familiarity with crime location;
8. she failed to disclose cousin's drug arrest;
9. she was divorced;
10. she had 2 children and 2 jobs;
11. she was asked few questions by defendant;
12. she didn't ask to be excluded as a juror.

Court: DA misrepresented his explanation to trial court.

DA: the unexpected "cause" removal of black juror Powell gave me a strike I wasn't going to use, but Garrett was one of two questionable jurors (the other was white race-Juror Blackmon) so I struck Garrett.

Court rejects DA's statement that Garrett had always been a "questionable" juror. The procedure used had the DA go first. Any juror not struck could by accepted by defendant. This DA knew in advance who he wanted to strike. The list had "definite NO" by her name. The writing means just what it says-none of these jurors will serve.

a. first 5 names on “definite NO’s” list were 5 black jurors. DA struck all blacks available. “N” appears next to Garrett’s name.

b. the Court says that the DA did not misspeak. He gave an intricate story comprising 3 single spaced typed pages and his account is belied by the record.

1. DA was untruthful in saying that the defendant did not ask Ms. Garrett pertinent questions. 2 questions concerned insanity, 1 concerned mental illness, 4 involved use of alcohol, and 5 questions explored publicity.

2. DA declined to strike 3 out of 4 white jurors who were divorced.

3. Ms. Garrett was age 34 yet DA took 8 white jurors under 36 years and a 21-year-old.

4. Ms. Garrett said she was unfamiliar with area of killing although she had gone to high school in the area BUT a white juror said the same thing and DA knew she lived ½ mile from murder scene and worked 250 yards from scene.

AS TO JUROR HOOD:

DA:

1. Hood’s son was same age as defendant and had a criminal conviction;

2. Hood’s wife worked food service at a mental institution;

3. Hood had food poisoning during voir dire;

4. Hood was slow in responding to death penalty question;

5. Hood was a member of Church of Christ;

6. Hood’s brother counselled drug offenders;

7. Hood wasn’t asked enough questions by defendant;

8. Hood asked to be excused from jury service.

COURT: DA’s reasons shifted over time:

a. DA first said he was only concerned with age of Hood’s son and conviction but in later proceedings he said it was

membership in Church of Christ and because Church doesn't favor death penalty;

b. as to age of son, DA accepted 2 white jurors with sons age 17 and 20 and one of the white jurors said that age of defendant would be a factor as to death penalty;

c. DA misinformed the court about Hood's son's conviction, saying it was "basically the same thing that defendant is charged with." Hood's son stole hubcaps from a car 5 years before while defendant was charged with sexually assaulting and murdering a 79-year-old woman.

d. Church of Christ-the Court notes that Hood asserted 4 times that he could impose the death penalty. The DA lied when he said 3 other jurors were struck because of membership in Church of Christ. One was excused before voir dire because she was 5 ½ months pregnant. One was excused by agreement because of death penalty answers. One had already formed an opinion about defendant's guilt. The DA's trial file has a document saying Church of Christ doesn't take a position on death penalty and lets each member decide but then says "No, No Black Church."

e. As to Hood's confusion, a white juror was confused too and the trial court stated the questions were confusing and needed changed because only 1 in 100 jurors understand them.

f. DA objected to Hood's wife working at a mental institution but a white juror worked there too.

g. DA lied when he said defendant didn't ask Hood about the defendant's age, insanity defense, or publicity.

Court: if a DA's proffered reason for striking a black applies just as well to a nonblack who was permitted to serve on jury, that is evidence of purposeful discrimination. In response to the government's argument that the DA made all the strikes because he was trying to protect interests of black jurors, the Court said that was made up.

Flowers v. Mississippi, 139 S.Ct. 2228 (2019) (prosecutor violated Batson):

Defendant was tried 6 times for murder by the same DA

1st trial: reversed due to prosecutorial misconduct. 36 prospective jurors (5 black and 31 white). DA uses 12 peremptory strikes and removes all 5 blacks. In granting new trial the court found that the DA gave baseless reasons to jury to doubt witnesses' testimony and relied on facts not in evidence;

2nd trial: reversed due to prosecutorial misconduct. 30 prospective jurors (5 blacks and 25 whites). DA strikes all 5 blacks. Trial court finds one strike to violate Batson and seats the juror. Defendant is convicted but it gets reversed due to DA relying on facts not in evidence and improperly undermining witness credibility;

3rd trial: reversed due to prosecutorial misconduct and discrimination in jury selection. 45 prospective jurors (17 black and 28 white). 1 black is removed for cause and 15 blacks are struck by DA using peremptories. 1 black was seated when the DA used all his peremptory strikes. Defendant is convicted and state supreme court reverses, holding that this was as strong a prima facie case of discrimination as it had ever seen.

4th trial: 36 prospective jurors (16 black and 20 white) DA uses 11 peremptory strikes, all against blacks, until he ran out. 7 whites and 5 blacks sat on jury. Hung jury.

5th trial: no information on jury selection (9 whites and 3 blacks) Hung jury.

6th trial: 26 prospective jurors (6 blacks and 20 whites). DA uses 6 peremptory strikes and strikes 5 of 6 prospective black jurors. Jury has 11 whites and 1 black. Defendant is convicted, appeals denied by state court, and the US Supreme Court sends case back to state saying look at this in light of *Foster v. Chatman.* Mississippi Supreme Court upholds conviction and case goes back to US Supreme Court.

CT: other than voting, jury service is most substantial opportunity for ordinary citizen to participate in democratic process. A blanket discretion to use peremptories clashes with equal protection clause of 14th Amendment.

1. 14th Amendment (1868) equal protection clause. As noted in *Slaughter-House Cases,* this was meant to secure and protect rights of blacks;

2. Civil Rights Act (1875) made it a criminal offense for state officials to exclude people from jury service based on race, color, or previous condition of servitude;

3. *Strauder v. West Virginia* (1880) not allowing blacks on jury is a brand of inferiority and a stimulant to race prejudice. The freedom to use peremptory strikes for any reason kept racial discrimination "widespread" and "deeply entrenched." In places where blacks were a minority, the number of available strikes usually exceeded the number of black jurors so DA's could easily get white juries. Defense counsel routinely strike blacks when defendant was white and victim was black.

4. *Swain v. Alabama (1965):* defendant is black and DA strikes all 6 black jurors. No black had sat on a jury in Talladega County, Alabama for 10 years. Court rules that a defendant doesn't prove constitutional equal protection violation in a single case. Court notes that DA's don't always judge jurors individually but often rely on group affiliations. It is okay to strike on the assumption that a black juror would be favorable to a black defendant or unfavorable to the state. Must show in case after case that blacks were removed for improper reasons.

5. *Batson v. Kentucky* (1986)

Court: central concern of 14th Amendment was to end discrimination based on race. *Swain* left DA's immune from constitutional scrutiny.

> Under *Batson,* once a prima facie case of discrimination is shown by defendant, the state must provide race-neutral reasons for strike. Trial judge must determine if reason is actual reason or a pretext for discrimination.
>
> > 1. it is too hard to prove a history of discrimination. Defendant can't access information on number of cases, racial composition of venire and petit juries, and how strikes were used. AND
> >
> > 2. in the eyes of equal protection, one racially discriminatory strike is one too many.
> >
> > THEREFORE: defendant can claim protection for their trial by showing purposeful discrimination.

3. we cannot tolerate an assumption that blacks will favor blacks.

4. race based peremptories are not okay just because blacks, whites, Asians, Hispanics are subject to them. Each discriminating strike is a constitutional violation, and we don't accept violations because of an argument that all suffer the same prejudice. [court notes it rejected separate but equal laws prohibiting inter-racial marriages.

5. it isn't okay to say that everyone can suffer improper use of peremptory strike as this ignores the reality of the judicial system and population that black defendants and jurors are not treated equally.

Court also notes the expansion of *Batson:*

a. a defendant of any race can raise a challenge even if of a different race;

b. applies to gender;

c. a defendant can't discriminate;

d. applies to a civil case.

A defendant can produce a variety of evidence to support the claim that strikes were improper:

a. statistical evidence about prosecutor's use of strikes against blacks as compared to whites;

b. evidence of disparate questioning or investigation of jurors;

c. side-by-side comparisons of blacks who were struck and whites who weren't struck;

d. prosecutor's misrepresentations of the record while defending strikes;

e. relevant history of state's peremptory strikes in past cases;

f. other relevant circumstances bearing on issue of racial discrimination.

Judges enforce *Batson*. Trial judge has primary responsibility of preventing racial discrimination from seeping into the jury selection process.

a. once a prima facie case of racial discrimination is established, DA must give race-neutral reason for strike. Trial judge can consider explanation in light of all relevant facts, circumstances, arguments of parties, demeanor of lawyers and credibility. Are reasons pretextual?

The ultimate inquiry: whether the state was motivated in substantial part by discriminatory intent.

Appellate review: highly deferential but court looks at the same factors as trial court. Was the decision clearly erroneous?

Ct: in previous 6 trials combined the DA struck 41 of 42 blacks. In this trial he struck 5 of 6 blacks. In this trial DA used different questions for black and white jurors. In this trial DA struck a black juror who was similar to a white juror not struck. 4 categories of important evidence:

1. history of the 6 trials;
2. DA struck 5 of 6 blacks at trial;
3. DA's disparate questioning of black and white jurors;
4. DA's proferred reasons for striking a black juror while allowing similarly situated white jurors to serve.

Court: over the course of the first 4 trials the state struck every black juror it could strike, and Mississippi courts twice found violations of *Batson.* We have a suspect pattern of strikes in this trial. DA struck 5 of 6 prospective jurors, asking 145 questions (about 29 per juror). DA asked 11 seated white jurors a total of 12 questions (1 each). DA didn't question white jurors who knew witnesses or defendant. DA investigated black jurors.

Court: this DA was looking for pretextual reasons and papered the record to disguise discriminatory intent. There is clear evidence that Carolyn Wright was struck for racial reasons. DA didn't ask white jurors about the people they knew. DA didn't ask nature of work relations Ms. Wright had with defendant's father and didn't strike a white juror who knew defendant's family. DA misstated that Ms. Wright worked with defendant's sister. DA gave three other inaccurate statements for 3 black jurors.

Pennsylvania Cases:

1. ***Commonwealth v. Jackson, 562 A.2d 338 (Pa. Super. 1989): provides an extensive discussion of Batson and challenges to jurors.***

2. ***Commonwealth v. Dinwiddie, 601 A.2d 1216 (Pa. 1992)***

If a court says it will require a prosecutor to give reasons if he strikes another minority juror, the DA can't refuse to justify or explain his peremptory strikes when he exercises that next strike.

3. ***Commonwealth v. Correa, 620 A.2d 497 (Pa. Super. 1993)***

When a trial court doesn't require DA to justify all her strikes, despite making DA justify some of strikes, an appellate court will examine the record and not automatically remand the case for a new trial. A prosecutor can rebut a charge of discrimination without justifying every strike.

4. ***Commonwealth v. Wheeler, 645 A.2d 853 (Pa. Super. 1994)***

Race neutral reasons in this case included:

1. juror appeared uninterested in participating in proceedings;
2. equivocating on ability to impose death penalty.

5. ***Commonwealth v. Tourscher, 682 A.2d 1275 (Pa. Super. 1996)***

DA's strikes against females constituted intentional gender discrimination.

6. Commonwealth v. Jones, 668 A.2d 491 (Pa. 1995)

To demonstrate a *prima facie* case of gender discrimination by DA, a defendant must make a record specifically identifying:

1. the gender of all the venire persons in the jury pool;
2. the gender of all venire persons remaining after challenges for cause;
3. the gender of those removed by the DA; and
4. the gender of the jurors who served and the gender of jurors acceptable to the DA who were stricken by the defense.

7. ***Alexander v. Carlisle Corp., 674 A.2d 268 (Pa. Super. 1996)*** *(juror properly struck for lack of respect for court process due to wearing sunglasses throughout jury selection.)*

7. Commonwealth v. Gibson, 688 A.2d 1152 (Pa. 1997)

In order to establish a *prima facie* case on a *Batson* claim, defendant must make a record identifying the race of venire persons stricken by DA, the race of prospective jurors acceptable to the DA but stricken by defense, and the racial composition of final jury.

8. Commonwealth v. Garrett, 689 A.2d 912 (Pa. Super. 1997)

Batson prohibits a criminal defendant from engaging in purposeful racial discrimination in exercise of peremptory challenges.

9. Commonwealth v. Rico, 711 A.2d 990 (Pa. 1998)

1. There is no harmless error review in context of a *Batson* claim;

2. Italian Americans can be a cognizable group. In order to show cognizability, a defendant must show the ethnic group:

a. is defined and limited by some clearly identifiable factor or factors;

b. possesses a common thread of attitudes ideas or experiences;

c. shares a community of interests such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process; and

d. has experienced or is experiencing discriminatory treatment and is in need of protection from community prejudice.

**Court notes that "[t]he mere spelling of a person's surname is insufficient to show that he or she belongs to a particular ethnic group."

3. Court further discusses how a defendant is to make a *prima facie* record stating that a defendant must specifically identify:
    a. the race or gender of all the venire persons in the jury pool;
    b. the race or gender of all venire persons remaining after challenges for cause;
    c. the race or gender of those removed by the DA;
    d. the race or gender of the jurors who served and the race and gender of jurors acceptable by the DA who were stricken by defense.

10. Commonwealth v. Hill, 727 A.2d 578 (Pa. Super. 1999)

Remedy for properly sustained *Batson* objections lies within the sound discretion of the trial court and may involve: calling additional jurors to the venire, granting additional challenges, seating the challenged juror, or beginning a new jury selection.

11. Commonwealth v. Carson, 741 A.2d 686 (Pa. 1999)

A trial court is duty bound to make a *sua sponte* inquiry after observing a *prima facie* case of purposeful discrimination by way of peremptory challenges. Harmless error can be applied **in reviewing trial court's remedy** after seating a juror for a perceived *Batson* violation.

12. Commonwealth v. Estes, 851 A.2d 933 (Pa. Super. 2004)

Discusses Allegheny County's method of creating jury pools and notes that under-representation alone does not show an actual discriminatory practice in the jury selection process.

13. Commonwealth v. Fletcher, 861 A.2d 898 (Pa. 2004)

Reinforces the need to make a complete record for appellate review.

14. Commonwealth v. Basemore, 875 A.2d 350 (Pa. Super. 2005)

Holds that a *Batson* violation isn't the type of prosecutorial misconduct which necessitates the ultimate remedy of double jeopardy.

15. *Trigg v. Children's Hospital of Pittsburgh, UPMC, (PA. April 2020)*

Superior Court had found that trial court erred by not personally observing the demeanor of prospective jurors challenged for cause. Appellee had moved to strike for cause, a juror whose sister and brother-in-law were doctors, mother-in-law a nurse, and who said she would favor hospital in a close case. Judge reviewed challenge for cause by reviewing the transcript. Appellee used peremptory to strike. Superior Court ruled that the judge should have observed demeanor and tenor of juror. Pa. Supreme Court finds the ISSUE IS WAIVED.

Foundations of Constitutional Discrimination/Understanding Batson v. Kentucky

-Michael W. Streily

In exercising peremptory challenges, both the Commonwealth and defendant must not challenge potential jurors solely on the basis of their race, gender, religion, or ethnicity or on the assumption that because a potential juror is of a particular race, gender, religion, or ethnicity he or she will be unable to impartially consider the evidence and reach a fair verdict

Batson recognized that discrimination in a single case can establish an equal protection violation.

- A *prima facie* case of discrimination has three elements:
- 1. the defendant's membership in a cognizable racial group.
- 2. the prosecutor's use of peremptory strikes to exclude members of that group.
- 3. an inference arising under the totality of the circumstances that the prosecutor used the strikes to exclude venire persons on account of race.

- If a defendant makes a *prima facie* showing of discrimination, the burden shifts to prosecutor to justify strike with a race neutral reason.

PA Supreme Court requires the objecting party to include the following information in its objection (make a record identifying):

- 1. the race of all the venire persons in the jury pool;
- 2. the race of all the venire persons remaining after challenges for cause;
- 3. the race of those removed by the DA; and
- 4. the race of the jurors who served and the race of jurors acceptable to the DA who were stricken by the defense.
- **at appellate level, there is no harmless error review when court finds a *Batson* violation.
- **harmless error applied when reviewing trial court's remedy

REMEDY

- **Remedy** for properly sustained *Batson* objections lies within the sound discretion of the trial court and may involve:

1. calling additional jurors to the venire
2. granting additional challenges
3. seating the challenged juror;
4. or beginning a new jury selection.

Article I, Section 2 reduced African Americans to 3/5ths of a free person, or someone bound by years of service, for purposes of apportioning representation and taxation.

Article I, Section 9 forbade Congress from regulating the importation of human beings until the year 1808.

Article IV, Section 2, Clause 3, held that: “No person held in service or labor in one State under the Laws thereof, escaping into another, shall in consequence of any Law or Regulation therein, be discharged from such service of labor, but shall be delivered up on Claim of the Party to whom such Service of Labor may be due.”

Dred Scott v. John Sanford, 60 U.S. 393 (1857) (Blacks are not citizens of the United States and only have the rights that States choose to give to them within their own borders; Missouri Compromise was unconstitutional)

- Ct: slave holding states would not have agreed to let another state give citizenship to blacks so that they could enter a southern state and then be permitted to do anything a white man could do. The power to naturalize resides with the federal government and naturalization is confined to people born outside the country. Given that states didn't want other states to have power to naturalize emigrants how could anyone think they would let states naturalize a population they found dangerous and depraved.

Ct: Articles of Confederation had a provision: “That the free inhabitants of each state shall be entitled to all the privileges and immunities of free citizens in the several states.” BUT the Constitution confined privilege to “citizens” of the state thus excluding foreigners and people not considered to be citizens.

a. First Naturalization Law (1790) confined the right to become a citizen to “aliens being free white persons.”

b. First Militia Law (1792) “free able-bodied white male citizen” shall be enrolled in militia.

c. Law of 1813: until the end of the war with Great Britain “it shall not be lawful to employ, on board of any public or private vessel of the United States, any person or persons except citizens of the United States, or persons of Color, natives of the United States.”

d. Washington D.C. (1820): regulated meetings of free negroes as well as where they could live.

Ct: people can be citizens and still not have equal rights: women and minors.

Civil Rights Cases, 3 S.Ct. 18 (1883):

- Congress passed Civil Rights Act (1878) which prohibited **discrimination in Inns, public conveyances and places of amusement based on race, color, or previous servitude. It provided for civil and criminal remedies.**
- **2 defendants had denied blacks the right to stay at their hotel;**
- **2 defendants had denied blacks the right to attend the theater (Grand Opera House in NY and Maguire's Theater in San Francisco.)**
- **1 defendant denied black woman (wife of white man) the right to ride in the Ladies Rail Car, thinking something immoral was afoot since she was with a white man.**

PLESSY V. FERGUSON, 16 S.Ct. 1138 (1896)

- 1. 1890 law required that Trains had to either have separate rail cars for whites and non-white or divide a car with a partition. Nurses attending children of another race were exempted. $25 fine and 20 days in jail. Train employees were liable if they forced someone into the wrong section.
  - Ct: no violation of 13th Amendment as that only deals with the institution of slavery. In *Civil Rights Cases* we said that individual action is not state action and that the amendment was not meant to abolish all forms of discrimination. The law acts on both races so it doesn't destroy legal equality or impose involuntary servitude.

No 14th Amendment issue:

- 14th Amendment sought equality before the law, not social equality. And it wasn't meant to force co-mingling of the races. Laws that require separation do not imply inferiority. Our schools are separated by race. Women don't have the same rights as men. Children don't have the same rights as adults. Intermarriage can be prohibited despite the fact those laws interfere with right to contract. And this is an intra-state rail line.

MYRA BRADWELL (Illinois Supreme Court 1869):

- . Her application for a law license was refused because as a married woman, she would not be bound by express contract nor by implied contract, which is the policy of the law to create between attorney and client. Illinois law: married women are not bound by contracts having no relation to their own property.

MYRA BRADWELL (83 U.S. 130 1872):

- Bradwell: I am a US citizen. I was a citizen of Vermont and I am now a citizen of Illinois. I should have all the rights of a male citizen of Illinois.
- Court: the practice of law is not a privilege or immunity of a US citizen.
- Justice Bradley (concurring): man is woman's protector. Ladies are suited for domestic work. "The paramount destiny and mission of woman is to fulfill the noble and benign offices of wife and mother."
-

KOREMATSU V. UNITED STATES, 65 S.Ct. 193 (1944):

• COURT (Justice Black): public necessity (but not racial antagonism) can justify curtailing civil rights, and this is just like the curfew order we upheld in *Hirabayashi v. U.S.* This is necessary to prevent espionage and sabotage. Hardships are a part of war and citizenship has its responsibilities.

42 Pa.C.S.A. 4502 Qualifications of Jurors

- Every citizen of required voting age (18 years) unless:
- Unable to read, write, speak, or understand English
- Mental or physical infirmity
- Convicted of crime punishable more than 1 year and haven’t been pardoned

42 Pa.C.S.A. 4503 Exemptions from jury duty

- 1. active service in armed forces;
- 2. served within 3 years on a jury [if service lasted less than 3 days, exemption period is 1 year;
- 3. hardship or extreme inconvenience;
- 4. spouses, children, siblings, parents, grandparents and grandchildren of homicide victims;
- 5. served on grand jury for 18 months;
- 6. over 75 years of age; 7. judges and magisterial district judges;

  8. Breast feeding women

Challenges for Cause are unlimited

- 1. prospective juror's conduct or response demonstrates a likelihood of prejudice;

- 2. prospective juror has such a close financial, family or situational relationship with parties, counsel, victims, or witness that the court will presume a likelihood of prejudice.

Pa.R.Crim.P. 634 Number of Peremptory Challenges

- Trial with 1 defendant
  - Misdemeanor-5 each
  - Non-capital felony-7 each
  - Capital felony-20
- Trial with joint defendants
  - Divide equally using highest grade of offense (must get at least 2)
  - Judge can increase to number if defendants had been tried alone
  - Commonwealth gets what defendants get

Pa.R.Civil Procedure 221 Peremptory Challenges

- Each party gets 4
- Court can give additional challenges
- If more than 1 plaintiff or more than 1 defendant, court can consider such groups as a single party

Strauder v. West Virginia (1880)

- Defendant was a black man indicted for murder. W.Va. Law said only white males over 21 years could serve on grand or petit juries.
- Court: If blacks excluded whites or Celtic Irishmen, there would be a huge cry of discrimination. This is a brand of inferiority and denial of equal protection.

Carter v. Texas (1900)

- Court: the equal protection clause is violated anytime a state, through its legislature, courts, its executive or administrative officers exclude persons from serving on grand juries because of their race or color.

Hernandez v. Texas (1954) (14th Amendment just doesn't contemplate whites and blacks)

- Defendant was a Mexican American indicted for murder and he alleges exclusion of Mexican Americans from grand and petit juries and as jury commissioners.
- When Texas argues that the 14th Amendment only applies to whites and blacks, the Court references the Celtic Irishmen in *Strauder.*
- Ct: defendant proved discrimination by showing Mexican Americans were a separate class in Jackson County, Texas distinct from whites by: showing attitude of community and restrictions put on them.
- Ct: defendant proved 14% of population were people with Mexican surnames, 11% of male population had such names. Within last 25 years no person with Mexican surname served on a jury.

Swain v. Alabama, (1965) (How much proof is required to prove equal protection violation)

- Defendant-19 year old black man convicted of rape and sentenced to death. Hadn't been a black citizen on a jury in Talladega County since 1950. 8 black citizens in venire, 2 were exempted, DA struck remaining 6.
- Ct: black males over 21 years made up 26% of population. No blacks on juries since 1950. All 6 qualified black jurors struck by DA. 3 member jury commission decides who are honest, intelligent, and of good moral character to serve. DA said if a black defendant wanted blacks he might allow it if circumstances were right.
- Ct: 14th Amendment is only violated if in case after case, whatever the crime or circumstance, blacks are struck from juries.

Carter v. Jury Commission of Greene County (1970)

- Citizens who are excluded from jury service because of their race have standing to sue.

Taylor v. Louisiana, (1975) (a criminal defendant has standing to challenge exclusions whether or not he is a member of the excluded class)

- Defendant was a male who objected to exclusion of women from venire. Only females who filed a written request to serve were called for jury duty. Although 53% of eligible citizens were women, females constituted less than 1% of his venire.
- Ct: purpose of jury trial: guard against arbitrary power; make available common sense judgment of community as a hedge against a zealous or mistaken prosecutor, and provide a preference to a conditioned or biased response of a judge.
- Ct: the time has come to reject the notion that women are not qualified to sit on juries.

Duren v. Missouri (1979) (in 6th Amendment fair-cross section cases, systematic disproportion itself demonstrates an infringement of defendant's interest)

- 54% of county population was female but only 15% of jury venire was female. Missouri allowed women to opt out of service.
- Ct gives test for *prima facie* violation of fair cross section requirement:
- 1. the group alleged to be excluded is a "distinctive" group in the community.
- 2. representation of this group in venires is not fair and reasonable in relation to the number of such persons in community.
- 3. under-representation is due to systematic exclusion

Batson v. Kentucky (1986) (Swain established a "crippling burden of proof" and made prosecutors immune from constitutional scrutiny. A single violation is enough)

- Ct: racial discrimination harms defendant, community, and juror
- As to defendants-they have a right to be tried by a jury selected pursuant to nondiscriminatory criteria.
- As to excluded juror-have a right not to be assumed incompetent on account of race.
- As to community-discrimination undermines public confidence in the fairness of the system of justice.
- Ct: discrimination in judicial system is most pernicious because it stimulates discrimination in other areas.

Batson (continued)

- Ct: to prove 14th Amendment violation a defendant must:
- 1. prove he is a member of a racial group capable of being singled out for different treatment and DA used peremptory strike to remove jurors of his race on account of their race.
- 2. once defendant makes *prima facie* showing that prosecutor's strikes were race related, burden shifts to prosecutor to provide race neutral reason.
- 3. judge then decides if defendant established purposeful discrimination.
- Ct: a single invidiously discriminatory government act is sufficient. To require many to suffer discrimination before one can object is wrong.

Powers v. Ohio, (1991) (a criminal defendant may object to race based exclusions whether or not defendant and juror share the same race)

- Defendant was white. DA strikes 7 blacks from jury panel.
- Ct:
- 1. discrimination reduces opportunity for ordinary people to participate in administration of justice.
- 2. casts doubt on integrity of system and humiliate people
- 3. damages the idea that jury checks wrongful power of state
- 4. condones constitutional violation, invites cynicism
- 5. it is apparent to the jurors and casts doubt on the need to follow the law

Standing to assert 3rd party interest

- 1. litigant suffered “injury in fact” giving sufficient concrete interest in the issue (injuries listed previously)
- 2. litigant has close relationship with 3rd party (voir dire lets defendant and jurors create a bond and both have interest in eliminating racial prejudice, both suffer humiliation and lack of confidence when race is used to exclude people from service)
- 3. a hinderance to 3rd party’s ability to protect their own interest (no mechanism for potential jurors to make a record during selection, it is hard to gather evidence, and the small financial stake of juror and heavy costs prevent them from pursuing their rights on their own.

Edmonson v. Leesville Concrete Co. Inc. (1991) (a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race)

Court finds state action because peremptory challenges are creatures of state and federal law and a creation of the government is being used to foster discrimination.

Hernandez v. New York (1991) (a neutral explanation means explanation based on something other than race of juror; impact doesn't equal discrimination

- *DA challenged 2 Hispanic jurors because he felt they couldn't accept the court interpreter as the final arbiter of what was said by Spanish speaking witnesses. Hesitancy in their answers and lack of eye contact)*

Georgia v. McCullum, (1992) (A criminal defendant is not permitted to engage in purposeful discrimination)

- Defendant as "state actor":
- 1. has the claimed constitutional deprivation resulted from exercise of right/privilege having a source in state authority?
  - A. peremptory challenges provided for by law

- 2. is the private party charged with the depravation acting as a state actor?
- Extent to which actor relies on govt. assistance/is actor performing traditional govt. function/is injury aggravated in unique way

- As to 2(a): Georgia establishes procedures to summon jurors, pays for their service. Defendant relies on this govt. assistance.
- As to 2(b): jury selection is a unique govt. function. Strikes occur in a courtroom and people will attribute them to the govt.
- As to 2(c): in exercising peremptory strikes, defendant is wielding the power to choose a quintessential govt. body-the institution of govt of which our judicial system depends.
- As to state's standing to assert jurors' interests:
- State suffers when fairness and integrity of judicial process is questioned.
- As a party litigator, prosecutor has relationship with jurors
- To difficult and costly for jurors to raise these rights

J.E.B. v. Alabama Ex Rel. T.B. (1994) (intentional discrimination by state actor on the basis of gender violates the equal protection clause).

- Justice O'Connor concurs but says we should limit this whole range of law to the State and let civil litigants and criminal defendants do what they want.

- Justices Rehnquist, Scalia, and Thomas dissent saying gender bias is different than racial bias and that sexual differences produce differences in outlook among jurors.

Purkett v. Elem, (1995) (a legitimate reason doesn't have to make sense as long as it doesn't deny equal protection

- DA's reasons for striking juror: long, unkempt hair, a mustache and a beard were race neutral.

Flowers v. Mississippi (2019) (prosecutor violated Batson)

- Defendant tried 6 times for murder by the same DA
- 1st trial: DA struck all 5 blacks, giving baseless reasons. New trial
- 2nd trial: DA struck all 5 blacks. New trial on DA trial misconduct
- 3rd trial: 15 blacks struck by DA. New trial
- 4th trial: DA uses all strikes against blacks. Hung jury
- 5th trial: Hung jury
- 6th trial: DA strikes 5 of 6 blacks
- CT: questioning and investigation as well as misstatements showed bias

Commonwealth v. Edwards, 177 A.3d 963 (Pa. Super. 2018) (Batson violation)

- Court's staff listed race and gender on the strike sheet and when defendant objected, the DA objected to his objection!
- DA used all 8 peremptories on racial minorities.
- DA explained why he struck a black juror saying she had an "inattentive posture" and that demonstrated she didn't want to be there and wouldn't discharge her duty in a fair manner
- CT: the trial court told the prospective jurors to sit back and relax while the selection process was occurring and by the way, most people don't want to be called for jury duty.

Duncan v. Louisiana, (1968) (14th Amendment due process includes the 6th Amendment right to jury trial.

- Jury Trials are intended to protect the accused from oppression by the government:
- a. Protects against unfounded criminal allegations intended to get rid of enemies.
- b. Protects against corrupt, biased or eccentric judges as well as those too responsive to higher political authority.
- c. Safeguards against corrupt and overzealous prosecutors
- Court notes 2 objectives of a tyrant: Make the legislature subservient to his will/deny ability to turn to fellow countrymen for freedom

The Judgment of Paris