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Batson's Grand Jury DNA

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Batson's Grand Jury DNA

Roger A. Fairfax, Jr.*

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* Professor of Law, George Washington University Law School. A.B., Harvard College; M.A., University of London; J.D., Harvard Law School. I would like to thank the organizers and participants associated with the 2011 “*Batson* at Twenty-Five: Perspectives on the Landmark, Reflections on Its Legacy” Symposium at the University of Iowa College of Law. I am grateful to Andrea Dennis, Lisa Fairfax, Kris Henning, Renee Hutchins, Michael Pinard, and Kami Chavis Simmons for their feedback and comments on earlier versions of this Essay. This Essay is dedicated to the memory of Judge Robert L. Carter (1917–2012), former District Judge, United States District Court for the Southern District of New York, and John A. Payton (1946–2012), former President and Director–Counsel of the NAACP Legal Defense and Educational Fund, Inc.

INTRODUCTION

Batson v. Kentucky was a landmark decision imposing constitutional restrictions on peremptory challenges in the petit jury selection process. *Batson* was a culmination of a long line of cases addressing racial discrimination in jury selection. However, the role of anti-discrimination doctrine in grand jury selection is often overlooked when the story of *Batson* is considered. Many of the key equal protection cases underpinning the *Batson* decision were *grand jury* cases. Furthermore, the evidentiary framework applied to challenges to race-based peremptory strikes in *Batson* was forged in a century's worth of grand jury discrimination doctrine. This Essay, prepared for the "*Batson* at Twenty-Five: Perspectives on the Landmark, Reflections on Its Legacy" Symposium at the University of Iowa College of Law, highlights this significant jurisprudence—*Batson's* grand jury DNA—and explores the import of its legacy.

Part I of this Essay sets the stage with the story of one defendant's extraordinary 1933 challenge—orchestrated by his brilliant lawyer, Charles Hamilton Houston—to the exclusion of blacks from the Loudoun County, Virginia grand jury that indicted him for murder. This Part suggests that, despite the significantly different contextual backdrop of the nonadversarial grand jury process (most notably, the absence of peremptory challenges in grand jury selection), there is sufficient reason to investigate the grand jury's role in the story of *Batson*. Part II chronicles how many of the significant equal protection gains in the jury selection arena were won and solidified in the context of challenges to discrimination in the selection of *grand jurors*. Indeed, the Supreme Court's equal protection jurisprudence in grand jury discrimination cases would lay the foundation for *Batson*. Part III explains how *Batson's* articulation of the quantum of proof necessary for demonstrating a violation of the Equal Protection Clause in the exercise of a peremptory challenge can be attributed to the grand jury discrimination cases of the previous century. This Essay concludes by contemplating whether the lessons we have drawn from the quarter-century experience under *Batson* might have some relevance for how we select and utilize grand juries in contemporary criminal justice.

I. THE GRAND JURY'S RELEVANCE TO *BATSON*

A. CHARLES HAMILTON HOUSTON AND THE CRAWFORD CASE

In 1932, Agnes Boeing Ilsley, a white socialite, and Nina Buckner, her housekeeper, were murdered at the Ilsley home in Loudoun County, Virginia.¹ A black man named George Crawford, a former Ilsley household

1. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 147 (2004).

employee, emerged as the prime suspect,² although evidence connected Ilsley's own brother to the murder.³ In early 1933, Crawford was arrested in Boston, Massachusetts on an unrelated charge and, after lengthy interrogation by Boston and Virginia authorities, confessed to having participated in the 1932 burglary of Ilsley's home along with another man who Crawford claimed was solely responsible for the killing of the two women.⁴ Crawford later recanted his participation in the burglary and maintained his innocence.⁵ The Commonwealth of Virginia sought extradition of Crawford from Massachusetts to Loudoun County to answer an indictment for capital murder.⁶

The National Association for the Advancement of Colored People ("NAACP") plunged into the case, which, like the early stages of the Scottsboro Boys case,⁷ became a high-profile example of the legal work the organization became known for in the first half of the twentieth century.⁸ At the helm of the NAACP's efforts in the *Crawford* case was the brilliant lawyer Charles Hamilton Houston, the transformative "dean" of Howard University School of Law ("HUSL"), who frequently collaborated with the NAACP even before taking a formal "special counsel" role with the group in 1935.⁹

2. See *id.*; PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* 164 (2009).

3. See SULLIVAN, *supra* note 2, at 164.

4. See KLUGER, *supra* note 1, at 148; SULLIVAN, *supra* note 2, at 164–65.

5. See SULLIVAN, *supra* note 2, at 165.

6. See *Hale v. Crawford*, 65 F.2d 739, 740 (1st Cir. 1933).

7. See DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969); JAMES A. MILLER, *REMEMBERING SCOTTSBORO: THE LEGACY OF AN INFAMOUS TRIAL* (2009). *But see* KLUGER, *supra* note 1, at 144–46 (recounting difficulties faced by the NAACP in connection with the *Scottsboro* case).

8. See JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994); *LONG IS THE WAY AND HARD, ONE HUNDRED YEARS OF THE NAACP* (Kevern Verney & Lee Sartain eds., 2009); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987).

9. See GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 121–27, 131–32 (1983). Houston did not carry the formal title of "dean" at Howard despite performing the role. See *id.* at 79–80. Along with his tremendous legal skill, Houston's biography, credentials, and pedigree made him an attractive consultant for the NAACP. Houston had excelled in the segregated District of Columbia public schools, graduated *Phi Beta Kappa* from Amherst College, served as an officer in World War I, graduated at the top of his class at Harvard Law School, and served as the first African American editor of the *Harvard Law Review*. See *id.* at 49–56; Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17 (1998); see also JOSÉ FELIPE ANDERSON, *GENIUS FOR JUSTICE: CHARLES HAMILTON HOUSTON AND THE REFORM OF AMERICAN LAW* (forthcoming 2012). A protégé of Roscoe Pound and Felix Frankfurter, Houston returned to Washington and became a partner in his father's law practice. See Fairfax, *supra*, at 21. Houston later joined the faculty of Howard's law school, helping to transform it into the premier training ground for African American lawyers in the twentieth century. See ROBERT L. CARTER, *A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS* 24–25 (2005); Fairfax, *supra*, at 21; Kenneth W. Mack, *Rethinking Civil*

Houston and the NAACP team opposed the extradition of Crawford to Virginia—seeking a writ of habeas corpus in the United States District Court for the District of Massachusetts on the ground that blacks were excluded from the Loudoun County, Virginia grand jury that had indicted him.¹⁰ Though the argument against extradition—that Crawford “suffer[ed] prejudice from the grand jury as constituted”¹¹—may have been novel, it was well-supported by the evidence. Houston had traveled personally to Loudoun County, Virginia in order to investigate the grounds for the opposition to extradition. As Patricia Sullivan describes, Houston and his team “interviewed several local officials, reviewed taxpayer lists from which the grand jury list was drawn, examined the grand jury panel that indicted Crawford, and secured sworn statements from local black citizens that no blacks had served on juries in recent memory.”¹² The team also “documented the qualifications of white jurors who served, took depositions from black citizens with equal or superior qualifications to white jurors, and reviewed census data and tax lists.”¹³

All of the time and resources devoted to preparation for the argument to Judge James A. Lowell of the U.S. District Court for the District of Massachusetts were no doubt viewed by the NAACP attorneys as a wise investment. Success with such an extradition argument would open the door to a new strategy of fighting jury discrimination in the South. As Sullivan writes, “[i]n the future, when a black person faced indictment in the South and he could make it North, a southern state would be unable to get him back until it abandoned the practice of excluding blacks from juries.”¹⁴ Houston himself believed that such a strategy “would go ‘the greatest

Rights Lawyering and Politics in the Era Before Brown, 115 YALE L.J. 256 (2005). Among Houston’s colleagues on the full-time faculty at HUSL was William E. Taylor, “who graduated at the top of his class at Iowa University School of Law,” SULLIVAN, *supra* note 2, at 161, and later served as acting dean of HUSL and dean of the short-lived, Jim Crow-era Lincoln University School of Law in Missouri. See KIMBERLEY JOHNSON, REFORMING JIM CROW: SOUTHERN POLITICS AND STATE IN THE AGE BEFORE *BROWN* 175 (2010); J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER: 1844–1944, at 62–63 (1993).

10. See *Crawford*, 65 F.2d at 740; DIANA KLEBANOW & FRANKLIN L. JONAS, PEOPLE’S LAWYERS: CRUSADERS FOR JUSTICE IN AMERICAN HISTORY 219 (2003). As was his frequent practice, Houston recruited to his Crawford legal team some of his former Howard students, including Thurgood Marshall, then a young attorney in Baltimore, Maryland. See SULLIVAN, *supra* note 2, at 165–66. Houston and his former student Edward Lovett worked with two Boston-based attorneys, J. Weston Allen, who had been Attorney General in Massachusetts, and Butler R. Wilson, who headed the Boston branch of the NAACP. See *Crawford*, 65 F.2d at 740; SULLIVAN, *supra* note 2, at 165.

11. SULLIVAN, *supra* note 2, at 165 (quoting correspondence from Charles H. Houston) (internal quotation marks omitted).

12. *Id.*

13. *Id.* at 166.

14. *Id.*

distance yet toward breaking up discrimination against Negroes on juries in the South.”¹⁵

In April of 1933, Judge Lowell heard arguments from both the NAACP and Loudoun County attorneys:

Virginia's representatives defended black exclusion from jury service, citing it as 'just an old Virginia custom.' Crawford's lawyers stated that Virginia could not have it both ways, namely invoking the Constitution in demanding the prisoner's rendition while at the same time violating the Constitution by illegally barring blacks from serving on grand and petit juries.¹⁶

Judge Lowell granted the writ of habeas corpus but ordered Crawford held pending appeal.¹⁷ However, Crawford's victory was short-lived as the state successfully appealed the grant of the writ to the United States Court of Appeals for the First Circuit.¹⁸ The First Circuit, although sympathetic to the NAACP's equal protection argument,¹⁹ held that it was improper to challenge a facially proper grand jury indictment through an application for a writ of habeas corpus seeking relief from a valid extradition order.²⁰ The court held that the proper route was to challenge the indictment in the state trial court and, if necessary, seek review on direct appeal in state and federal courts before seeking a writ of error in federal court.²¹ The United States Supreme Court denied the NAACP's petition for certiorari, and Crawford was extradited to Loudoun County, Virginia.²²

During the subsequent state-court hearing on Crawford's motion to dismiss the grand-jury indictment, Houston questioned the state circuit judge “who had selected the grand jury that indicted Crawford.”²³ The judge

15. *Id.* (quoting letters from Charles Hamilton Houston to Walter F. White (Mar. 10, 1933) (Mar. 12, 1933) (Apr. 15, 1933)).

16. *Id.* at 167.

17. *See* *Hale v. Crawford*, 65 F.2d 739, 740–41 (1st Cir. 1933); SULLIVAN, *supra* note 2, at 167. As Professor Sullivan notes, Judge Lowell's decision was lauded as a landmark ruling in the fight against jury discrimination and initiated calls by some southern members of Congress for Lowell's impeachment. *See* RAWN JAMES, JR., *ROOT AND BRANCH: CHARLES HAMILTON HOUSTON, THURGOOD MARSHALL, AND THE STRUGGLE TO END SEGREGATION* 3–4 (2010); SULLIVAN, *supra* note 2, at 167; *see also* KENNETH MACK, *REPRESENTING A RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (forthcoming Sept. 2012) (on file with author).

18. *See Crawford*, 65 F.2d at 740.

19. *See id.* at 745. The court acknowledged *Strauder v. West Virginia*, 100 U.S. 303 (1879), and *Ex parte Virginia*, 100 U.S. 339, 346 (1879), and found “that the discrimination exercised by the state officers of Virginia in making up the lists and drawings of the grand jurors by whom Crawford was indicted, was an infringement of his rights guaranteed by the Fourteenth Amendment.” *Crawford*, 65 F.2d at 745.

20. *See Crawford*, 65 F.2d at 744.

21. *See id.* at 746–47.

22. *See Crawford v. Hale*, 290 U.S. 674 (1933); KLEBANOW & JONAS, *supra* note 10, at 219.

23. *See* KLUGER, *supra* note 1, at 150–51.

reluctantly admitted that Loudoun County had a custom of having white-only grand juries because he did not know of any African Americans in the county qualified for grand jury service.²⁴ Houston then called to the stand more than a dozen African American residents of Loudoun County, all of whom testified as to their qualifications for grand jury service.²⁵ Despite Houston's skillful questioning and powerful summation, the court rejected Crawford's motion.²⁶ After Houston's unsuccessful attempt to have the Virginia trial court dismiss the indictment against Crawford on the grounds of grand jury exclusion, Crawford was tried for and convicted of murder.²⁷ For strategic reasons, Houston declined to appeal the grand-jury-discrimination issue.²⁸

Although Houston was unsuccessful in pressing the grand-jury-exclusion claim in *Crawford*, the episode effected change in Virginia as "blacks began to appear on grand jury lists in several Virginia counties for the first time in thirty years."²⁹ Houston's strategy of challenging the systematic exclusion of blacks from the grand jury highlighted an avenue that defense lawyers had been utilizing in criminal cases since the Reconstruction Era. Most importantly, however, such attacks on discriminatory grand-jury selection practices would slowly shape the Supreme Court's jury-selection-equal-protection jurisprudence and, ultimately, would help to pave the way for *Batson*.

B. CONTEXT MATTERS

Early in the *Batson* opinion, the United States Supreme Court declared that "[t]he basic principles prohibiting exclusion of persons from participation in jury service on account of their race 'are essentially the same for grand juries and for petit juries.'"³⁰ But is this necessarily so? Of course, broad equal protection principles apply in both contexts; the Fourteenth Amendment prohibits the exclusion of blacks from grand juries and petit

24. See *id.* at 151; see also JAMES, *supra* note 17, at 6-7.

25. See KLUGER, *supra* note 1, at 151.

26. See *id.* at 151-52.

27. See *id.* at 152-54; SULLIVAN, *supra* note 2, at 184-85.

28. Crawford's initial story and alibi supporting his protestations of innocence began to crumble under closer scrutiny leading up to trial. SULLIVAN, *supra* note 2, at 184. In the end, Houston was forced to focus on persuading the jury to reject the death penalty, *id.* at 185, an unlikely result in a case of a black defendant charged with the brutal murder of a wealthy white woman in the 1930s. For a fascinating treatment of the story of the Crawford murder trial, the complex strategic choices made by Houston in convincing the jury to spare Crawford's life, and the symbolic significance of an extraordinarily talented African American lawyer taking center stage in a high-profile case in a Southern courtroom, see JAMES, *supra* note 17, at 1-15; KLEBANOW & JONAS, *supra* note 10, at 218-20; KLUGER, *supra* note 1, at 147-54; MACK, *supra* note 17; SULLIVAN, *supra* note 2, at 184-86.

29. SULLIVAN, *supra* note 2, at 184; see also KLUGER, *supra* note 1, at 153.

30. *Batson v. Kentucky*, 476 U.S. 79, 84 n.3 (1986).

juries alike. However, do the distinct differences in context between grand jury selection and petit jury selection make it inappropriate to consider the grand jury when thinking about the principles underlying *Batson*?

After all, grand jury selection is a notoriously low-visibility exercise. Many grand jury selection procedures involve only a court employee (such as a clerk or jury commissioner) or a paneling judge.³¹ This lack of transparency means that defense counsel often has little or no opportunity to scrutinize how or why individuals are selected for service on a particular grand jury panel.³² This differs greatly from petit jury selection, which takes place on the record in open court and involves the participation of the judge, prosecutor, and defense counsel. Furthermore, whereas the institution of the petit jury is often celebrated as the crown jewel of our constitutional democracy,³³ the grand jury suffers from the reputation of being “a weak, passive, and . . . unnecessary screening organ.”³⁴ Indeed, the Supreme Court held in 1884 that a grand jury indictment was not a requisite of due process in state criminal cases.³⁵ Finally, and most profoundly, there are no peremptory challenges in the context of grand jury selection. The discriminatory exercise of the peremptory challenge—the issue at the very heart of the *Batson* case—has no role in grand jury selection.

Nevertheless, there are important parallels between grand jury selection and petit jury selection, aside from the shared susceptibility to equal protection scrutiny. As grand jurors and petit jurors typically are drawn from the same pool of potential jurors and the same jury box, discriminatory actions often impact the composition of both bodies. Furthermore, jurisdictions that intentionally excluded blacks from the grand jury typically intentionally excluded blacks from the petit jury.³⁶ Also, it is safe to say that

31. See, e.g., Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–1878 (2006). In some districts in the federal system, a representative of the United States Attorney sometimes participates in grand jury selection and empanelment.

32. See *id.*; FED. R. CRIM. P. 6(b)(2); see also U.S. DEP'T OF JUSTICE, FEDERAL GRAND JURY PRACTICE 4–7 (2000).

33. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968).

34. Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 705 (2008); see also Roger A. Fairfax, Jr., *Remaking the Grand Jury*, in *GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY* 323, 324–25 (Roger A. Fairfax, Jr. ed., 2011) (“Why retain the grand jury? Given the low esteem in which the grand jury is held in American legal culture, it is surprising that we have not followed the lead of our English forbears and abolished the whole enterprise. Complaints about the grand jury run the gamut from assertions that it imposes unnecessary costs on the system, to the allegation that it is the complete captive of the prosecution.”).

35. See *Hurtado v. California*, 110 U.S. 516 (1884).

36. However, some jurisdictions permitted a token number of blacks to serve on grand juries (where unanimity is not required), even though they excluded blacks from petit juries (where unanimity is typically, but not always, required). See, e.g., Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141, 142 (2006). In fact, two blacks served on the grand jury that indicted the petitioner in *Swain v. Alabama*. See, e.g., *Swain v. Alabama*, 380 U.S. 202, 205 (1965). This does not mean, however, that a lone

certain procedural issues—including the limited statutory right of removal of state criminal cases to federal court—contributed to the grand jury's central role in the historical development of jury selection equal protection jurisprudence.³⁷

In the end, it is important to consider the role that challenges to discriminatory grand jury selection played in the development of the principles underpinning *Batson*. Indeed, the Supreme Court may have felt the need to affirm that “[t]he basic principles prohibiting exclusion of persons from participation in jury service on account of their race ‘are essentially the same for grand juries and for petit juries’”³⁸ because it could scarcely justify the holding in *Batson* without resting upon the equal-protection jurisprudence developed in the context of the grand-jury cases stretching back over one hundred years. This Essay considers two aspects of the *Batson* decision—the equal-protection foundation upon which the opinion relies and its recalibration of the evidentiary burden necessary for challenges to discriminatory peremptory strikes—and suggests that these pillars upon which *Batson* rests were forged in the context of challenges to the grand jury.

II. GRAND JURY SELECTION EQUAL PROTECTION JURISPRUDENCE ON THE ROAD TO *BATSON*

Part Two of the *Batson* decision is devoted to recounting and reaffirming the notion “that a ‘State’s purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.’”³⁹ Many of the cases cited by the Court throughout its review of this equal-protection jury-selection jurisprudence involved challenges to discriminatory *grand* jury selection.

grand juror cannot make a difference. Richard Kluger, in his seminal book, recounts the story of Justice Marshall’s father, Will Marshall, a Baltimore waiter who became the first African American grand juror to serve in the city. See KLUGER, *supra* note 1, at 175–76. Suspicious of the motives of his fellow grand jurors, who would inquire as to the race of the target of the grand jury investigation in each case, the senior Marshall prevailed upon the grand jury foreman to disallow such inquiries in future cases. See *id.* at 176.

37. See *infra* Part II.

38. *Batson v. Kentucky*, 476 U.S. 79, 84 n.3 (1986) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 626 n.3 (1972)).

39. *Id.* at 84 (quoting *Swain v. Alabama*, 380 U.S. 202, 203–04 (1965)); see also *id.* at 84–89. The petitioner in *Batson*, constrained by the belief *Swain v. Alabama* foreclosed an equal protection argument within the facts of the case, rested his claim primarily on a fair cross-section argument under the Sixth Amendment. See *id.* at 83–84; Brief for Petitioner, *Batson*, 476 U.S. 79 (No. 84-6263), 1985 WL 66782 at *4–5. However, amicus briefs were free to raise squarely the equal protection issue—and the invitation to overturn *Swain*. See Brief for the Lawyers’ Committee for Civil Rights Under Law as Amicus Curiae, *Batson*, 476 U.S. 79 (No. 84-6263), 1985 WL 669920, at *11–17; Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc., the American Jewish Committee, and the American Jewish Congress, *Batson*, 476 U.S. 79 (No. 84-6263), 1984 WL 565907 at *24–36.

The Fourteenth Amendment's promise of equal protection of the laws failed to put an end to the exclusion of blacks on grand and petit juries in many parts of the country in the late-nineteenth century.⁴⁰ Congress sought to enforce the provisions of the amendment with the Civil Rights Act of 1875.⁴¹ Footnote three of the *Batson* decision cited 18 U.S.C. § 243 for the proposition that "[t]he basic principles prohibiting exclusion of persons from participation in [grand and petit] jury service . . . are reinforced by the criminal laws of the United States."⁴² Section 243 derives from the Civil Rights Act of 1875,⁴³ the sweeping Reconstruction-era civil-rights legislation, significant portions of which were struck down by the Court in 1883.⁴⁴ Section 4 of the civil-rights legislation, which had survived constitutional challenges in earlier cases,⁴⁵ pertained to grand jury and petit jury service:

Sec. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.⁴⁶

Notably, this statute covered both grand jury and petit jury discrimination. Furthermore, it gave standing to the black person (potential juror) discriminated against, rather than to the defendant being indicted or convicted.

Four years after its passage, the constitutionality of Section 4 of the 1875 Act was challenged in *Ex parte Virginia*.⁴⁷ The Supreme Court held that Section 4 was authorized under the Thirteenth and Fourteenth

40. See CHRISTOPHER WALDREP, *JURY DISCRIMINATION: THE SUPREME COURT, PUBLIC OPINION, AND A GRASSROOTS FIGHT FOR RACIAL EQUALITY IN MISSISSIPPI* 153–200 (2010); see also KLUGER, *supra* note 1, at 61–63.

41. See *Neal v. Delaware*, 103 U.S. 370, 386 (1881).

42. *Batson*, 476 U.S. at 84 n.3 (citations omitted) (internal quotation marks omitted).

43. Civil Rights Act of 1875, ch. 114, 18 Stat. 335. Interestingly, under the legislation, a prosecutor who “willfully fail[ed] to institute and prosecute” violations of the 1875 Act was subject to a \$500 forfeiture or a misdemeanor conviction punishable by a fine of between \$1000 and \$5000. See *id.* § 3.

44. See Civil Rights Cases, 109 U.S. 3 (1883) (striking down Sections 1 and 2 of the legislation pertaining to public accommodations); WILLIAM T. COLEMAN WITH DONALD T. BLISS, *COUNSEL FOR THE SITUATION: SHAPING THE LAW TO REALIZE AMERICA’S PROMISE* 113 (2010); John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, 6 PROLOGUE 225, 234–35 (1974).

45. See *infra* notes 47–48 and accompanying text.

46. § 4, 18 Stat. at 336–37.

47. *Ex parte Virginia*, 100 U.S. 339 (1879).

Amendments and that a state judge who discriminated against blacks in selecting grand jurors could be held to answer for a violation of the 1875 Act because jury selection was a ministerial action, not an immunity-protected judicial act.⁴⁸ In dissent, Justice Field cited federalism concerns with the federal regulation of state juror-selection practices and argued that eligibility for jury service is not an incident of citizenship, pointing out that women, minors, and the elderly are all citizens yet regularly were barred from jury service.⁴⁹ Justice Field also employed a number of slippery-slope arguments, positing that a requirement of jury diversity ultimately would lead to a requirement of *bench* diversity and suggesting that if equal protection required a diverse jury for a fair trial, then perhaps it also would demand an all-black jury in cases involving black defendants.⁵⁰

As the 1875 Civil Rights Act was being implemented and challenged in the lower courts, the U.S. Supreme Court began deciding a line of cases defining the parameters of the Fourteenth Amendment's regulation of state jury-selection practices. These cases would establish the bedrock equal protection principles upon which *Batson* and its progeny rest. Most of these cases involved challenges to grand-jury-selection practices. Perhaps the most significant of these cases was one of the earliest—*Strauder v. West Virginia*.⁵¹

In *Strauder*, the Supreme Court “decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded.”⁵² West Virginia, by statute, limited jury service to white males.⁵³ The Court reversed the conviction of a black defendant in West Virginia who challenged the all-white grand jury that indicted him and the petit jury that convicted him on the grounds that the state's exclusion of blacks from jury eligibility violated the Fourteenth Amendment.⁵⁴ The Court was careful to emphasize, however, that the question it answered was 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 . . . 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.⁵⁵ The Supreme Court would revisit this distinction between jury diversity on the one hand and

48. *Id.* at 348–49.

49. *Id.* at 367 (Field, J., dissenting).

50. *Id.* at 368–69 (Field, J., dissenting).

51. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

52. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986).

53. *Strauder*, 100 U.S. at 305.

54. *Id.* at 312. The Court also reaffirmed the federal removal statute, § 641, which permitted removal of state criminal cases to federal court. *See id.* at 311–12.

55. *Id.* at 305.

anti-discrimination on the other hand time and time again, including in *Batson* itself.⁵⁶ For example, in *Virginia v. Rives*, a case challenging discrimination in the selection of the grand jury and the petit jury, one of the defendant's arguments was that the petit jury should have included blacks, given the racial makeup of the county.⁵⁷ The Court emphasized that a diverse jury is not essential to the equal protection of the laws; all that the Fourteenth Amendment guarantees to the defendant is "that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color."⁵⁸ A year later, in *Neal v. Delaware*, the Court reversed a conviction of a black defendant by an all-white petit jury on an indictment returned by an all-white grand jury, where it was established that black grand jurors had been excluded on the premise that blacks were not fit to serve on juries.⁵⁹ The Court reaffirmed its stance in *Strauder*, stating:

that to compel a colored man to submit to a trial before a jury drawn from a panel from which was excluded, because of their color, every man of his race, however well qualified by education and character to discharge the functions of jurors, was a denial of the equal protection of the laws⁶⁰

However, the Court was careful to underscore its position in *Virginia v. Rives* that the Constitution does not guarantee jury diversity, only the nonexclusion of blacks.⁶¹

Strauder, *Rives*, and *Neal* were part of a line of cases decided under the federal civil-rights removal statute, which was established by the Civil Rights Act of 1866.⁶² Section 641 of the Revised Statutes permitted a state criminal defendant to remove a criminal prosecution to federal court if the state's

56. *Batson*, 476 U.S. at 85–86 & nn.5–6.

57. *Virginia v. Rives*, 100 U.S. 313, 315–16 (1879).

58. *Id.* at 323; see also KLUGER, *supra* note 1, at 62–63.

59. *Neal v. Delaware*, 103 U.S. 370, 396–98 (1880). As the chief justice of the Delaware court stated in the case below in connection with the state's concession that blacks had never been permitted to serve on juries: "that none but white men were selected is in nowise remarkable in view of the fact—too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries." *Id.* at 393–94 (internal quotation marks omitted).

60. *Id.* at 386.

61. *Id.* at 394 ("We repeat what was said in [*Virginia v. Rives*], that while a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, 'that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.'"). Justice Field dissented, arguing, *inter alia*, that the absence of black jurors did not necessarily mean that blacks were excluded because of race. See *id.* at 401 (Field, J., dissenting).

62. *Georgia v. Rachel*, 384 U.S. 780, 786 (1966).

initiation of the prosecution violated his federal constitutional or statutory civil rights.⁶³ However, the Court interpreted the statute to have three significant limitations. First, the constitutional deprivations triggering removal were not coextensive with the Fourteenth Amendment.⁶⁴ Therefore, not all constitutional deprivations would trigger removal under § 641.⁶⁵ Second, the Court developed the view that only deprivations pursuant to valid, facially discriminatory state statutes or constitutional provisions were bases for removal under § 641.⁶⁶ For instance, if a state officer—such as a judge or jury commissioner—excluded blacks from a grand jury even though the state jury-qualification law was not facially discriminatory, the resulting constitutional deprivation would not be grounds for removal. However, if the state officer dutifully followed a facially discriminatory law and excluded blacks from the grand jury because of it, then § 641 would permit removal because the officer had acted pursuant to legal authority.⁶⁷ Finally, and perhaps most importantly for present purposes, the statute provided relief for *pretrial* deprivations; in other words,

63. 18 R.S. § 641 (1874). In 1911, the provision was substantially carried forward in the Judicial Code of 1911, ch. 231, § 31, 36 Stat. 1087, 1096, and, in 1926, at 28 U.S.C. § 74 (1926). Since 1948, the removal provision has been codified at 28 U.S.C. § 1443 and now reads:

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. § 1443 (2006); see also *Rachel*, 384 U.S. at 788–90; Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction To Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965).

64. See *Neal*, 103 U.S. at 386 (“[T]he constitutional amendment [is] broader than the provisions of sect. 641 of the Revised Statutes. . .”).

65. See *id.* at 386–87.

66. See, e.g., *Williams v. Mississippi*, 170 U.S. 213, 225 (1898); *Bush v. Kentucky*, 107 U.S. 110, 122 (1883).

67. In *Neal*, the Court bent over backwards to deny application of § 641 where Delaware’s Constitution contained a facially discriminatory provision restricting the franchise—the basis for juror eligibility in the state—to white men. The Court reasoned that the Fifteenth Amendment to the Constitution had rendered the state constitutional provision a nullity and, therefore, a state officer who excluded blacks from grand jury service actually was violating state law (properly understood) and did not commit a constitutional deprivation sufficient to trigger removal under § 641. *Neal*, 103 U.S. at 388–93. One might easily suspect that this logic was a pretext for the pragmatic concern that a number of states in the South had yet to amend their constitutions to comply with the provisions of the Civil War Amendments and enforcing federal legislation. As a result, nearly every constitutional or civil-rights deprivation in criminal or civil cases would give rise to removal under § 641. See *id.* at 392; WALDREP, *supra* note 40, at 185.

it did not permit federal removal of state criminal cases for constitutional violations that took place *during* trial.⁶⁸

As the Court explained in *Neal*, § 641 “only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence.”⁶⁹ Constitutional deprivations taking place after trial had commenced were only remediable through direct appeal and habeas review in the state and federal courts.⁷⁰

Taken together, these limitations—particularly the pretrial-deprivation limitation—meant that challenging discrimination in the selection of the grand jury may have been the only realistic hope for black defendants seeking expedient preconviction relief from biased state criminal proceedings.⁷¹ As a result, many of these criminal removal proceedings—and subsequent equal-protection cases in the Supreme Court—were *grand jury* selection cases.⁷²

In *Carter v. Texas*, the Court relied on *Strauder*, *Neal*, and *Gibson* in reaffirming that the exclusion of all blacks from serving as grand jurors in a prosecution of *another black* denies him equal protection of the laws:

Whenever, by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal

68. See *Gibson v. Mississippi*, 162 U.S. 565, 581–82 (1896).

69. *Neal*, 103 U.S. at 386.

70. See *id.* at 386–87.

71. When black defendants challenged jury discrimination at this pretrial stage they typically *knew* blacks had been excluded from the grand jury but merely *anticipated* blacks would be excluded from the petit jury panel.

72. Another example of a grand jury selection case based on an application for removal under §641 can be found in *Gibson*. The *Gibson* Court reemphasized the limitation of the coverage of the removal statute to state discrimination authorized by law. See *Gibson*, 162 U.S. at 581, 585. In *Smith v. Mississippi*, 162 U.S. 592, 600 (1896), a case argued the same day as *Gibson*, the Court rejected another grand jury discrimination challenge on similar grounds to those articulated in *Gibson*. Interestingly, counsel for petitioner Smith, Cornelius J. Jones, and counsel for petitioner Gibson, Wilfred H. Smith and Emmanuel Moylneaux Hewlett, were all African American—the first time in American legal history that more than one black lawyer had been heard before the United States Supreme Court on different cases on the same day.” SMITH, *supra* note 9, at 294. Indeed, the Court, in *Gibson*, noted that the argument on behalf of the black defendant had been “forcibly presented by his counsel, who are of his race.” *Gibson*, 162 U.S. at 592. Two years later, Attorney Jones would argue and lose the Supreme Court grand jury selection discrimination case of *Williams v. Mississippi*, 170 U.S. 213 (1898). Attorneys Smith and Hewlett would later team together and successfully argue for the petitioner in *Carter v. Texas*, 177 U.S. 442 (1900), another grand jury selection case. See R. VOLNEY RISER, *DEFYING DISFRANCHISEMENT: BLACK VOTING RIGHTS ACTIVISM IN THE JIM CROW SOUTH, 1890–1908*, at 101 (2010).

prosecution of a person of the African race, the equal protection of the laws is denied⁷³

The Court would “consistently and repeatedly reaffirm[.]” *Carter*’s turn-of-the-century restatement of the equal protection lessons of the late nineteenth-century grand jury discrimination cases in grand jury and petit jury selection cases right up through *Batson* itself.⁷⁴

III. GRAND JURY SELECTION AND THE DEVELOPMENT OF THE *BATSON* FRAMEWORK

In Part Three of the *Batson* decision, the Court articulated the framework for “proving purposeful discrimination on the part of the State” in the context of peremptory challenges.⁷⁵ In doing so, the Court relied heavily upon a handful of cases that established the basic parameters of the evidentiary framework it applied to peremptory challenges in *Batson*.⁷⁶ Again, many of these keystone cases—like the aforementioned equal protection cases—were cases challenging discriminatory grand jury selection.

The late nineteenth-century grand jury cases did more than establish the equal protection principles upon which *Batson* rests. They also began to sketch the outlines of the Court’s determination of how advocates would have to prove jury selection discrimination. One aspect of this proof question involved the burden of proving purposeful discrimination and the resulting importance of access to sworn testimony from those in control of juror selection. For example, in *Carter*, the Texas Court of Criminal Appeals—the court of last resort in Texas for criminal appeals—acknowledged that it is virtually impossible for a criminal defendant to challenge the makeup of a grand jury array prior to indictment.⁷⁷ The Supreme Court jumped at the opportunity to clarify that courts must give criminal defendants a fair opportunity to challenge the grand jury array.⁷⁸ The Court made clear that defendants challenging grand jury composition must be permitted “to introduce witnesses to prove discrimination in the selection of jurors.”⁷⁹ *Neal* also addressed this question, with the Court chastising the state court for not allowing the defendant leave to gather evidence of his grand jury discrimination claim by calling jury

73. *Carter*, 177 U.S. at 447. Unlike many of the other cases discussed, *Carter* involved a black victim. See WALDREP, *supra* note 40, at 197.

74. *Batson v. Kentucky*, 476 U.S. 79, 84 (1986) (internal quotation marks omitted); see also *id.* at 85–89 (collecting cases).

75. *Id.* at 90.

76. *Id.* at 90–98.

77. See *Carter*, 177 U.S. at 446.

78. See also *id.* at 447; WALDREP, *supra* note 40, at 200.

79. WALDREP, *supra* note 40, at 200; see also *Carter*, 177 U.S. 442.

commissioners.⁸⁰ These cases foreshadowed the type of strategy showcased by Charles Hamilton Houston in the Crawford case. Houston's tactics—in surveying the local community, scouring jury, voter, and tax rolls, and comparing qualifications of white and black potential grand jurors—exemplified the sort of advocacy necessary to make such a claim.⁸¹

However, another facet of these cases was the Court's reluctant willingness to entertain "statistical" evidence to help establish a *prima facie* case of discrimination in jury selection. The Court's opinion in *Neal* used language and analysis that would become more common with time:

The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the State,—although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand,—presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States.⁸²

In *Norris v. Alabama*, one of the famous Scottsboro cases, the Court again confronted evidence produced by the defendant that no blacks had ever been called for grand jury service although there was a critical mass of blacks qualified to serve.⁸³ This sort of evidence, according to the Court, established a *prima facie* case of systematic discrimination in violation of the Equal Protection Clause.⁸⁴ The Court would repeat this approach to the use of evidence of systematic discrimination in case after case throughout the 1930s, 1940s, and 1950s.⁸⁵ Of course, the key innovation of *Batson* dealt with

80. *Neal v. Delaware*, 103 U.S. 370, 396 (1880); WALDREP, *supra* note 40, at 185; *see also Williams v. Mississippi*, 170 U.S. 213, 223 (1898) ("There is no charge against the officers to whom is submitted the selection of grand or petit jurors, or those who procure the lists of the jurors."); WALDREP, *supra* note 40, at 194–95 (noting that the *Williams* Court demanded "direct evidence that the deputies picking jurors consciously discriminated").

81. *See supra* Part I.A.

82. *Neal*, 103 U.S. at 397; *see also Castaneda v. Partida*, 430 U.S. 482, 502 (1977) (Marshall, J., concurring) ("This line of cases begins with the decision almost a century ago in *Neal v. Delaware* . . ."). Certainly, early shades of this also can be found in the arguments made by the petitioner in *Bush v. Kentucky*. *See* WALDREP, *supra* note 40, at 188 (quoting Brief for Plaintiff in Error at 22, *Bush v. Kentucky*, 107 U.S. 110 (1883)).

83. *Norris v. Alabama*, 294 U.S. 587, 591–92 (1935).

84. *See id.*; *see also* A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 161–62 (1996).

85. *See, e.g., Eubanks v. Louisiana*, 356 U.S. 584 (1958) (grand jury case); *Reece v. Georgia*, 350 U.S. 85 (1955) (grand jury case); *Hernandez v. Texas*, 347 U.S. 475 (1954) (grand and petit jury case); *Avery v. Georgia*, 345 U.S. 559 (1953) (petit jury case); *Cassell v. Texas*, 339 U.S. 282 (1950) (grand jury case); *Patton v. Mississippi*, 332 U.S. 463 (1947)

how to prove discrimination in an individual case. The Court would move slowly toward that question, however, winding its way through the 1960s and early 1970s when there were several significant cases considering the use of statistical evidence in challenges to grand jury and petit jury selection.

The 1965 case of *Swain v. Alabama*, which was partially overturned in *Batson*, serves as the point of departure for this line of cases. In *Swain*, the Court rejected a jury-discrimination challenge in a capital rape case.⁸⁶ Despite the underrepresentation of black males on jury panels and the lack of any black petit jurors in Talladega County for over a decade, the Court concluded that it was "wholly obvious that Alabama has not totally excluded a racial group from either grand or petit jury panels,"⁸⁷ as the Court had determined in certain other cases.⁸⁸ Also, recounting the "very old credentials" of the peremptory challenge,⁸⁹ the Court rejected the notion that there should be scrutiny of a prosecutor's reasons for exercising any particular peremptory challenge in a given criminal case.⁹⁰

The Court, however, did entertain the argument that exclusion of blacks from petit juries through the prosecutor's *systematic* use of peremptory challenges violated equal protection.⁹¹ Nevertheless, the Court determined that *Swain* had not made out a *prima facie* case because he presented only evidence of the peremptory challenges exercised in the instant case; proof of discrimination would require evidence of a pattern of discriminatory strikes across other cases.⁹² Furthermore, even though the record was clear that no blacks had served on a petit jury in over a decade, the Court noted that there was no proof that exclusion of blacks was not the result of defendants' peremptory strikes against black members of the venire.⁹³ The dissent accused the majority of undermining *Strauder* and its progeny and "creat[ing] additional barriers to the elimination of jury

(grand and petit jury case); *Hill v. Texas*, 316 U.S. 400 (1942) (grand jury case); *Smith v. Texas*, 311 U.S. 128 (1940) (grand jury case); *Pierre v. Louisiana*, 306 U.S. 354 (1939) (grand and petit jury). In the 1935 jury-discrimination case of *Hollins v. Oklahoma*, the Supreme Court issued a per curiam opinion reaffirming *Norris* and giving Charles Hamilton Houston a victory in the United States Supreme Court. See *Hollins v. Oklahoma*, 296 U.S. 394 (1935) (per curiam); KLUGER, *supra* note 1, at 161.

86. See *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986); CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW* 200-01 (1998).

87. *Swain*, 380 U.S. at 206.

88. *Id.* at 205-09.

89. *Id.* at 212.

90. *Id.* at 209-22.

91. *Id.* at 222-24.

92. *Id.* at 227 ("[T]he defendant must . . . show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time.").

93. *Id.* at 224-26.

discrimination practices which have operated in many communities to nullify the command of the Equal Protection Clause.”⁹⁴

Swain launched a sustained run of Supreme Court cases examining how statistical evidence of jury discrimination should be weighed and considered in equal protection challenges. Many of these cases—like those in the first half of the century—would involve challenges to the grand jury.⁹⁵ In this post-*Swain* jurisprudence, the *Batson* framework continued to take shape. In *Alexander v. Louisiana*, the defendant was indicted by an all-white grand jury in a parish where the eligible grand jury population was twenty-one percent black.⁹⁶ The jury commissioners had (ostensibly) randomly refined the list of eligible grand jurors until only one black remained in the grand jury venire, and ultimately, no blacks were included on the grand jury that indicted the defendant.⁹⁷ Alexander argued:

[T]he substantial disparity between the proportion of blacks chosen for jury duty and the proportion of blacks in the eligible population raises a strong inference that racial discrimination and not chance has produced this result because elementary principles of probability make it extremely unlikely that a random selection process would, at each stage, have so consistently reduced the number of Negroes.⁹⁸

The Court concluded that Alexander had made out a *prima facie* case based on both the racial disparity and the susceptibility of the Lafayette Parish jury commissioners’ selection system to manipulation for discriminatory purposes:

This Court has never announced mathematical standards for the demonstration of “systematic” exclusion of blacks but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors. The progressive decimation of potential Negro grand jurors is indeed striking here, but we do not rest our conclusion that petitioner has demonstrated a *prima facie* case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral. The racial designation on

94. *Id.* at 231 (Goldberg, J., dissenting). The dissent cited the 1961 Report of the United States Commission on Civil Rights for the proposition that “[t]he practice of racial exclusion from juries persists today even though it has long stood indicted as a serious violation of the 14th amendment.” *Id.* (alteration in original) (internal quotation marks omitted).

95. See, e.g., *Turner v. Fouche*, 396 U.S. 346 (1970) (challenging grand jury); *Jones v. Georgia*, 389 U.S. 24 (1967) (challenging grand and petit jury); *Whitus v. Georgia*, 385 U.S. 545 (1967) (challenging grand and petit jury).

96. *Alexander v. Louisiana*, 405 U.S. 625, 627 (1972).

97. *Id.* at 627–28.

98. *Id.* at 630.

both the questionnaire and the information card provided a clear and easy opportunity for racial discrimination.⁹⁹

Once the *prima facie* case of discrimination had been made, the Court further reasoned that “the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.”¹⁰⁰ This burden-shifting framework, which will sound familiar to students of *Batson*, was utilized in *Alexander* and other cases involving challenges to grand jury selection discrimination.¹⁰¹

Less than a decade before *Batson*, the Court decided *Castaneda v. Partida*, a case involving a Mexican American defendant who challenged the underrepresentation of members of his racial group on the grand jury produced by the Texas “key-man” grand jury selection system.¹⁰² Not only did this case deal with alleged discrimination against Mexican Americans rather than blacks and present the issue of underrepresentation rather than the total exclusion of a racial group, it involved a jurisdiction in which Mexican Americans were said to have a “governing majority,” and where three of the five jury commissioners were Mexican American. Despite the contextual differences presented by *Castaneda*,¹⁰³ the Court seemed to seize upon the case to complete its refinement and explanation of the burden of proving discriminatory grand jury selection—a burden that the Court developed over decades of cases:

[I]n order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial

99. *Id.*

100. *Id.* at 631–32. *Alexander*, a black man, also challenged Louisiana’s exemption of women from compelled grand jury service, a novel claim the Court did not reach based on the doctrine of constitutional avoidance and the curious notion that state grand jury indictment is not required by due process under *Hurtado v. California*, 110 U.S. 516 (1884). *See Alexander*, 405 U.S. at 633. Justice Douglas’s concurrence urged the court to decide the question and to overturn *Strauder*’s countenance of gender discrimination in grand and petit jury selection. *See id.* at 635 (Douglas, J., concurring). Justice Douglas also reiterated the Court’s earlier statement that although a state is not constitutionally bound to require grand jury indictment for felony offenses, “[o]nce the State chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria.” *Id.* at 635–36 (quoting *Carter v. Jury Comm’n*, 396 U.S. 320 (1970)). That same year, the Court decided *Peters v. Kiff*, which held that a *white* defendant could challenge a grand jury from which *blacks* were excluded. *See Peters v. Kiff*, 407 U.S. 493 (1972).

101. *See, e.g., Turner v. Fouche*, 396 U.S. 346 (1970) (grand jury case); *Eubanks v. Louisiana*, 356 U.S. 584 (1958) (grand jury case); *Hernandez v. Texas*, 347 U.S. 475 (1954) (grand and petit jury case).

102. *See Castaneda v. Partida*, 430 U.S. 482, 485–92 (1977).

103. These issues resulted in a spirited exchange between Justice Marshall, who concurred, *id.* at 501–03 (Marshall, J., concurring), and Justice Powell, who wrote a separate dissent, *id.* at 507–18 (Powell, J., dissenting).

underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. . . . Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. Once the defendant has shown substantial underrepresentation of his group, he has made out a *prima facie* case of discriminatory purpose, and the burden then shifts to the State to rebut [the] case.¹⁰⁴

A review of Part III.C of the *Batson* decision demonstrates clearly that the evidentiary standards it set out for challenging a prosecutor's race-based peremptory strike of a petit juror were evolved from the Court's jurisprudence developed in the *grand* jury selection discrimination cases over the previous half century.¹⁰⁵ Thus, as with its equal protection foundation, *Batson* clearly reflects its grand jury DNA.¹⁰⁶

CONCLUSION

As this Essay argues, the jurisprudence that arose from a century of challenges to discriminatory *grand* jury selection practices laid the foundation for the *Batson* decision. Although the *Batson* decision represented a tremendous victory for the principles muted in *Swain*,¹⁰⁷ some have questioned whether it does enough to eliminate racial discrimination in peremptory challenges.¹⁰⁸ Indeed, in his *Batson* concurrence, Justice Thurgood Marshall argued that the only way to "end the racial discrimination that peremptories inject into the jury-selection process"¹⁰⁹ is "by eliminating peremptory challenges entirely."¹¹⁰ The extent to which *Batson* has lived up to its promise is explored in the many contributions to this symposium issue.

104. *Id.* at 494–95 (majority opinion) (internal citations omitted).

105. See *Batson v. Kentucky*, 476 U.S. 79, 96–97 (1986).

106. Other significant grand jury selection cases in the years leading up to *Batson* include *Rose v. Mitchell*, 443 U.S. 545 (1979) (grand jury foreperson selection); *Hobby v. United States*, 468 U.S. 339 (1984) (grand jury foreperson selection); and *Vasquez v. Hillery*, 474 U.S. 254 (1986) (grand jury selection).

107. See GREENBERG, *supra* note 8, at 460; MOTLEY, *supra* note 86, at 200–01.

108. See, e.g., Charles J. Ogletree, *Blind Justice? Race, the Constitution, and the Justice System*, in *AFRICAN AMERICANS AND THE LIVING CONSTITUTION* 235, 237–38 (John Hope Franklin & Genna Rae McNeil eds., 1995).

109. *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring).

110. *Id.* at 103.

However, in our “world of guilty pleas,”¹¹¹ it may be advisable to focus more attention on the grand jury. As jury trials become increasingly obscure, the grand jury touches many more criminal cases than does the petit jury. As the author has argued elsewhere,¹¹² the grand jury is an organ with tremendous potential to contribute to and improve the administration of modern criminal justice. Perhaps a first step to greater appreciation of the grand jury is to acknowledge the heritage it shares with the more celebrated petit jury in the lengthy struggle to eradicate discrimination in the selection of jurors. In this way, the jurisprudence developed in the context of grand jury discrimination cases stretching back to the Reconstruction era can serve as the catalyst for a contemporary conversation about participation and equality in the administration of criminal justice.

111. See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001) (“Our world is no longer one of trials, but of guilty pleas.”); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90 (2005) (citing data showing that over 95% of federal defendants plead guilty).

112. See, e.g., Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339 (2010).