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RIGHTS HELD HOSTAGE: RACE, IDEOLOGY AND THE PEREMPTORY CHALLENGE

Kenneth B. Nunn*

Prologue

In the spring of 1991, a gang of baton-wielding Los Angeles police officers savagely beat motorist Rodney King at the intersection of Foothill Boulevard and Osborne Street. 1 By a quirk of fate, a bystander captured the assault on videotape and, within days, much of the nation became witness to the excesses of the Los Angeles Police Department. 2 Most Americans reacted with shock and outrage 3 to this apparent police rampage and the Department's subsequent cover-up attempt. 4 Yet, thirteen months later, a jury of ten whites, one Latino and one Asian-American returned verdicts of acquittal on ten of the eleven charges filed against the officers. 5

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2 George Holiday videotaped the assault and sold the tape to Los Angeles television station KTLA. The footage was picked up by the major television networks and broadcast around the country. Dunne, supra note 1, at 24.


4 Police reports of the incident claimed that King attacked officers, resisted arrest, and suffered only minor injuries before he was ultimately "subdued by several [officers] using the swarm technique." These claims were later found to be untrue. Christopher Commission Report, supra note 1, at 9.

5 Although over 20 police officers were on the scene when Mr. King was attacked, only 4, Stacey Koon, Laurence Powell, Timothy Wind, and Theodore Briseno, were ultimately charged with any crime. Richard A. Serrano & Ronald L. Soble, Grand Jury Widens Probe of King Beating, L.A. Times, Mar. 29, 1991, at A1, A22. Each of the four was charged with three felony counts—assault with a deadly weapon, filing a false police report, and accessory after the fact to a felony—and one misdemeanor, excessive use of force as a police officer. Amended Indictment, People v. Powell, et. al., Cal. Super. Ct.
The verdicts were immediately attacked as racist (King is Black, his attackers were white), and some jurors, who requested anonymity, lent credence to this assessment by their post-trial comments. Echoing a theory proffered by the defense, one juror stated that Rodney King "was in full control" of the situation, even as he absorbed more than fifty blows from police officers armed with service revolvers, batons and Tasers. Such an explanation (for the jury's leniency) recalls the racist stereotype of the "Black savage." It transforms Rodney King into a wild and fe-

for L.A. Cty. No. BA-035498. The jury returned verdicts of acquittal on all counts except for the excessive use of force charge against Officer Powell, on which the jury was unable to reach a decision. Seth Mydans, Los Angeles Policemen Acquitted in Taped Beating, N.Y. TIMES, Apr. 30, 1992, at A1, A8 [hereinafter Mydans, Los Angeles Policemen Acquitted].

6 Mydans, Los Angeles Policemen Acquitted, supra note 5, at A1.

7 I use "Black" and "African-American" interchangeably throughout this Article to refer to American citizens of African descent. "Black" denotes racial and cultural identity rather than mere physical appearance and is therefore capitalized. The word "white," on the other hand, is not capitalized because it is not ordinarily used in this sense. See Joan Mahoney, The Black Baby Doll: Transracial Adoption and Cultural Preservation, 59 UMKC L. REV. 487, n.1 ("'white'. . . . denotes a number of separate ethnic or cultural groups"). Some commentators have offered a political rationale for the capitalization of terms describing people of African descent, arguing that the use of lower case terms to describe Blacks indicates their lower status vis-à-vis other ethnic groups whose descriptors are capitalized. See, e.g., Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1332 (1988) [hereinafter Crenshaw, Race, Reform, and Retrenchment]; Neil Gotanda, A Critique of "Our Constitution is Color-Blind," 44 STAN. L. REV. 1, 4 n.12 (1991) [hereinafter Gotanda, Color-Blind].

8 The officers' defense team argued that Mr. King posed a continuing threat to the officers and that the officers used only what force was necessary to take King into custody without harm to themselves. One defense attorney argued, "The circumstances [of the King incident] were consistent with the job [Timothy Wind] was hired to do. He was part of the line between society and chaos." Mydans, Los Angeles Policemen Acquitted, supra note 5, at A8. Another attorney added that Officer Powell's batonwork was justified because he was not "paid to roll around in the dirt with the likes of Rodney Glenn King." People v. Powell, et. al., Cal. Super. Ct. for L.A. Cty., No. BA-035498 (Closing Argument for Defendant Laurence M. Powell by Attorney Michael Stone) 3.

9 Lee A. Daniels, Some of the Jurors Speak, Giving Sharply Differing Views, N.Y. TIMES, May 1, 1992, at A10. This particular juror expressed the belief that "Rodney King was not being abused. Rodney King was directing the action . . . [A]s long as he fought the patrolman, the policemen had to continue to try to maintain him, to keep from having more erratic felonious actions." Id.

10 One of the central myths about people of African descent is the characterization of them as vicious, savage and animalistic. Conscious and unconscious racists use this stereotype to reduce African-Americans to subhuman status and to justify treating them as lesser beings. Psychiatrists Price Cobbs and William Grier, in their landmark book Black Rage, claim this stereotype has ensnared itself in American culture as the myth of the "bad n_____." They write:

Today black boys are admonished not to be a "bad nigger." No description need be offered; every black child knows what is meant. They are angry and hostile.
rocious Black "buck" who, like his counterpart in Hollywood fantasy, could somehow threaten life, limb and property while lying prone and surrounded by more than two dozen of Los Angeles' finest.

Yet the Rodney King verdict teaches more than the power of racial stereotypes over a particular jury, and more even than the enduring influence of racist images in American society. The King case is a textbook example of the use of the criminal justice system to subjugate African-Americans. The decision permitted the attackers of a member of the African-American community to go unpunished. Moreover, the verdict validated the attack against King, declaring open season on Blacks who happen to be stopped by the police. Juries in criminal cases do not merely determine facts; they grant or withhold social approbation for defendants' behavior. In the Rodney King case, where a videotape left so many facts undisputed, the jury's most significant action was its decision to place the stamp of approval on the use of brutal force against "unruly" Blacks. The predominantly Black residents of

__William Grier & Price Cobbs, Black Rage 65 (1968).__ Later, the psychiatrists note the psychological effects of this popular myth. They state that:

> Cultural stereotypes of the savage rapist-Negro express the fear that the black man will turn on his tormentors. Negro organizations dread the presence of the bad nigger. White merchants who have contact with black people have uneasy feelings when they see a tight mouth, a hard look, and an angry black face. The bad nigger in black men no doubt accounts for more worry in both races than any other single factor.

Id. at 66. __See also__ Winthrop Jordan, White Over Black 25–28, 114 (1968) (noting that fascination and fear of purported Black savagery began with first contact between the races and continued into the slavery era, fueled by the fear of slave insurrections); Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 13 (1992) [hereinafter Hacker, Two Nations] (arguing that the stigma of "the savage" prevents African-Americans from gaining full acceptance in American society).

11 American films have depicted and frequently continue to depict African-American males in this way. __See Donald Bogle, Toms, Coons, Mulattoes, Mammyes & Bucks: An Interpretive History of Blacks in American Film 13 (2d ed. 1989) (describing the stereotypical Hollywood "buck" as a "big, baadddd nigger[]], oversexed and savage, violent and frenzied").

12 This subjugates the Black community in part because punishment can be seen as morally and psychologically compensatory for the physical and psychic harm done to King and his family, friends and community. Failing to impose punishment, then, both deprives those victimized by the beating of retribution, and legitimates ideological judgments as to the lack of worth of African-Americans. __See sources cited at supra note 10.__
South Central Los Angeles received this message loud and clear, and registered their disapproval in a fit of self-destructive anger and despair within hours after the jury announced its decision.\textsuperscript{13}

Much of the commentary on the Rodney King verdict and its aftermath has focused on the decision to change the trial’s venue.\textsuperscript{14} But what if Mr. King’s car had come to a stop in Simi Valley and no venue change had been possible?\textsuperscript{15} What if there had been no George Holliday present to videotape the assault and the Rodney King incident had remained a garden variety resisting arrest case?\textsuperscript{16} Is there any doubt what the outcome would have been if the trial went before the same jury that heard the charges against Officers Briseno, Wind, Powell and Koon?

Rather than concentrating on venue, critics of the Rodney King decision might better focus on the jury selection process itself. For perhaps the most pressing question about the verdict is this: in a case so clearly implicating racism, why were there no Blacks on the jury? Whether Blacks were excluded “intentionally,” or whether their underrepresentation was a simple matter of demographics, their absence from the jury casts a shadow over the verdict, a shadow lengthened by the history of discrimination against African-Americans in this country. Given that Mr. King would probably have been the one on trial in the absence of a videotape, a thorough investigation of the jury selection process should concentrate particularly on the impact of juror bias on Black defendants. When juror bias leads to the unjust conviction of Black defendants\textsuperscript{17} or the unjust acquittal of whites who practice violence on Blacks, the criminal justice system becomes a mechanism for unjust social control.\textsuperscript{18} A race-conscious approach to

\textsuperscript{13} Seth Mydans, 11 Dead in Los Angeles Rioting; 4,000 Guard Troops Called Out as Fires and Looting Continue: Vandals Roam City, N.Y. TIMES, May 1, 1992, at A1.
\textsuperscript{15} In California, initial venue for a criminal prosecution is determined by reference to the county in which the crime took place. Cal. Penal Code § 777 (West 1985).
\textsuperscript{16} King was initially charged with evading arrest in violation of Cal. Penal Code § 69 (West 1988). Christopher Commission Report, supra note 1, at 8. He was released after four days when the prosecutor determined that not enough evidence existed to prosecute him on the charge.
\textsuperscript{17} By “unjust convictions” I mean to adopt Sheri Lynn Johnson’s definition embracing “totally blameless convicted defendants, the criminally culpable defendant guilty of a lesser offense than the offense of which he is convicted, and the factually guilty but legally not guilty convicted defendant.” Sheri Lynn Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1611, 1616 (1985) [hereinafter Johnson, Black Innocence].
\textsuperscript{18} Most egregiously, for example, law enforcement officials can accomplish this control by isolating activists or detaining members of a racial group \textit{en masse}. 
Rights Held Hostage

Introduction

This Article addresses the Supreme Court's application of the Equal Protection Clause to the selection of juries in criminal trials. Focusing on Black-white relations, it takes the position that efforts to eliminate racial discrimination in jury selection are successful only to the extent that they also eliminate the result of the discrimination—racial subjugation of Blacks through the criminal justice process. By this measure, the Supreme Court's recent jury selection cases are an abject failure.

The Court's application of colorblind principles to jury selection does little to improve the Equal Protection rights of Black defendants or excluded Black jurors, and even less to enhance the sorry state of race relations in this country. In recent jury selection cases, the Court has abandoned its earlier efforts to instill substantive racial equality in the jury trial of criminal defendants. Instead, it has embraced a surface, ultimately non-neutral, process neutrality in the selection of jurors. By adopting colorblind rhetoric and insisting that any rights or privileges extended to Blacks also be extended to whites, the Court hampers its ability to shape remedies that address courtroom discrimination particular to African-Americans.

The Court's recent race-neutral approach effects a radical transformation of its own jurisprudence in the jury selection area. In prior jury selection cases interpreting the Equal Protection Clause, the Court purposefully constructed race-conscious remedies to prevent racially motivated convictions. As a threshold matter, the Court required the defendant to be a member of the racial or ethnic group that was excluded from jury service in order to raise an Equal Protection claim. Specifically, the Court required such racial identity between the defendant and excluded venirepersons in cases alleging the prosecution's discriminatory use of peremptory challenges. The Court held that a prima facie case of discrimination was established when, in cases involving a

Black defendant, all Blacks were excluded from the pool of potential jurors despite the availability of eligible Blacks in the population at large. The Court did not adopt these race-conscious approaches haphazardly. Rather, it recognized the need for affirmative efforts to protect the Equal Protection rights of Black defendants and to neutralize the use of the jury selection process as an explicit means of racial subjugation.

The pragmatic color-consciousness of the Supreme Court’s jury selection jurisprudence stood in sharp contrast to the disingenuously utopian colorblind analysis that the Supreme Court has applied in other Equal Protection Clause contexts. In these other cases, the Supreme Court has focused consistently on eliminating what it perceives as “undeserved” Black rights rather than fashioning remedies that recognize the gross disparities between conditions for Blacks and whites in this country. The Court has demonstrated a misguided concern with equalizing the rights and privileges available to both races, in complete disregard for the goal of achieving substantive equality in results.

In Powers v. Ohio, the Court applied its new colorblind standard to the jury selection area. Powers permitted white defendants to avail themselves of Batson rights to contest the racially discriminatory exercise of peremptory challenges by prosecutors. By doing so, the Court, in true colorblind fashion, shifted its attention from equality of result to equality of process. The colorblind standard used by the Court ignores the central reality of racial oppression in America—that the preeminent form of racism is white racism. It fails to acknowledge that white defendants,

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22 By “explicit means” I am referring to the fact that the Court has not permitted the intentional exclusion of Blacks from jury service. See, e.g., Batson, 476 U.S. at 85. The Court has stopped short of adopting a disparate impact test for proving discrimination in the selection of juries.
23 See infra notes 42–55 and accompanying text.
25 This aspect of the Court’s recent civil rights decisions is discussed infra notes 38–63 and accompanying text.
27 See infra notes 138–154 and accompanying text.
28 By “white racism” I mean all conduct that privileges white interests over Black, whether conscious or unconscious, intentional or unintentional, individual or institutional, overt or covert.
though concerned only with avoiding convictions, now have license from the Court to appropriate the banner of racial equality for their own parochial purposes.

*Powers* was followed closely by *Georgia v. McCollum*,

which prevented white defendants from using their peremptory challenges to intentionally exclude Black jurors. While the result immediately reached in *McCollum* does not harm Black interests, its holding, applied under the colorblind analysis adopted in *Powers*, could prevent Black defendants from using their peremptory challenges to remove white jurors suspected of racism. Such practice would reinforce the use of the criminal justice system by whites as an instrument of racial subjugation.

This Article argues that colorblindness, as applied by the Supreme Court, is a form of racial politics that privileges white interests over Black. Part I defines colorblindness, exploring its meaning as general ideology and social theory, then examines the parameters and effects of colorblind judicial philosophy.

Part II describes how, prior to *Powers*, race-consciousness influenced the Supreme Court’s jury selection jurisprudence.

Part III critiques the Supreme Court’s holdings in *Powers* and *McCollum*, exploring the Court’s liberal use of colorblind rhetoric. Part III also explains how the Court, deviating from its prior doctrine, extended third party standing to white defendants—thus granting white defendants rights previously created for Black defendants—in an attempt to impose symmetry on the criminal jury selection process.

Part IV offers a counter-narrative to the *Powers/McCollum* conclusion that both Black and white criminal defendants should have the same prerogatives in selecting juries. This counter-narrative explores how whites and Blacks are situated differently with respect to jury discrimination and catalogues the harms that Blacks—particularly Black defendants—suffer as a result of that discrimination. Part IV argues that the shift in focus from how the criminal justice system may contribute to the subjugation of Blacks, to how defendants as a class are treated by the criminal process, brings political gains for the white majority and concrete negative consequences for African-Americans.

Finally, Part V concludes that in order to diminish the subjugation of African-Americans via the criminal process, the per-

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emptory challenge of Black venirepersons should be prohibited whenever there is a substantial likelihood that racial issues would impact the trial.

I. Colorblindness

Colorblindness, a social theory that proclaims that race should have no bearing on how an individual is treated,\(^{30}\) posits a world where all will be treated equally and race prejudice will wither away. Martin Luther King, Jr.’s famous *I Have a Dream* speech may be the quintessential expression of a colorblind view of society, a vision of a world in which people are judged by the “content of their character” rather than the color of their skin.\(^{31}\)

\(^{30}\) As I use the term here, “colorblindness” is analogous to such concepts as: “formal equality,” D. Marvin Jones, *The Death of the Employer: Image, Text, and Title VII*, 45 *VAND. L. REV.* 349, 379 (1992) (“The formal equality model of discrimination seeks to remove discrimination from its setting within broad historical and social patterns . . . and confine it to the narrow world of legal forms and classical legal values.”); “formal equal opportunity,” Roy Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 *SAN DIEGO L. REV.* 881, 886, 896 (1988) [hereinafter Brooks, *Racial Subordination*] (describing “formal equal opportunity” as a civil rights policy providing “a legalistic, formalistic type of equality”); “formal-race,” Gotanda, *Color-Blind*, supra note 7, at 4 (“formal-race . . . refers to socially constructed formal categories” of racial divisions which are “unconnected to social attributes such as culture . . . ”); and “racial non-recognition,” *id.* at 6 (defining this term as the “recognition of racial affiliation followed by the deliberate suppression of racial considerations”). All of these expressions describe an analytic formalism that factors race out of law. See, e.g., *id.* at 17 (arguing that racial non-recognition “permits a court to describe, to accommodate, and then to ignore issues of subordination”).

In *A Case for Race-Consciousness*, 91 *COLUM. L. REV.* 1060 (1991) [hereinafter Aleinikoff, *Race-Consciousness*], T. Alexander Aleinikoff contends that there are two kinds of colorblindness, weak and strong, and that race is irrelevant only under the strong variety. “Weak colorblindness,” on the other hand, “would not outlaw all recognition of race, but would condemn the use of race as a basis for the distribution of scarce resources or opportunities.” *id.* at 1079.


During the early years of the civil rights struggle, African-Americans often embraced colorblindness as a means of eliminating the oppressed status of Blacks in the United States. Since their lived experience was one of unequal treatment on the grounds of racial difference, the prospect of a world where all would be treated equally, at least in theory, was a considerable improvement.

Colorblindness, however, is thought to offer more than just a practical means of resolving the nation's racial problems. It has a moral dimension as well and it is often associated with univer-

measures as a means to achieving this goal. Martin Luther King, Jr., Why We Can't Wait 134-41 (1964). King wrote:

the nation . . . must incorporate in its planning some compensatory consideration for the handicaps [the Negro] has inherited from the past . . . . [We must] do something special for [the Negro] now, in order to balance the equation and equip him to compete . . . .

Id. at 146-47. See also Anthony Cook, Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr., 103 Harv. L. Rev. 985 (1990) (arguing that Dr. King realized that "colorblind" legalisms could not sweep away the United States' legacy of racism); David Garrow, Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference 310 (1986) (noting King's support for a "compensatory crash program" for Blacks).

On the other hand, King's program was not wholly race-conscious. In order to insure the support of the white working class, he was willing to extend remedial measures to "poor whites." Id. at 312. See Harold Cruse, Plural But Equal: A Critical Study of Blacks and Minorities in America's Plural Society 238-41, 256-57 (1987) for a convincing argument that King's positions on the need for integration and colorblindness were often contradictory. Professor Cruse notes, for example, that King's "transcendent moral postures on the universal brotherhood of man" were in conflict with his position as the "preeminent representative of the one and only traditional and 'separate' institution that blacks . . . controlled," which "neither King nor any of his brother preachers ever contemplated, intimated or suggested . . . should be integrated out of existence in deference to anyone's concept of racial equality." Id. at 241.


33 For treatments of the conditions of African-Americans prior to the general desegregation of American life, see generally, C. Vann Woodward, The Strange Career of Jim Crow (1974); August Meier & Elliot Rudwick, From Plantation to Ghetto (1970); August Meier & Elliot Rudwick, Along the Color Line (1976); E. Franklin Frazier, The Negro in the United States (1949); John H. Franklin, From Slavery to Freedom (1968); Howard Quint, Profile in Black and White: A Frank Portrait of South Carolina (1958). See also King, Why We Can't Wait 81-82 (a poignant description of the Black experience under segregation).

34 According to Dr. Marable, several false assumptions made colorblindness appealing. Chief among these was the belief that "as African-Americans escaped the ghetto and were more broadly distributed across the social class structure and institutions of society, racial tensions and bigotry would decline in significance." Marable, Race, Reform, and Rebellion, supra note 32, at 187.

35 See Liston Pope, The Kingdom Beyond Caste 71-72, 77-78 (1957). See also
salism and progressive thought. Implicit in colorblindness, then, is a form of racial symmetry in which “discrimination against whites gains the same disreputable status as discrimination against blacks.”

A. The Ascendancy of Colorblind Constitutionalism

The term “colorblind constitutionalism,” as used in this Article, refers to the application of colorblind ideology to the interpretation of the Equal Protection Clause. Colorblind interpretations of constitutionality focus exclusively on equality of treatment and are unconcerned with equality in the broader, result-oriented sense. Additionally, colorblind constitutionalism insists on strict scrutiny—rather than weaker tests such as rational basis or intermediate scrutiny—for review of government conduct that favors subjugated racial and ethnic groups. Colorblind constitutionalism thus fails to distinguish between minority and majority status and disallows affirmative steps to achieve racial justice. In this way, minority rights granted through government action are held hostage by the rhetoric of racial equality propounded by whites.

The variant of colorblind constitutionalism currently in vogue can be traced to the 1978 Supreme Court decision in University of California Regents v. Bakke. The centerpiece of this widely dis-
cussed "reverse discrimination" case is Justice Powell's concurring opinion, which has become the most influential judicial statement on how to shape an acceptable special admissions program. While Justice Powell did not dispense with affirmative action programs entirely, he made it clear that the Court would not tolerate disadvantages to so-called "innocent" whites, "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." To protect these whites, Powell wrote that the Court should require specific findings of past discrimination and apply strict scrutiny when whites were disadvantaged, even though this standard of review was traditionally applied only when members of suspect classes were subjected to discriminatory treatment. Contending that the Fourteenth Amendment was "framed in universal terms," Justice Powell concluded:

The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not afforded the same protection then it is not equal . . . . Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

Since Bakke, colorblindness has found expression as a dominant theme in the Court's equal protection jurisprudence. The opinions in Wygant v. Jackson Board of Education and City of

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43 The case arose when a white applicant contested the refusal of the University of California at Davis Medical School to admit him to its M.D. program when it admitted Black and Chicano applicants with lower admission test scores and lower undergraduate grades. Id. at 277–78.


45 Bakke, 438 U.S. at 310.

46 "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." Id. at 307.


48 Bakke, 438 U.S. at 293.

49 Id. at 289–91.

Richmond v. J.A. Croson Company\textsuperscript{51} are particularly revealing of the Court's growing commitment to colorblind ideology. In Wygant, the plurality held it constitutionally impermissible to favor more recently hired Black workers over whites with longer tenures during layoffs. Justice Powell, joined by Justices O'Connor and Rehnquist, wrote that "a 'core purpose of the Fourteenth Amendment' . . . is to 'do away with all governmentaly imposed discriminations based on race.'"\textsuperscript{52} Justice O'Connor's plurality opinion in Croson also employed colorblind rhetoric to justify the Court's repudiation of a minority set-aside plan.\textsuperscript{53} Writing that the "ultimate goal" of the Equal Protection Clause was to "eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race,"\textsuperscript{54} O'Connor appealed to the "dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement."\textsuperscript{55} Justices Kennedy\textsuperscript{56} and Scalia\textsuperscript{57} also weighed in with concurring opinions in favor of race-neutral constitutional analysis.

Judging by the positions taken in Wygant and Croson, at least five current Supreme Court Justices—O'Connor, Scalia, Rehnquist, Kennedy and White—subscribe to colorblindness as their philosophical basis for interpreting the Equal Protection Clause.\textsuperscript{58}

\textsuperscript{51} 488 U.S. 469 (1989).
\textsuperscript{52} Wygant, 476 U.S. at 277 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)). Elsewhere, the Wygant plurality declared that "This Court has 'consistently repudiated distinctions between citizens because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" Id. at 273 (quoting Loving v. Virginia, 388 U.S. 1, 11 (1967)).
\textsuperscript{53} The plan required awardees of city construction contracts to subcontract at least 30% of the contract's value to minority-owned businesses. Croson, 488 U.S. at 477.
\textsuperscript{54} Id. at 495 (quoting Wygant, 476 U.S. at 320) (Stevens, J., dissenting). Interestingly enough, Justice Stevens used this phrase in Wygant while arguing for a decidedly color conscious remedy on the grounds that protecting minority workers from layoffs was a necessary "step toward that ultimate goal of eliminating from governmental decisionmaking such irrelevant factors as a human being's race." Wygant, 476 U.S. at 320. Cf. supra note 31 (Martin Luther King, Jr.'s advocacy of race-conscious affirmative action).
\textsuperscript{55} Croson, 488 U.S. at 505-06.
\textsuperscript{56} "The moral imperative of race neutrality is the driving force of the Equal Protection Clause." Id. at 518 (Kennedy, J., concurring).
\textsuperscript{57} Placing discrimination against the white majority in the same category as that targeted against people of color, Justice Scalia expressed the belief that "discrimination on the basis of race is 'illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" Id. at 521 (Scalia, J., concurring) (quoting ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1975)).
\textsuperscript{58} The commitment of two of these justices may be subject to question. Although Justice White joined the Croson majority, he also voted to uphold the race conscious policies of the Federal Communications Commission in Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990). This apparent vacillation in Metro Broadcasting may be a recognition
The prospects for future colorblind judicial activism are bright. Since Croson, two new Supreme Court justices have been appointed. Though Justice Souter’s attitudes toward race consciousness are not yet certain, Justice Thomas, while yet to hear a case involving the Fourteenth Amendment, has made his preference for colorblindness well known in other contexts. These developments clearly indicate that the Supreme Court is moving vigorously toward the adoption of colorblind constitutionalism as the jurisprudential norm and its recent cases are but a harbinger of what is to come.

of Croson’s determination that broad remedial powers were vested in Congress. See Croson, 488 U.S. at 488; Aleinikoff, Race-Consciousness, supra note 30, at 1061, 1077 n.82 and accompanying text.

Justice O’Connor appears to be one of colorblind constitutionalism’s more strident proponents, judging by her positions in Wygant, Croson and Metro Broadcasting. Yet she uncharacteristically advocated a decidedly color-conscious position in Georgia v. McCollum, 112 S. Ct. at 2364 (O’Connor, J., dissenting) (endorsing use of peremptory challenge to secure minority representation on juries in order to combat conscious and unconscious racial bias). O’Connor may have intended this proposal merely to underscore her argument with the majority over which colorblind rule most appropriately applied to the issues in that case.

As of publication time, it is too early to determine what effect Bill Clinton’s November 1992 election to the Presidency will have on the development of colorblind constitutionalism.

See Aleinikoff, Race-Consciousness, supra note 30, at 1062. See also Ruth Marcus, Senators Left Wondering After Hearing: Which is the Real David Souter?, WASH. POST, Sept. 23, 1990, at A4; Ruth Marcus, Souter, As State Official, Opposed U.S. Racial Breakdown Rules, WASH. POST, Aug. 1, 1990, at A4. Given George Bush’s focus on eliminating race-conscious remedies, Souter was probably selected with this perspective in mind and it seems likely that he will join the colorblind majority of the Court.

See, e.g., Clarence Thomas, Toward a “Plain Reading” of the Constitution—The Declaration of Independence in Constitutional Interpretation, 30 How. L.J. 691, 700–03 (1987) (endorsing Justice Harlan’s vision of a colorblind Constitution as embodying “the ultimate American principle . . . that all men are created equal”); Clarence Thomas, The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment, Speech to the Federalist Society for Law and Policy Studies, University of Virginia School of Law (Mar. 5, 1988), in 12 HARV. J.L. & PUB. POL’Y 63, 68 (1989) (claiming that colorblind constitutional interpretation would provide a higher-law foundation for the Court’s civil rights opinions); Clarence Thomas, Civil Rights As a Principle Versus Civil Rights As an Interest, Speech to the Cato Institute (Oct. 2, 1987), in ASSESSING THE REAGAN YEARS 391 (David Boaz ed., 1988).

Some have argued that the Court has not yet adopted colorblind formalism wholesale. See, e.g., Willie Abrams, A Reply to Derrick Bell’s Racial Realism, 24 CONN. L. REV. 517, 521 (1992) (civil rights advocates have survived first round of judicial attacks launched by Reagan and Bush appointees with civil rights laws virtually intact); John a. powell, Racial Realism or Racial Despair?, 24 CONN. L. REV. 533, 540 (1992) (arguing that only isolated adoptions of suspect interpretations of formalism by the Court have materialized).

See, e.g., Georgia v. McCollum, 112 S. Ct. 2348 (1992); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991) (“if our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury”); Powers v. Ohio, 111 S. Ct. 1364 (1991); Holland v. Illinois, 493 U.S. 474 (1990) (fourteenth amendment prohibits “unequal treatment in general and racial discrimination in particular”).
B. The Flawed Vision of Colorblindness

For all its surface attractiveness as social theory, colorblindness carries within its ideological structure certain significant contradictions which undermine its usefulness as an anti-discriminatory tool. First, colorblindness makes it impossible to remedy pre-existing discrimination. Second, colorblindness masks conscious or unconscious racism. Taken together, these flaws make for an inadequate, and even counterproductive, jurisprudence for freeing Black rights from self-preserving notions of racial justice and equality held by the white status quo.

1. Remedying Pre-existing Discrimination

Racial disparities exist in virtually every aspect of American life. Whether the inquiry be in the area of housing, employment, education, or...
come, incarceration rates, or mortality rates, it quickly becomes obvious that Blacks lag behind whites in every measure of quality of life. Blind to reality as well as color, proponents of colorblind jurisprudence ignore such disparities, or deny that they exist, and consequently offer no solutions for achieving a substantively "equal" society.

Even-handed methods which treat the privileged the same as the underprivileged, the advantaged the same as the disadvantaged, are inherently useless to make up for past inequalities. If two boxes contain unequal amounts of sand, they cannot be equalized by adding like amounts of sand. They can only be equalized such groups. Id. at 5. Indeed, these disparities may be caused by gross inequities in monies expended for Black as compared to those expended for white education, "in part as a result of local (white) decision making." EZORSKY, RACISM & JUSTICE 13, supra note 65 (citing Southern Regional Council, A Decade of Frustrations (1981)). See also JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991) (describing effects of underfunding and general neglect of predominantly Black inner-city schools).

Blacks constitute roughly 46% of the inmates in prisons and jails nationwide. Bureau of Justice Statistics, Report to the Nation on Crime and Justice 41 (2d ed. 1988). The Sentencing Project, a Washington, D.C.-based advocacy group, estimates that one-quarter of Black men age 20 to 29 are either incarcerated, on probation or on parole. MARC MAUER, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM (The Sentencing Project, Feb. 1990). Two recent studies suggest that in major urban areas the numbers of Black men serving sentences in institutions, on probation or on parole may be vastly higher. Jerome G. Miller, Hobbling a Generation: Young African-American Males in Washington D.C.'s Criminal Justice System (National Center on Institutions and Alternatives, April 1992) (42% of African-American males ages 18-35 are involved in the criminal justice system) and National Center on Institutions and Alternatives, Hobbling a Generation: Young African-American Males in the Criminal Justice System of America's Cities: Baltimore, Maryland (Sept. 1992) (56% of African-American males ages 18-35 involved in the criminal justice system).

Black male life expectancy is 7 years less than that of white males and 13 years less than that of white women. MARABLE, RACE, REFORM, AND REBELLION, supra note 32, at 208. The New England Journal of Medicine reported that the "life expectancy for a black male born and living in Harlem is shorter than that of a male born in Bangladesh." Colin McCord & Harold P. Freeman, Excess Mortality in Harlem 322 NEW ENG. J. MED. 173 (1990).

if more sand is placed into the box with relatively less sand in it. The adoption of colorblind strategies to address social inequalities entails a decision to preserve the superior position of white citizens vis-a-vis those of African descent.

Colorblindness fails to address existing disparities not only because it is ill-suited for the task, but because it fails to acknowledge that the task needs doing. Colorblind formalists view the world through a crude lens which cannot bring societal discrimination into focus. Colorblindness fails to address existing disparities not only because it is ill-suited for the task, but because it fails to acknowledge that the task needs doing. Colorblind formalists view the world through a crude lens which cannot bring societal discrimination into focus. The invisibility of Black oppression to colorblind observation results from two considerations, one practical and the other theoretical.

As a practical matter, Black expressions of their own reality have limited outlets for dissemination in a world where the major forms of communication are controlled by the white majority. As a nation, we see what the white-dominated media wants to show, or what white media consumers want to see. Frequently, both choose to ignore evidence of the continued existence of racial oppression. Black voices remain hostage to the majority's mediated perceptions.

The theoretical limitations of colorblindness arise from its obsession with procedure and its willful ignorance of results. Colorblind analysts tinker with the rules but need not attend to

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72 See Crenshaw, Race, Reform and Retrenchment, supra note 7 at 1346-47 ("it [is] clear that a 'color-blind' society built upon the subordination of persons of one color [is] a society which [cannot] correct that subordination because it [can] never recognize it.") (quoting Alfred Blumrosen).
73 See, e.g., Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997, 3003 (1990) (citing a 1986 study that found that minorities owned only 2.1% of the radio and television stations in the United States, many of which "serve geographically limited markets with relatively small audiences").
74 Aleinikoff tells us why this is so:

Blacks are "invisible" not in the sense that whites do not see them; they are "invisible" in the sense that whites see primarily what a white dominant culture has trained them to see. In a curious yet powerful way, whites create and reflect a cultural understanding of blackness that requires little contribution from blacks . . . not out of vindictiveness or animus but because the black stories simply do not register.

Aleinikoff, Race-Consciousness, supra note 30, at 1070 (footnotes omitted).
75 See Delgado, Race Problem, supra note 30, at 1398. Justice Scalia took great pains to underscore the focus on equality of process in his concurring opinion in Croson, 109 S. Ct. at 739 ("[A]ny race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, accords with the letter and spirit of our Constitution.") (emphasis in original).
the outcome of the game. Richard Delgado calls this preference for equality of opportunity over equality of result a false dichotomy.

One cannot judge whether two athletic teams are playing fairly, on an even field, without attending to the results of the game, and vice versa. Law’s preference for protecting only equality of opportunity is, then, a veiled way of assuring that those who benefit from the current rules of the game continue winning.\(^6\)

A focus on the playing field that does not look to the results of the game values form over substance. As a consequence of its ideological tunnel vision, colorblindness can only acknowledge and remedy the most egregious forms of racism.\(^7\)

Colorblindness’s fatal flaw is that it takes the game as played by whites for the ideal. White requirements set the standard. If the needs of Blacks are not met, that must be due to the failure of Blacks, not of the standards. Colorblindness allows for no reordering of priorities and no fundamental change in how the game is played.

2. Colorblindness: A Smokescreen for Racial Injustice

Besides being ill-suited to remedy the problems of racial inequity that persist in America, colorblindness can be made an instrument of active social injustice as well. Colorblindness provides a convenient cover for the exercise of benign (and sometimes malignant) neglect, masks oppression and delegitimizes reform efforts.

In its most common form, colorblindness serves to keep Black rights hostage by operating as a defensive shield for conscious and unconscious racists. Colorblind arguments deflect accusations that the advantages which whites have in society are based on oppression or exploitation. “Objective” standards and universal proce-

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\(^6\) Delgado, Race Problem, supra note 30 at 1398.
\(^7\) Id. at 1394.
dures provide an alternative, "fair" explanation for white privilege.78

From their failure to properly distinguish racial categories, adherents of colorblindness erroneously conclude that race is not a factor in how individuals are treated. Therefore, they oppose the efforts of those who would inject a racial element into any debate.79 Professor Gotanda points out that this conscious suppression of race permits social problems such as housing and unemployment to be evaluated as if the race of those affected was not a factor, obscuring the continuing existence of institutional racism and the correlation between race and the concentration of supposedly distinct problems.80

A related consequence of colorblind formalism is its tendency to reinforce white cultural hegemony.81 Viewing human accomplishments through colorblind lenses deprives Black communities and individuals of deserved credit for their accomplishments.82 Colorblindness is particularly suspect, given that:

[i]he theory that no important differences exist between Blacks and Whites in America . . . is of recent origin. It gained prominence at precisely the time when Blacks began to insist they did have distinctive attitudes, values, and lifestyles and began to question the validity and relevance of White culture. At the same time that Whites wanted to be color-blind, Blacks were demanding separate admissions standards to schools and jobs. Thus the

78 Peller, Race Consciousness, supra note 31, at 778; Freeman, Antidiscrimination Law, supra note 38, at 1433–41. See also Delgado, Race Problem, supra note 31, at 1396–97 ("persons of the majority race have . . . constructed racial realities so as to avoid any sense of personal responsibility"); Gotanda, Color-Blind, supra note 7, at 37–40, 49 (demonstrating how colorblindness hides an inherent asymmetry in the status afforded white and Black individuals on account of race).
79 As an example of "racial non-recognition" in action, Neil Gotanda refers to Patricia Williams’s story of how student law review editors sought to remove racial references from her description of her experience of being excluded from entering a clothing store. Gotanda, Color-Blind, supra note 7, at 19–20 (discussing Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism, 42 U. MIAMI L. REV. 127, 128 (1986)).
80 Gotanda, Color-Blind, supra note 7, at 45.
81 See generally Crenshaw, Race, Reform, and Retrenchment, supra note 7, at 1369–81 (arguing that the failure to consider race legitimates both the domination of Blacks and the white elitist hierarchy).
82 See, e.g., Aleinikoff, Race-Consciousness, supra note 30, at 1080 (describing how students taught the accomplishments of George Washington Carver and Martin Luther King, Jr. without any mention of their race believed both men were white).
ideology of universalism must be viewed in proper context. It is mostly an attempt by Whites to maintain institutional arrangements which embody the residual results of past overt racism.\textsuperscript{83}

Far from being a guarantor of social justice, then, colorblindness has the potential for concrete use \textit{against} oppressed communities. By obscuring the reality of Black subjugation, colorblindness denies the legitimacy of efforts to secure racial justice.\textsuperscript{84} In a colorblind world, no investigation need take place into whether justice \textit{in theory} translates into justice \textit{in fact}. A racial utopia requires no reform.

II. Race Consciousness and the Development of Jury Discrimination Case Law

Colorblind doctrine has never taken full root in the Supreme Court's Equal Protection cases dealing with the selection of juries. This is due in large part to the factual context in which these cases arose. Historically, most complaints against discriminatory jury selection procedures have been made by Black defendants seeking to overturn convictions returned by all-white or overwhelmingly white juries.\textsuperscript{85} In those few cases that did not fit the mold of a racial or ethnic minority seeking to avoid discriminatory treatment...

\textsuperscript{83} ROBERT STAPLES, INTRODUCTION TO BLACK SOCIOLOGY 260–61 (1976), \textit{cited in} Peller, \textit{Race Consciousness, supra} note 30, at 778 n.34. Peller notes that the tenets of colorblindness are "historically constructed" and thus are "manifestations of group power," rather than pure artifacts of intellectual production. \textit{Id.} at 779. The irony in this, according to Peller, and indeed a further obstacle to Black freedom, is that the colorblind emphasis on purportedly objective "standards" allows "the former administrators of racial segregation" to determine what these standards are and how they will be met. \textit{Id.} at 778. \textit{See also} Duncan Kennedy, \textit{A Cultural Pluralist Case for Affirmative Action in Legal Academia}, 1990 DUKE L.J. 705, 733 (1990) (arguing that white male law faculty members have the power to determine whether legal scholarship meets acceptable standards and also "the power to create the traditions or projects within which they will make these judgments"). Kennedy is decidedly unsympathetic to any claim that the "objective" standards of legal academia are either universally beneficial or evenly applied. \textit{Id.} at 718.

\textsuperscript{84} \textit{See} Crenshaw, \textit{Race, Reform, and Retrenchment, supra} note 7, at 1348 (discussing how the appearance of equality created by colorblindness delegitimates the movement for true equality).

\textsuperscript{85} I include here cases where claims of discriminatory jury selection were made by members of historically oppressed groups other than Blacks. \textit{See, e.g.}, Castaneda v. Partida, 430 U.S. 482 (1977) (upholding Latino defendant's claim).
at the hands of a power-wielding majority, the Supreme Court decided on grounds other than the Fourteenth Amendment.\textsuperscript{86}

The Equal Protection jurisprudence of jury selection cases was also shaped heavily by the belief of the nineteenth-century Supreme Court that the Fourteenth Amendment was intended by Congress as an explicitly color-conscious solution to the country’s racial problems.\textsuperscript{87} This core belief was never fundamentally challenged in jury discrimination cases until recently, although it lost currency in other contexts much earlier.\textsuperscript{88} Until Powers, the Court was forced to take conscious notice of the race of the defendant and to shape explicitly race-conscious remedies in order to protect the Black defendant’s Equal Protection rights.

\textbf{A. Early Equal Protection Cases}

The Supreme Court set out its basic outline of the discriminatory jury selection challenge at a very early stage, soon after the passage of the Fourteenth Amendment. To make an Equal Protection challenge to the composition of the jury, a defendant had to demonstrate that: (1) members of his or her race were being excluded from jury service; and (2) the exclusion was purposeful, that is, intentionally racially motivated.

The first jury selection case to invoke the Equal Protection Clause to bar the discriminatory exclusion of Blacks was \textit{Strauder v. West Virginia}.\textsuperscript{89} In \textit{Strauder}, a Black defendant was convicted of murder by an all-white jury after his petition for removal of his case to federal court was denied.\textsuperscript{90} The defendant had sought

\textsuperscript{86} The Court has overturned exclusionary jury selection procedures based on a number of different rationales. In addition to the equal protection clause, the Court has relied on the sixth amendment’s right to an impartial jury, see Taylor v. Louisiana, 419 U.S. 522 (1975) (sixth amendment held to forbid exclusion of women from jury service); the right of criminal defendants to due process, see Peters v. Kiff, 407 U.S. 493 (1972) (plurality found jury selection procedures that excluded Blacks from white defendant’s jury violated due process on mixed statutory and constitutional grounds); and its supervisory authority over the federal court system. See Theil v. Southern Pacific Co., 328 U.S. 217 (1946) (discrimination against blue-collar workers held impermissible).

\textsuperscript{87} See Laurence H. Tribe, American Constitutional Law 1526 (2d ed. 1988) [hereinafter Tribe, Constitutional Law].

\textsuperscript{88} See Lively, Equal Protection, supra note 30.

\textsuperscript{89} 100 U.S. 303 (1880).

\textsuperscript{90} Removal was permitted under the Civil Rights Act of 1866, as amended in 1870. Removal was the preferred remedy for Black defendants who feared they could not get fair trials in the courts of the formerly slaveholding South. For a discussion of this practice, see Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1, 65, n.323 (1990) [hereinafter Colbert, Challenging the Challenge].
removal on the grounds that a West Virginia statute excluding Blacks from jury service denied him the equal protection of the laws. In reversing the conviction, the Supreme Court readily concluded that a law which "compell[ed] a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race . . . ." constituted a clear denial of equal protection.

The Strauder Court was by no means overwhelmingly sympathetic to the plight of the newly freed African, yet it was aided in its interpretation of the Fourteenth Amendment by a healthy dose of realism. Instead of seeking to construct transcendent, objective, but ultimately useless neutral principles that were blind to a defendant's color, the Court framed its considerations in view of the "history of the times." The "history of the times" forced the Court to acknowledge the Amendment's intended role in confronting the legacy of slavery and the reality of white racism. Consequently, the Court interpreted the Constitution to require more than mere symmetry in the government's treatment of Black and white citizens. The Court realized that allowing West Virgini-

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91 The West Virginia statute provided that only "white male persons, who are twenty-one years of age, and not over sixty, and who are citizens of this state, shall be able to serve as jurors . . . ." 1872 W. Va. Acts 102.

92 Emphasizing the racist nature of West Virginia justice, the defendant claimed in his petition to the Court that the statute deprived him of the "full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens." 100 U.S. at 304.

93 Id. at 309.

94 Indeed, the Court's own racism is evident in its characterization of the considerations that called for the passage of the fourteenth amendment:

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.

95 See Colbert, Challenging the Challenge, supra note 90, at 66.

96 See Strauder, 100 U.S. at 306.

97 According to the Court, "the one pervading purpose" of the fourteenth amendment was to insure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freedman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them." Id. at 307 (citing The Slaughter-House Cases, 83 U.S. 36 (1876)). The Strauder Court repeatedly emphasized that the purpose of the fourteenth amendment was to end the oppression of the Black race by the white. Strauder, 100 U.S. at 306-09.

98 The Court did note that the exclusion of all Blacks from a Black defendant's jury violated the equal protection clause, just as excluding all white citizens from jury service in a state where Blacks were a majority would deprive a white defendant of equal protection. Id. at 308.
ia's statute to stand would not only treat the Black defendant\textsuperscript{99} unequally, but would subject him to racial oppression.\textsuperscript{100} Providing equal protection, then, in the jury selection process was a means to the greater end of preventing the racial subjugation of African-Americans through the criminal justice system.

\textsuperscript{99} Some commentators (and the \textit{Powers} Court) have erroneously concluded that the \textit{Strauder} Court was concerned with equal protection violations against Black jurors. See \textit{Powers}, 111 S. Ct. 1364, 1369 (1991). The \textit{Strauder} Court did note the discriminatory purpose of jury composition law:

\begin{quote}
  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, . . . 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.
\end{quote}

\textit{Strauder}, 100 U.S. at 308. Yet, other than its use here to establish the threshold fact that such a law could only be for the purpose of racial segregation, the Court did not concern itself with the plight of the excluded Black jurors. Its real interest lay with the Black defendant, who was not permitted to rest his equal protection claim on the fact that the statute prevents him from serving on a West Virginia jury. See Barbara D. Underwood, \textit{Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?}, 92 COLUM. L. REV. 725, 743 (1992) ("[t]he \textit{Strauder} Court [did not treat] the injury to jurors . . . as the central rights violation in the case, but rather as an additional reason for recognizing the defendant's personal right to equal protection (an equal right to same-race jurors)"). The denial of equal protection to the defendant comes from the fact that he or she was tried before a jury from which all members of his or her race have been excluded. As the Court put it:

\begin{quote}
  \textit{Id. at 310 (emphasis supplied). See also Ex Parte Virginia, 100 U.S. 339, 345 (1880); Neal v. Delaware, 103 U.S. 370, 386 (1881).}
\end{quote}

\textsuperscript{100} The \textit{Strauder} Court was concerned that the exclusion of Blacks from juries would allow the oppression of Blacks to continue. Requiring Blacks to be tried before all-white juries would allow Black defendants to be unjustly convicted by prejudiced whites. The Court stated that the fourteenth amendment must, like statutory provisions at common law,

\begin{quote}
  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.
\end{quote}

\textit{Strauder}, 100 U.S. at 309. Cf. Albert W. Alschuler, \textit{The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts}, 56 U. CHI. L. REV. 153, 189 (1989) (arguing \textit{Strauder}'s holding was based on the proposition that "[B]lacks were more likely to favor the defendant's acquittal than white jurors").
The true limit of *Strauder* was clarified in another criminal jury selection case, decided that same day. In *Virginia v. Rives*, the Supreme Court held that the refusal of a state judge to place qualified Black citizens on a selection list for grand and petit juries violated the Equal Protection Clause. At the same time, however, *Rives*’ focus on procedural issues rendered *Strauder* more a regulation of form than substance.

*Rives* displayed the Court’s early commitment to an intent-based equal protection standard by its refusal to find discrimination solely because the challenged statute had an adverse impact on Blacks. The Court was not swayed by the defendants’ allegation that no Black jurors had *ever* been seated in a criminal or civil case in which Blacks had an interest. Moreover, the *Rives* Court rejected a request by the defendants, two Black men accused of murdering a white man, that their trial jury venire be adjusted so that it would be at least one-third Black. The Court’s later statements to the contrary, the defendants do not appear to have been asserting a “right to have the jury composed in part of colored men.” Rather, they were seeking the opportunity to select from a pool that contained at least some Black people, which seems reasonable given the local demographics and the fact that the exclusion of Blacks from the venire was the practical result of the alleged Equal Protection violation. The Supreme Court, how-

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100 U.S. 313 (1880).
101 Id. at 321.
102 For example, the Court held that in the absence of a facially discriminatory statute, removal to federal court was unavailable, leaving most Black defendants to defend their suits in hostile state courts. *Id.* at 332. See also *Neal v. Delaware*, 103 U.S. 370, 387, 393 (1880). For a critique of this practice, see Colbert, *Challenging the Challenge*, *supra* note 90, at 68 and authorities cited therein.
103 Id. 100 U.S. at 315.
104 *Rives*, 100 U.S. at 314.
105 Id. at 314.
106 Id. at 323.
107 Id. Professor Johnson, however, makes a persuasive argument that the fourteenth amendment should uphold such a right. See Johnson, *Black Innocence*, *supra* note 17. For a similar argument on thirteenth amendment grounds, see Colbert, *Challenging the Challenge*, *supra* note 90.
108 The defendants requested that the “venire” be adjusted to include African-Americans. 100 U.S. at 314. The “venire” or “panel” is a subset of the overall jury pool from which the actual petit jury is selected. Charles H. Whitebread & Christopher Slobogin, *Criminal Procedure* 615 (2d ed. 1986).
109 In 1880, Blacks constituted over twenty percent of the county population. *Statistics of the Population of the United States at the Tenth Census* (June 1, 1880) (Census Office, Dept. of the Interior) 412 (1883) [hereinafter 1880 Census].
110 Eventually, the Supreme Court came to recognize that a defendant’s right to equal
ever, rejected this request out of hand, saying only that "[a] mixed jury in a particular case is not essential to the equal protection of the laws."\textsuperscript{111}

Only one aspect of the Court's approach to jury selection cases changed over the 110 years after Strauder and Rives set this strict but race-conscious standard: the Court gradually lessened the level of proof necessary for a defendant to establish the existence of intentional discrimination. The Court thus maintained the standard set in Rives but acknowledged the constitutional mandate for protecting Black defendants recognized in Strauder. In Neal v. Delaware,\textsuperscript{112} a Black/white rape case decided the year after Strauder and Rives, the Court held that uncontroverted evidence that Black persons had always been excluded from state court juries established a \textit{prima facie} Fourteenth Amendment violation,\textsuperscript{113} one which could not be rebutted by merely alleging that none of the Black citizens in the state\textsuperscript{114} were qualified to sit as jurors.\textsuperscript{115} Over time, the Court grew even more willing to infer the existence of intentional discrimination, relaxing its requirement of "substantial disparity,"\textsuperscript{116} caused at least in part by the exercise of subjective criteria, to one of "statistical disparity" between the number of Blacks in the population and those in the jury pool.\textsuperscript{117}

protection in jury selection was meaningless without assurances that the jury pool would be representative of the minority population in the community. \textit{See infra} note 117.

For a critique of the argument that denying Black defendants the right to seat same-race jurors deprives them of a cognizable constitutional right, see Underwood, \textit{supra} note 99, at 731–33 (objecting to theories that would include Black jurors for the benefit of Black defendants because "race-based generalization[s] about the likely views of jurors cannot lawfully be the basis for any legal rule"). Arguing the primacy of colorblind principles, Underwood concludes that equal protection challenges to jury composition should be based solely on cognizance of jurors' right not to be discriminated against in the selection process. \textit{See id.} at 742–50.

\textsuperscript{111} Rives, 100 U.S. at 323.
\textsuperscript{112} 103 U.S. 370 (1881).
\textsuperscript{113} Id. at 397.
\textsuperscript{114} Blacks at the time numbered over 26,000 persons or approximately 22% of the state population. 1880 CENSUS, \textit{supra} note 109, at 384.
\textsuperscript{115} 103 U.S. at 397. The Chief Judge of the Delaware court found the total exclusion of Black persons from jury service unremarkable because "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." \textit{Id.} at 393–94.
\textsuperscript{116} \textit{See}, e.g., Avery v. Georgia, 345 U.S. 559 (1953) (Frankfurter and Reed, J.J., concurring separately) (discriminatory intent found where Blacks were 25% of the population in the county, yet only 5% of the names on the jury list belonged to Black citizens); Turner v. Fouche, 396 U.S. 346 (1970) (finding discrimination where Blacks comprised 60% of the population but accounted for only 37% of the places on the jury list); Alexander v. Louisiana, 405 U.S. 625 (1972) (discrimination established when Black population of parish was 21%, but only 7% of those selected for grand jury venires were Black).
\textsuperscript{117} By the late 20th century, the Court was willing to find intentional discrimination
It should be underscored that the Supreme Court never varied from its cardinal requirement that the defendant alleging an Equal Protection violation in a jury discrimination case show that members of "his race or of the identifiable group to which he belongs" were intentionally excluded from jury service. Protecting Black defendants from racial subjugation was the clear concern of the Supreme Court, no matter how ineffective its methods turned out to be.

**B. Peremptory Challenge Cases**

The Supreme Court has always purported to apply the same Equal Protection principles when it hears a challenge to the composition of trial as well as to grand juries. Yet the Court was never squarely confronted with a case contesting discrimination which occurred after selection of the jury venire. Admittedly, early cases sometimes scrutinized the exclusion of Blacks from petit juries, but these cases involved mechanisms of exclusion which operated prior to voir dire. The Supreme Court did not hear a case which directly challenged discrimination during voir dire until 1965, at which time it explicitly rejected the extension of Equal Protection case law to a state's exercise of its peremptory challenges.

In *Swain v. Alabama*, the Court accepted the argument in principle that intentionally excluding Blacks from a trial jury would

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118 *Castaneda*, 430 U.S. at 494.
119 *See Derrick Bell, Race Racism and American Law* 350 (3d ed. 1992) (hereinafter *Bell, Race, Racism*) (claiming that the Court's standards for "racial fairness" in jury selection may seem "worthwhile in the abstract but... are... woefully inadequate in practice").
121 For example, the defendant in *Avery v. Georgia*, 345 U.S. 559 (1953), objected to the makeup of the petit jury that tried his case because the members of the venire had been selected by a judge from a box in which the names of white jurors had been placed on white cards and the names of Black jurors had been placed on yellow cards.
violate the Fourteenth Amendment, but it nevertheless refused to question Alabama’s removal of all potential Black jurors from the case of the defendant before it. As far as the Court was concerned, a state’s exercise of its peremptory challenges was not subject to judicial scrutiny.

The Court took this position in *Swain* chiefly because of the high value it placed on the peremptory challenge. The Court agreed with Alabama that arbitrary challenges eliminated “the extremes of partiality on both sides” and satisfied the parties that their case would be fairly decided, since they made their own juries. Additionally, the Court noted that peremptories permitted the parties to fully explore their for-cause challenges, secure in the knowledge that, should a juror be antagonized and the challenge for cause fail, the juror could be removed by peremptory challenge anyway. The Court also cautioned that the peremptory challenge should not be tampered with lightly, since it was “one of the most important of the rights secured to the accused” and had been in use for over 600 years. Rather than subject this essential legal device to too much scrutiny, the *Swain* Court stated that:

The presumption in any particular case must be that the prosecutor is using the State’s challenges to obtain a fair and impartial jury . . . . The presumption is not overcome . . . by allegations that in the case at hand all Negros were removed from the jury or that they were removed because they were Negros.

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123 *Id.* at 204.
124 *Id.* at 219–20.
125 *Id.* at 219.
126 *Id.* at 220 (“The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control”).
127 *Id.* at 213.
128 *Id.* at 222. It is almost unbelievable that the Court would find nothing suspicious about the total exclusion of Blacks from juries in a former Confederate state considering the well-documented amount of enmity and violence directed at African-Americans both historically and at the time the case was heard. *See generally*, Colbert, *supra* note 90.
The Court was willing to concede that the systematic exclusion of Blacks in case after case would violate the Equal Protection Clause, but it insisted that the record in the case before it was insufficient to support the conclusion that such discrimination had occurred.\textsuperscript{133} Even proof of total exclusion of Blacks from previous trials would be insufficient to establish a Fourteenth Amendment violation if non-state actors also participated in the selection process.\textsuperscript{134}

The \textit{Swain} Court was ready to sacrifice the anti-subjugation interest of individual Black defendants in favor of the peremptory challenge, but it was willing to preserve, under limited circumstances, the rights of African-Americans to participate in the criminal justice system as jurors.\textsuperscript{135} Thus, the primacy of Black jurors' participation interests over the rights of Black defendants, later enshrined in \textit{Powers},\textsuperscript{136} found its origins in the Court's ill-considered decision in \textit{Swain}.\textsuperscript{137}

Twenty years after \textit{Swain}, in light of experience showing that "the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread,"\textsuperscript{138} the Court revisited the balance it had struck between the peremptory challenge and the Equal Protection Clause. This time, in \textit{Batson v.}

\textsuperscript{133} \textit{Id.} at 223–25 (citing lack of evidence "of what the prosecution did or did not do on its own account in any cases other than the one at bar"). In his dissent, Justice Goldberg argued vehemently that there \textit{was} evidence in the record showing that the state prosecutor, by his own admission, independently and intentionally excluded all African-Americans from trial jury venires. \textit{Id.} at 234–35 (Goldberg, J., dissenting). The majority itself admitted that the defendant had established that "[a]pparently in some cases, the prosecution agreed with the defense to remove [Blacks]." \textit{Id.} at 224–25. \textit{See also id.} at 225, n.31.

\textsuperscript{134} \textit{Id.} at 227.

\textsuperscript{135} \textit{Id.} at 224 (the presumption that the state was using its peremptory challenges to ensure a fair and impartial jury could be overcome by evidence "that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population"). \textit{See} Bruce J. Winick, \textit{Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis}, 81 Mich. L. Rev. 1, 9–10, n.34 and accompanying text (1982).

\textsuperscript{136} \textit{See infra} notes 155–178 and accompanying text.


Kentucky, the Court concluded that the removal of Black jurors by peremptory challenge because of their race violates the Constitution, even when there is no evidence of racially motivated strikes in cases other than the defendant's. The Court determined that continuing to require Black defendants to show a pattern or practice of discrimination would place a "crippling" burden of proof on them and "would be inconsistent with the promise of equal protection to all."

The Batson test for uncovering the discriminatory use of peremptory challenges required first that the criminal defendant show that he or she was "a member of a cognizable racial group, and that the prosecutor [had] exercised peremptory challenges to remove from the venire members of the defendant's race." Upon establishing this, the defendant could rely on the fact that the subjective nature of the exercise of the peremptory challenge "permits 'those to discriminate who are of a mind to discriminate.'" The defendant would then have to "raise an inference" of racial discrimination, based on the "relevant circumstances," such as a pattern of strikes against Black venirepersons or the nature of the prosecution's statements and questions during voir dire. The burden then shifted to the prosecution to rebut the allegation of improper motivation.

Batson was hardly an unalloyed victory for civil rights. The demands of the Equal Protection Clause finished a poor second in this decision to the traditional nature and form of the peremptory challenge. Justice Marshall adroitly spotted two potential problems...
with the Court's holding in his concurring opinion: the difficulty of establishing a prima facie case and the ease with which the prosecution might rebut that case. Given that the judges and prosecutors at both the state and federal levels are overwhelmingly white, Marshall's admonition about the inability of the bench to adequately apply the *Batson* test is particularly telling:

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.

Experience, unfortunately, has proven Justice Marshall correct. Nonetheless, *Batson* remained true, for the most part, to established Equal Protection jurisprudence. Reaffirming the unfulfilled promise of *Strauder*, the Court declared that "the State denies a Black defendant equal protection of the laws when it puts

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146 *Batson*, 476 U.S. at 105 (Marshall, J., concurring). Justice Marshall emphasized that some jurisdictions will not consider a *Batson* claim without the occurrence of three or more discriminatory challenges of minority jurors. *Id.*

147 The prosecution need only mention a facially neutral reason for the striking of the juror, which, as Marshall points out, "trial courts are ill equipped to second-guess." *Id.* at 106.

148 In Florida, for example, a state that is almost 14 percent Black, only six percent of the state prosecutors and only four percent of the state court judges are African-Americans. FLA. SUP. CT. RACIAL AND ETHNIC BIAS STUDY COMM., REPORT AND RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION — "WHERE THE INJURED FLY FOR JUSTICE": REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA 14, 26 (1990) [hereinafter FLA. SUP. CT. COMM. REPORT]. The report concludes that "[t]he State simply cannot expect continued acceptance of a judicial system in which minorities are virtually invisible in positions of decision-making and responsibility." *Id.* at 11.

149 476 U.S. at 106.

him on trial before a jury from which members of his race have been purposefully excluded. 151

Although the Court expressed concern for the rights of the excluded Black jurors, 152 this clearly was not its primary interest. Otherwise, it would not have required a shared racial identity between the excluded juror and the defendant.

The Court was primarily concerned with protecting Black defendants from racially motivated prosecutions. This concern, in the Court's view, constituted the essence of an Equal Protection violation:

Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. 153

Thus, every Equal Protection case—from Strauder to Batson—dealt explicitly with the question of the defendant's racial identity. 154 In each of these cases, intentional exclusion of Black jurors

151 Batson, 476 U.S. at 85. The Court went on to remark:

The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.

Id. at 86 (citations omitted).

152 The Batson Court asserted that the intentional exclusion of potential Black jurors denied African-Americans "the same right and opportunity to participate in the administration of justice enjoyed by the white population." 476 U.S. at 91 (quoting Swain, 380 U.S. at 224).

153 Batson, 476 U.S. at 97 (citations omitted).

154 See, e.g., Hernandez v. Texas, 347 U.S. 475 (1954); Patton v. Mississippi, 332 U.S. 463 (1947); Norris v. Alabama, 294 U.S. 587 (1935). Unlike the equal protection clause, other grounds for contesting jury composition have not been interpreted to require the defendant/complainant to be a member of the excluded group. See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975) (male defendant permitted to challenge the exclusion of women on sixth amendment grounds); Holland v. Illinois, 493 U.S. 474, 477 (1990) (white defendant may raise sixth amendment challenge to exclusion of Blacks from jury venire); Peters v. Kiff, 407 U.S. 493 (1972) (due process rationale invoked to permit white defendant to contest exclusion of African-American jurors); Ballard v. United States, 329 U.S. 187 (1946) (male defendant allowed to challenge the exclusion of women under Court's supervisory authority). Indeed, it is the Court's reluctance to extend its equal protection analysis to cover forms of jury exclusion not based on racial or ethnic differences that best explains the development of these alternative legal theories. Cf. WAYNE R. LAFAVE & JEROLD H.
was thought to be akin to "jury packing," depriving a Black defendant of a fair trial. Thus, throughout the years, the Court held fast to two fundamental aspects of its Fourteenth Amendment jury selection case law: the protection of the Black defendant from unjust conviction, and, to that end, the requirement of racial identity between the defendant and the excluded juror.

III. The Advent of Colorblind Jury Selection: Powers v. Ohio and Georgia v. McCollum

A. Powers v. Ohio

In Powers v. Ohio, the Supreme Court, for the first time, granted white defendants the right to protest the exclusion of potential Black jurors from their trials. In previous cases, the Court's analysis had focused on the possibility of racial oppression of the defendant. Yet in Powers, the Court emphasized the right of Black jurors not to be excluded on the basis of their race. This shift in emphasis placed Black rights at the mercy of white privilege, leaving Black jurors in the hands of guardians who are, at best, indifferent to the goal of racial justice.

1. Background and Rationale

Larry Joe Powers must have seemed an unlikely candidate for a major role in the development of jury discrimination law. A white defendant charged with the murder and attempted murder of other whites, Powers came before the Supreme Court objecting to the removal of potential Black jurors from his trial through the prosecution's use of its peremptory challenges. Although his case involved no racial issues, Powers argued that Batson v. Kentucky required the prosecution to demonstrate that its challenges were not racially motivated. In a seven to two decision, the

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ISRAEL, CRIMINAL PROCEDURE 965–67 (2d ed. 1992) (noting that until the extension of the sixth amendment to the states, "efforts . . . to upset state juries on grounds other than racial exclusion did not meet with success").


156 The prosecution used seven of its ten peremptory challenges to remove potential Black jurors. Id. at 1366.

157 Joint Appendix at 32. The Ohio Court of Appeals observed that Powers is white, that his alleged victims were white and that the defense counsel and prosecutor who tried his case were "apparently" white as well. Id. at 24.
Court agreed that *Batson* challenges may be raised without regard to the defendant’s race.\(^{158}\)

At its outset, *Powers* reaffirmed the well-settled proposition that the discriminatory use of peremptory challenges violates the defendant’s right to equal protection under the law, although the Court took pains to express this premise in race-neutral language. Justice Kennedy wrote that “a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State’s purposeful conduct.”\(^{159}\) Obviously, Powers’ Equal Protection Clause rights were not violated in this manner since he was white and the excluded jurors were Black.\(^ {160}\)

As Justice Kennedy’s language reveals, a completely race-neutral interpretation of *Batson* would only allow white defendants to object to the intentional exclusion of white jurors. The Court needed some other reason to extend this right to defendants who do not share racial identity with excluded jurors. As one possibility, the Court could have interpreted the Fourteenth Amendment as providing every criminal defendant with a substantive right to a trial before a jury selected in a racially nondiscriminatory way. In fact, the defense briefed and argued this point before the Court, and Justice Kennedy considered it briefly in his opinion.\(^ {161}\) Yet the

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\(^{158}\) *Powers*, 111 S. Ct. at 1366.

\(^{159}\) Id. at 1367. Kennedy’s reference to race here is generic. See also id. at 1368 (“a defendant” can raise an equal protection challenge when a prosecutor excludes “members of the defendant’s race”). It appears that a defendant of any race—white, Black or otherwise—would suffer an equal protection violation if a juror of the same race were excluded from jury service on the presumption that the juror would be biased in favor of the defendant or that members of the defendant’s race as a group are not qualified to serve as jurors.

\(^{160}\) Since this is true, it was not necessary for the Court’s opinion to discuss this point at all. Perhaps the Court simply found the opportunity to restate the scope of the fourteenth amendment in race-neutral terms irresistible. Did the same temptation drive the Court to omit all race-specific references from its citations of prior cases? For example, the Court transformed *Strauder*’s reference to “a colored man” to the more generic term, “a defendant.” 111 S. Ct. at 1367. See also id. at 1368 (“In *Batson*, we spoke of the harm caused when a defendant is tried by a tribunal from which members of his own race have been excluded”) (emphasis supplied). The most flagrant example of Kennedy’s colorblind revisionism appeared in a key passage quoted from *Strauder*. The original passage described how singling out recently freed Blacks, “colored people” in the parlance of the times, by denying them the right to participate in the administration of justice, is “a brand upon them,” “an assertion of their inferiority,” and a “stimulant to... race prejudice.” *Strauder*, 100 U.S. at 308. By using these terms, Justice Strong’s opinion was clearly attempting to connect the denial of Black defendants’ rights with the discredited institution of slavery. Yet Kennedy brazenly revised *Strauder*’s pointed reference to “colored people” by replacing it with the more neutral-sounding “members of a particular race.” *Powers*, 111 S. Ct. at 1369.

\(^{161}\) In a key passage, the Court stated that “[a]lthough a defendant has no right to a
Court apparently was unwilling to risk the radically broad implications of this theory and it declined to ground its analysis on the denial of Equal Protection rights to the defendant.

Instead, the Powers Court focused its attention on the harm to rejected venirepersons caused by their racially motivated exclusion. According to the Court, these excluded venirepersons are denied the “opportunity to participate in the democratic process” and the security of knowing that by “being part of the judicial system of the country [they] can prevent its arbitrary use or abuse.” Moreover, such exclusion denies them the sense of civic-mindedness and the educative benefits that result from jury service. Accordingly, the Powers Court held that the Equal Protection Clause prohibits the exclusion of “otherwise qualified and unbiased” Black jurors “solely by reason of their race.” While “an individual juror does not have the right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race.”

By extending the Equal Protection Clause to protect excluded jurors not present before it, the Court significantly expanded and altered the rights it had recognized earlier in Batson. As Justice Scalia noted in his dissent to Powers, Batson never acknowledged that the Equal Protection rights of potential jurors were implicated

162 If criminal defendants could invoke the equal protection clause to challenge discrimination directed at others, other litigants who were collaterally affected by race discrimination might also utilize the fourteenth amendment. This could permit any plaintiff litigating the impact of a government service to contest racial discrimination in the provision of that service. For example, a homeowner situated in a municipal fire district could claim that the discriminatory hiring of fire department personnel violated his or her equal protection rights without showing any direct effects from the hiring policy. See generally Tribe, Constitutional Law, supra note 87, at 119.

163 111 S. Ct. at 1368. The Court also notes the society-wide benefits of jury service, but it devotes little attention to this point. Id. at 1369 (“jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people”). Had the Court been willing to base its decision on the harm it catalogued as accruing to the community at large, it might have avoided the tortured standing analysis, see infra at notes 180-209, needed to allow Powers to exercise Black jurors’ rights.

164 Id. at 1369.

165 Id. at 1368 (citing Balzac v. Porto Rico, 258 U.S. 298, 310 (1922)).

166 Id. at 1368.

167 Id. at 1370.

168 Id.
by discriminatory peremptory challenges.\textsuperscript{169} \textit{Batson} only recognized the violation of a Black defendant’s Equal Protection rights by the exclusion of jurors of his or her race from the jury.

More significantly, even after recognizing a Fourteenth Amendment right for excluded Black jurors, the \textit{Powers} Court might still have declined to let white defendants assert that right. Yet the Court granted such standing to white defendants on a third party basis. This is particularly interesting given that the Supreme Court had never recognized this theory of rights before in criminal litigation. Justice Scalia’s dissent pointed out several areas in which criminal defendants had been expressly prevented from exercising the rights of third parties, including Fourth Amendment search and seizure cases\textsuperscript{170} and Fifth Amendment self-incrimination\textsuperscript{171} and confidentiality cases.\textsuperscript{172} Additionally, the Supreme Court has held that a criminal defendant may not contest the denial of another person’s Sixth Amendment right to counsel at identification proceedings.\textsuperscript{173} In general, these cases are said to involve purely “personal rights,”\textsuperscript{174} which could be asserted only by those who have suffered the complained-of violation. Furthermore, several Court opinions have expressed the view that the exercise of third party rights in the criminal context is inappropriate since those rights must be balanced against society’s interest in securing convictions against the guilty.\textsuperscript{175} Based on this concern, the Court has sometimes been reluctant to let a criminal defendant exercise his or her own rights, let alone those of a third party.\textsuperscript{176} Yet the \textit{Powers} Court readily extended third party standing to a

\begin{footnotes}
\item[169] Id. at 1375 (Scalia, J., dissenting).
\item[170] \textit{Powers}, 111 S. Ct. at 1376 (Scalia, J., dissenting) (cases cited). It is well-settled that a criminal defendant may not object to the illegal search or seizure of a third party, even when the government proffers the fruit of the illegality as evidence against the defendant. See, e.g., Rawlings v. Kentucky, 448 U.S. 98 (1980) (defendant had no right to object to search of another’s purse); Rakas v. Illinois, 439 U.S. 128 (1978) (defendants could not object to search of automobile in which they were riding as passengers). See generally LAFAVE & ISRAEL, \textit{supra} note 154, at 460.
\item[171] Id. at 1377 (Scalia, J., dissenting). A criminal defendant cannot rely on a violation of a third party’s Fifth Amendment right against self-incrimination. See generally LAFAVE & ISRAEL, \textit{supra} note 154, at 460–61.
\item[172] A criminal defendant may not exclude testimony or evidence obtained "in violation of someone else’s confidentiality privilege." \textit{Powers}, 111 S. Ct. at 1377 (Scalia, J., dissenting) (cases cited).
\item[173] LAFAVE & ISRAEL, \textit{supra} note 154, at 461.
\item[174] Rakas, 439 U.S. at 138 (citing Simmons v. United States, 390 U.S. 377, 389 (1968)).
\item[175] See WHITExREAD & SLOBOGIN, \textit{supra} note 108, at 3–4.
\end{footnotes}
white defendant in spite of this long-standing policy. Apparently, the need for "equality" between Black and white defendants was more important to the Court than its oft-expressed concern that the enforcement of procedural rights may allow the guilty to go free. 

Although Justice Kennedy presented his opinion as if it conformed to prior precedent, Powers also marked a significant shift in the Court's treatment of the issue of jury discrimination. Previously, the Supreme Court had always focused on the denial of Equal Protection rights to the defendant as the grounds for allowing him or her to seek to overturn a conviction due to discrimination in the jury selection process. Moreover, the Court had always viewed its Equal Protection cases as addressing a particular, concrete problem—the use of the criminal process to oppress Blacks—and had shaped its remedies accordingly. In Powers, however, the Court shifted its focus from the needs of minority defendants to the demands of colorblind constitutionalism. As a result, the oppression of Blacks is acknowledged only as a convenient rationale for the extension of previously unexercised rights to whites.

2. The White Use of Black Rights

The centerpiece of Powers is its grant of third party standing to white defendants, permitting them to litigate the Equal Protection rights of excluded Black jurors. Drawing on civil third party

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177 The unique outcome of the standing issue in Powers could possibly be justified on the grounds that race discrimination in jury selection must be treated differently than rights violations which take place in the gathering of evidence, since it casts doubt on the legitimacy of the proceedings. See 111 S. Ct. at 1365. Yet, this explanation is not wholly satisfactory because the Court has done nothing in other contexts when the integrity of the judicial process was threatened. See, e.g., Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (permitting introduction of coerced confessions to be evaluated under harmless error standard, and rejecting argument that reliance on coerced confessions offends the integrity of the courts).

178 See Thomas Y. Davies, Denying a Right by Disregarding Doctrine, 59 Tenn. L. Rev. 1, 5–6 (1991) (arguing that in fourth amendment cases, the Rehnquist Court habitually feigns adherence to earlier traditions in order to mask its creation of entirely new doctrine).

179 See supra note 99 and accompanying text.

180 Given the outcome of the case, it seems strange that the Court did not mention the central role of the Black juror when it described the issues under consideration. 111 S. Ct. at 1367 (stating the question of the case as "whether, based on the Equal Protection Clause, a white defendant may object to the prosecution's peremptory challenges of black venirepersons").
standing doctrines, the Court declared that white defendants may exercise *Batson* challenges as proxies for excluded Black jurors. A cursory glance at the related case law, however, reveals that the Court applied its third party standing test much less stringently in *Powers* than usual.

Generally, a third party litigant must meet three criteria in order to obtain standing. First, the litigant must have suffered an "injury-in-fact." Second, the litigant must have a "close relation" to the third party. Finally, it must be difficult for the third party to protect his or her own interests. The Court held in *Powers* that white defendants meet all three criteria when protesting the exclusion of Black jurors. First, the Court found that a white defendant suffered an injury-in-fact from the improper exclusion of Black venirepersons because such exclusion "casts doubt on the integrity of the judicial process, and places the fairness of a criminal proceeding in doubt." Next, the Court found that the voir dire process establishes a "relation, if not a bond of trust" between white defendants and excluded Black jurors and that both of these parties may lose faith in the judicial process if the defendant is unable to object to an instance of racial discrimination at trial. Finally, the Court found that it would be procedurally awkward, time-consuming and expensive for an excluded venireperson to bring a suit protesting his or her exclusion. Even taken together, however, these findings provide little justification for extending third party standing to white criminal defendants.

As an initial matter, the *Powers* Court glossed over the first and most significant element in the test for third party standing: the "injury-in-fact" requirement. This element is intended to prevent unnecessary or premature decisions on constitutional issues and ensure that the litigant "properly . . . frame[s] the issues and

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181 *Powers*, 111 S. Ct. at 1370.
182 *Id.*
183 *Id.*
184 *Id.* at 1371 (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)).
185 *Id.* at 1372.
186 *Id.* The Court also found that the relation between excluded Black jurors and white defendants is no more tenuous than other relationships found sufficient to support third party standing claims in prior cases. *Id.*
187 *Id.* at 1373.
present[s] them with the necessary adversarial zeal." 189 Yet, rather than requiring Powers to assert an "injury-in-fact" to himself, the Court imported new terminology into its standing analysis by asking whether he had suffered a "cognizable injury" 190 from the prosecution's exclusion of African-Americans by peremptory challenge. Thus, the Court focused on the possibility of injury to the defendant rather than actual injury. 191

The key to Justice Kennedy's reluctance to find a direct injury to Powers lies in the implications of finding such an injury. The Court could have found at least two instances of direct injury to white defendants when prosecutors exclude Blacks from their juries, but recognizing either one would have undermined Justice Kennedy's colorblind agenda. First, the Court could have acknowledged that white defendants suffer injury when Blacks are excluded from their juries because Black jurors are less likely to convict than whites. 192 Of course, this reality flies in the face of the Court's contrived assumption that race makes no difference. In any event, the Court would be loath to permit a criminal defendant to claim a right not to be convicted. Alternatively, the Court could have placed greater emphasis on the harm to white defendants that results when race discrimination occurs in the judicial process. A racially motivated acquittal does not fully exonerate a defendant and a racially motivated conviction is even more objectionable. But recognizing harms of this sort would make it difficult for the Court to ignore the impact of societal discrimination on individual civil rights plaintiffs—white or Black. If Powers could complain of the derivative impact of discrimination directed at

190 Powers, 111 S. Ct. at 1371.
192 See Johnson, Black Innocence, supra note 17, at 1626–34. See also Frank P. Williams & Marilyn D. McShane, Inclinations of Prospective Jurors in Capital Cases, 74(2) SOC. & SOCIAL RESEARCH 85 (1990) (Black jurors more likely to acquit white defendants than white jurors); J.L. Bernard, Interaction Between the Race of the Defendant and that of Jurors in Determining Verdicts, 5 LAW & PSYCHOL. REV. 103, 109 (1979) (rate of acquittal of white defendants increased as number of Black jurors increased); Dale W. Broeder, The Negro in Court, 1965 DUKE L.J. 19, 20 (Blacks tend to acquit criminal defendants regardless of the defendants' race at higher rate than whites). But see Johnson, Black Innocence, supra note 17, at 1697 (some mock jury studies show Black jurors treat white defendants much the same way that white jurors treat Black defendants).
others, so might plaintiffs in a variety of other civil rights contexts.\(^{193}\)

At first blush, the "third party difficulty" factor provides a compelling reason for allowing a white defendant to champion the Batson rights of excluded Black venirepersons. Upon closer examination, however, even that rationale is flawed. Extending standing to a white defendant in Powers required the Court to sidestep one of the central concerns of its third party standing test, namely, the desire of third parties not to enforce their rights.\(^{194}\)

To reach its decision, the Court had to assume that a juror excluded due to racial discrimination would deviate from the natural inclination of jurors to avoid jury service in most cases.\(^{195}\) This assumption might have been reasonable in two of the cases the Powers Court relied on\(^ {196}\) to meet this prong of the standing test, Vasquez v. Hillery\(^ {197}\) and Rose v. Mitchell.\(^ {198}\) However, the excluded jurors in those cases may well have believed that they needed to remain on the jury to protect a member of their own race from a racially motivated conviction, an explanation that does not apply to Powers.

The most mystifying part of the Court's standing analysis is its conclusion that a "close relation" existed between Powers and the excluded Black jurors. As the Court itself noted, the presence of a relationship is only germane to the question of standing to the extent that it ensures that the litigant is "fully, or very nearly, as effective a proponent of the right as the [third party]."\(^ {199}\)

Notwithstanding the Court's claims to the contrary, the relationship between a criminal defendant and the jurors trying his or her case is far less substantial than those recognized in earlier third-party

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\(^{193}\) See supra note 162.

\(^{194}\) See Tribe, Constitutional Law, supra note 87, at 136; Brilmayer, Article III, supra note 188 (defining the right to "self-determination" as the right of the third party to decide when and when not to exercise rights).

\(^{195}\) See Paula DiPerna, Juries On Trial: Faces of American Justice 85 (1984) (60% of jury pool members actively seek to avoid jury service); Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 111 (1977) (most people consider jury service "a nuisance," and approximately 60% seek to be excused).

\(^{196}\) 111 S. Ct. at 1373.

\(^{197}\) 474 U.S. 254 (1986) (Latino defendant's conviction overturned due to racially discriminatory exclusion of Latinos from grand jury).

\(^{198}\) 443 U.S. 545 (1979) (discriminatory exclusion of Blacks from grand jury service was grounds for reversal of Black defendant's conviction).

\(^{199}\) Powers, 111 S. Ct. at 1372 (citation omitted).
standing cases, such as doctor-patient or vendor-vendee relationships.

Unlike a doctor-patient relationship, for example, the "bond of trust" which supposedly exists between criminal defendants and jurors does not provide an independent motivation for the defendant to act in the best interests of jurors. The obligation to care for patients is inherent in a doctor's role. The same cannot be said about the defendant's relationship with a member of the venire. Admittedly, a criminal defendant may seek to vigorously litigate an Equal Protection violation, since "discrimination in the jury selection process may lead to the reversal of a conviction." But this is precisely the point: the defendant will be motivated primarily by the desire to go free, not the desire to do racial justice or to vindicate the rights of excluded jurors. Moreover, even assuming that both defendants and excluded jurors desire to eliminate racial discrimination from trial, this says nothing about their respective conceptions of what race discrimination is and how best to fight it, concerns that go to the heart of the standing requirement. Thus, the defendant-juror relationship, standing alone, provides no assurance that the defendant will properly present and argue the equal protection issues raised in the case.

Not only is there little reason to expect that white defendants will make trustworthy fiduciaries of Black Equal Protection rights, there is reason to think just the opposite. The central assumption

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200 The Court offers Griswold v. Connecticut, 381 U.S. 479 (1965), Craig v. Boren, 429 U.S. 190 (1976) and U.S. Dept. of Labor v. Triplett, 110 S. Ct. 1428 (1990) as examples of cases where the litigant was in close relation to the third party, permitting assertion of the third party's rights. 111 S. Ct. at 1372.

201 Griswold, 381 U.S. at 481 (physicians offering birth control advice were in a "confidential" and "professional" relationship with patients).

202 Craig, 429 U.S. at 195 (shared purpose made beer distributor effective litigant for equal protection clause challenge to statute by 18- to 20-year-old males). Vendors are effective litigants of the rights of vendees because both wish to ensure the vendees' access to the seller's product. There is no similar common end driving defendants and jurors to seek the same outcome from litigation.

203 Powers, 111 S. Ct. at 1372.

204 See Singleton v. Wulff, 428 U.S. 106, 114 (1976) ("courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them"); Baker v. Carr, 369 U.S. 186, 204 (1962) (purpose of standing is to "assure that concrete adverseness which sharpens the presentation of issues upon which the court . . . depends for illumination of difficult constitutional questions").

205 In any event, this rationale of seeking to obtain a reversal of one's conviction does not explain sufficiently why white defendants should be permitted to make Batson challenges at trial, prior to conviction and prior to the need to explore all possible means of obtaining reversal.
of the Court’s standing analysis in *Powers* was that "[b]oth the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom."206 In other words, the Court felt that a white defendant would not harbor, or at least would not act upon, racist sentiments against Blacks. As desirable a state of affairs as that might be, the available evidence suggests that, at present, it is little more than a naive judicial fantasy. Virtually every public opinion survey, sociological study and political indicator shows that white animus toward people of African descent is persistent and widespread.207 Thus, the Court’s decision in *Powers* placed the well-being of the Black community in the hands of white criminal defendants and their attorneys, who, generally speaking, have little or no concern for the elimination of racial discrimination from the courthouse. In essence, the Court has set foxes to guard the chicken coop.

*Powers*’ third party standing arrangement clearly privileges white interests over Black. White defendants may rely on Black Equal Protection rights to avoid a conviction, but they need exercise this right only when it is to their benefit to do so.208 Consequently, permitting white defendants to represent the interests of Black venirepersons silences Black voices and allows white defendants to shape Equal Protection jurisprudence according to their needs.209 Thus, while white defendants are free to exploit the rights of Black citizens, adequate litigation of the Equal Protection rights of potential Black jurors becomes less likely.

**B. Georgia v. McCollum**

Given *Powers v. Ohio*’s ostensible focus on the civil rights of excluded Black jurors, the case of *Georgia v. McCollum*210 follows

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206 111 S. Ct. at 1372.

207 See generally A COMMON DESTINY, supra note 64, at 113–56.


209 Judge Wyzanski’s critique of a decision permitting white labor officials to represent Black workers’ interests is apropos here:

Suppression, intentional or otherwise, of the presentation of non-white claims cannot be tolerated in our society . . . . In presenting non-white issues non-whites cannot, against their will, be relegated to white spokesmen, mimicking black men. The day of the minstrel show is over.


logically. In *McCollum*, the Court held that white defendants may not use their peremptory challenges to intentionally exclude Black jurors on the basis of their race. At first glance, this holding appears to protect Black interests. However, a colorblind extension of *McCollum* (which appears likely) could contribute to the continued subjugation of Blacks through the criminal justice system. One can easily imagine a future case denying a Black defendant the use of peremptory challenges to exclude white jurors, even though the defendant made these challenges in an effort to prevent a racist conviction. Such a result would undermine the underlying purpose of *Batson*—providing Black defendants with fair trials.

1. Defendants as State Actors, Prosecutors as Proxies

Unlike *Powers*, where all the major players were white, *Georgia v. McCollum* involved white defendants charged with attacking and beating two African-Americans.211 Because the prosecution intended to show that the race of the victims was a factor in the alleged assault,212 it was anxious to prevent the discriminatory exclusion of potential African-American jurors. Pursuant to *Batson*, the prosecution sought an order from the trial court which would have required the defendants to articulate a racially neutral reason for the peremptory challenge of a Black juror once the prosecution established a prima facie case of discrimination.213 The trial court denied the prosecution’s request and the Georgia Supreme Court affirmed.214

The United States Supreme Court reversed. In an opinion written by Justice Blackmun, the Court held that criminal defendants may not intentionally use peremptory challenges to strike potential jurors due to their race.215 The Court merged the reasoning it had reached in two prior cases, *Powers* and *Edmonson v. Leesville Concrete Co.*,216 to find that discrimination by criminal

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211 *Id.* at 2351.
212 As another indication of the racial factors present in the case, the Court noted that a leaflet referring to the assault and urging a boycott of the defendants’ business was "widely distributed in the local African-American community." *Id.*
213 *Id.*
214 *Id.* at 2352.
215 *Id.* at 2359.
216 111 S. Ct. 2077 (1991) (holding that civil litigants could not exercise peremptory challenges in racially discriminatory manner).
defendants was "state action" and that prosecutors had standing to contest the defense's racially discriminatory use of the peremptory challenge on behalf of excluded jurors.

Although criminal defendants—unlike the civil litigants in Edmonson—are themselves beneficiaries of constitutional protection, the Court concluded that none of the procedural rights afforded to defendants enable them to escape the Constitution's prohibition against racially discriminatory peremptory challenges. The Court explicitly held that the prohibition of the exercise of discriminatory peremptory challenges does not violate a defendant's Sixth Amendment right to effective assistance of counsel, nor does it violate a defendant’s right to trial by an impartial jury.

2. The Cost of McCollum: Dealing with Discrimination by Denying Oppression

Undoubtedly, when confined to its facts, McCollum makes a significant contribution toward greater racial justice in the criminal justice system. As a result of McCollum, white defendants are less able to exclude Black jurors from trials with racial implications. Had the Court ruled otherwise, not only Black jurors but also Black victims and the Black community at large would have suffered.

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217 McCollum, 112 S. Ct. at 2354–55. The Court noted that criminal defendants engage in a traditional government function—"the selection of an impartial trier of fact"—when they exercise their allotted peremptory challenges. Id. at 2355 (citing Edmonson, 111 S. Ct. at 2083). In addition, the "harmful effects of the private litigant's discriminatory act" are aggravated and intensified by the authority of the state. Id. at 2356.

218 Id. at 2357. The Court found that the state suffered a cognizable injury from the exercise of discriminatory peremptory challenges, that the state had a close relation to the excluded venirepersons, and that the "barriers to a suit by an excluded juror are daunting." Id. (quoting Powers, 111 S. Ct. at 1373). In this, McCollum surpasses even Powers' poorly considered standing analysis. It is difficult to envision the state as a legitimate proxy for the rights of Black venirepersons since, prior to McCollum, the entire thrust of the Supreme Court's jury selection case law was to seek to eliminate purposeful state discrimination. See Swain, 380 U.S. 202, 234–35 (Goldberg, J., dissenting) (noting complicity of state prosecuting attorney in the intentional exclusion of Blacks from jury service).

219 Id. at 2357–58.
220 Id. at 2358.
221 Id. at 2358.
222 Id. at 2358–59.
223 The Rodney King trial is one example of how the criminal justice system may be employed to subjugate African-Americans. See supra notes 1–18 and accompanying text.
The problem with *McCollum*, however, lies in the Supreme Court's determined effort to elicit a general antidiscrimination rule from the case. Recharacterizing its prior decisions from *Strauder* onward, the *McCollum* Court constructed a history of rigidly colorblind jury selection jurisprudence. "Over the last century," wrote Justice Blackmun, "this Court gradually has abolished race as a consideration for jury service." Whenever he addressed the issue of racial discrimination, Justice Blackmun spoke in generic terms only, making no distinction between discrimination directed against whites and that directed against subjugated minorities. In absolute colorblind fashion, the Court concluded that "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination."

Using general antidiscrimination language in this way blocks attempts to fashion appropriate, color-conscious remedies to racial injustice. Yet, the reasons the Court gave for allowing the prosecutor in *McCollum* to contest the defense's use of peremptory challenges belie the need for a colorblind remedy:

One of the goals of our jury system is "to impress upon the criminal defendant and the community as a whole that the verdict of conviction or acquittal is given in accordance with the law by persons who are fair." Selection procedures that purposefully exclude African-Americans from juries undermine that public confidence—as well they should.

But does the purposeful exclusion of a suspected racist by a member of a racial minority seeking to avoid racial subjugation "undermine . . . public confidence" in the verdict? The only logical answer is no. Even Justice O'Connor, ordinarily a strong proponent of colorblind constitutionalism, noted in dissent that "the
Court's holding may fail to advance nondiscriminatory criminal justice," since "[u]sing peremptory challenges to secure minority representation on the jury may help to overcome . . . racial bias."\(^{228}\) In the messy racial landscape of America's courtrooms, "[t]he ability to use peremptory challenges to exclude majority race members may be crucial to empaneling a fair jury."\(^{229}\)

Unfortunately, the *McCollum* majority rejected the argument that Black defendants should be able to peremptorily challenge white jurors whom they suspect are racially biased. The Court acknowledged that "a defendant has the right to an impartial jury that can view him without racial animus,"\(^{230}\) but it insisted that Black defendants have to avail themselves of the limited remedy provided by *Ham v. South Carolina*\(^{231}\) to remove "those on the venire whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism"\(^{232}\) and forego the use of the peremptory challenge for this purpose.\(^{233}\)

The Court paints with too broad a brush when it categorizes any diversion from formal equality as "racially discriminatory." Whether the exclusion of a juror is "racially discriminatory" or not turns on whether the defendant and the excluded juror share racial identity and whether race plays a role in the trial. *McCollum*, because it does not take notice of this fact, bodes ill for future jury selection cases involving Black defendants.

\(^{228}\) Id. at 2364.

\(^{229}\) Id. (quoting Brief for NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae 9–10). Justice Thomas makes the same point in his concurring opinion. Id. at 2360 (Thomas, J., concurring).

\(^{230}\) Id. at 2358.

\(^{231}\) 409 U.S. 524 (1973) (requiring trial court to interrogate prospective jurors on the subject of race prejudice during trial of Black civil rights worker). The remedy in *Ham* is "limited" because even in those instances where a defendant is permitted to ask whether jurors are prejudiced against Black people, the juror can only be removed if he or she gives a response sufficiently biased that it would justify a challenge for cause. In practice, this would require an egregious statement and allow jurors who harbor less overt, but equally dangerous, racist sentiments to pass. See *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring) ("unless jurors actually admit prejudice during [voir dire], defendants generally must allow them to sit and run the risk that racial animus will affect the verdict").


\(^{233}\) But see id. at 2359 ("[T]here is a distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice"). Apparently, the majority believed a defendant could legitimately exercise a peremptory strike against a juror the defendant believed to be racist. However, since courts have not been sympathetic to claims of racism by Black defendants contesting the use of the prosecution's peremptory challenges, there is little reason to believe that Black defendants will be any more successful in convincing trial judges that a particular juror is racist.
IV. The Consequences of Colorblindness

Powers and McCollum ignore how the impact of race actually affects the trial process, an approach that is both ahistorical and acontextual. The Court presumes in these cases that white and Black defendants are similarly situated and that racism affects them in the same fashion and in equal measure. But discrimination affects different actors differently, and the race of the defendant is a key variable in determining whether discriminatory jury selection distorts the function of the trial. By failing to acknowledge these factors, the Supreme Court ignores and perpetuates the racial oppression of Blacks in the criminal justice system.

A. Black Defendants and the Reality of Racism

The most obvious target of racial oppression in the jury selection process is the Black defendant. Trial before a racially biased jury is an unfortunate, but all too common, experience for Black defendants. Racially biased juries may harm Black defendants in a number of ways. Black defendants may become victims of both conscious and unconscious racial bias on the part of jurors—either of which can result in an unwarranted conviction. An unwarranted conviction also may result when, due to the underrepresentation of Blacks, a jury wrongly interprets data crucial to the outcome of the trial. In addition to the danger of an incorrect result, the Black defendant may suffer symbolic and psychic harm as a result of the underrepresentation of Black jurors. These latter forms of race-based harm may not necessarily implicate the veracity of the verdict, but they do provide cause for concern for reasons related to fairness and due process of law.

The most dramatic type of juror bias is conscious racism: intentional, racially motivated conduct. In terms of the conduct of jurors, conscious racism involves deliberately voting for guilt or finding a fact adverse to a Black defendant as a consequence of consciously known and deliberately chosen racist sentiments.

234 See generally Johnson, Black Innocence, supra note 17, at 1616-49 (reviewing data from criminal trials, mock jury experiments, and general research on race prejudice that suggest jurors “will judge the defendant more harshly if he is [B]lack than if he is white”).

Evidence suggests that there must be a critical mass of non-racist Black jurors for Black defendants to avoid the effects of conscious racism and receive a fair trial. Given the prevalence of racial bias in the community-at-large, there is a great likelihood that at least one person who is biased against Blacks will be seated on any particular jury. In a close case, this one juror could prevent a deserved acquittal or secure an unjust conviction. More generally, the presence of one or more racists may affect group dynamics in the jury room. In both of these circumstances, then, the defendant has a critical need for one or more Black jurors to be on hand to counteract conscious racism. Consequently, any act which reduces the probability of including the highest possible number of Blacks on a jury harms the Black defendant.

Unconscious racial discrimination may be just as damaging to the Black defendant as conscious racism. Non-Black jurors may decide against a Black defendant, not out of a deliberate intent to harm, but because they are responding to unconsciously held beliefs regarding the inferiority or criminal nature of Blacks. Jurors may themselves harbor racial prejudice towards other Blacks, an occurrence of more frequency than one might suspect. See Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) ("members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes toward the minority"); Gordon W. Allport, The Nature of Prejudice 150–53 (1954); E. Franklin Frazier, Black Bourgeoisie 213–16 (1957); Gerald Simpson & John Yinger, Racial and Cultural Minorities 192–95, 227, 295 (4th ed. 1972). While prevalent, the possibility of Black-on-Black racism does not obviate the need to ensure the presence of Black jurors in the trials of Black defendants. Studies indicate that such racial self-destructiveness is far less probable than racism from white jurors. Johnson, Black Innocence, supra note 17, at 1698, n.462 (citing authorities).

Sheri Johnson argues convincingly that, in order to prevent convictions based on racial prejudice, a defendant should be entitled to three "racially similar jurors" on his or her jury. Johnson, Black Innocence, supra note 17, at 1698–99. See also Colbert, Challenging the Challenge, supra note 90, at 110–15 ("[t]he results in . . . jury experiments suggest that the influence of race is minimized when an all-white jury is replaced by one that is racially mixed"); Developments in the Law—Race and the Criminal Process, 101 Harv. L. Rev. 1472, 1559–60 (1988).

acting in this way will not admit to being swayed by racism\(^{241}\) (and therefore will be difficult to identify at voir dire), yet they will nonetheless let their biases affect their decisions. For example, an unconsciously biased juror may be less likely to believe that sex between a Black man and a white woman was consensual,\(^{242}\) that a Black man was in a predominantly white neighborhood "just for a walk,"\(^{243}\) or that a Black woman dressed in a sequined gown and high heels was not soliciting prostitution.\(^{244}\) As in the case of conscious discrimination, the underrepresentation of Black jurors increases the chances that a jury whose members harbor sublimated racial animus will victimize the Black defendant.\(^{245}\)

Another potential harm to Black defendants caused by the underrepresentation of Black jurors is the defendant's trial by a jury that lacks the information to resolve the case fairly. In certain cases, juries will need representatives from the Black community who can provide interpretations of data based on Black culture.\(^{246}\) Examples of the harm engendered by jury information deprivation include the inability to translate Black English into standard English\(^{247}\) or to determine, when relevant, whether the conduct of a defendant was reasonable or unreasonable in a self-defense or resisting arrest case.\(^{248}\) This is not to say that whites are inherently incapable of understanding Black life and culture. The different outcomes reached by Black and white jurors result from the lack of information, and whites can certainly understand the Black perspective if they are given access to informed teachers.

\(^{241}\) See sources cited supra note 240.

\(^{242}\) A common stereotype exists that Blacks are far more promiscuous and "oversexed" than whites. One who unconsciously believed this stereotype would find it more plausible for the Black man to desire the white woman than for the white woman to desire the Black man. See generally, Winthrop D. Jordan, White Over Black: American Attitudes Toward the Negro, 1350–1812 32–40 (1968); Jesse Walter Dees, Jr. & James S. Hadley, Jim Crow 11–22 (1951); Willis D. Weatherford & Charles S. Johnson, Race Relations: Adjustment of Whites and Negroes in the United States 60, 230–31 (1934) (copies on file at University of Florida main library).


\(^{244}\) Again, the stereotype of Black promiscuity is at work here.

\(^{245}\) Johnson, Black Innocence, supra note 17, at 1698; Colbert, Challenging the Challenge, supra note 90, at 112.


\(^{247}\) Id. at 1559; Valerie Hans & Neil Vidmar, Judging the Jury 138–40 (1986).

\(^{248}\) A properly informed jury might decide that fear of police officers in a particular community rendered a defendant's refusal to obey a police order reasonable, or that conduct which whites would not regard as threatening appeared threatening to the defendant.
Given the existence of conscious racism, unconscious racism and the possibility of juror ignorance, racially discriminatory peremptory challenges are a harm to the Black defendant whether or not they actually result in a guilty verdict. Where Blacks are already a minority of the population, each exercise of a strike is an independent source of race-based harm. Even if the result is not an all-white jury or a jury on which the numbers of Blacks can be said to be underrepresented, each strike is discriminatory because it lessens the probability that Blacks will be on the jury, thus increasing the probability of a biased jury and decreasing the probability that a cross-section of community values will be fairly represented. Given the history of racism in this country and the history of the use of the jury to enforce that racism, a jury that underrepresents Blacks is inexcusable.

Black defendants also may suffer what I call "symbolic harm" when tried before juries on which Blacks are underrepresented. "Symbolic harm" results when Black defendants are treated in ways that demonstrate their subjugated status and suggest their inferiority. Black defendants may be harmed symbolically in a variety of ways.

First, underrepresentation of Blacks causes symbolic harm to the extent that it derogates from the democratic values that the jury system is supposed to embody and uphold. One purpose of the jury trial is to provide a voice for the people to counter-balance the power of the state. The jury as an institution affirms the principle that the adjudication of rights and imposition of punishment should be a democratic process. What, then, is the implication if Blacks are underrepresented on the jury? Instead of an example of democracy at work, a jury which contains no Blacks or only a token number of Blacks displays what De Tocqueville condemned as the "tyranny of the majority."

The word "tyranny" begins to describe the second kind of symbolic harm suffered by Black defendants. Besides being simply a numerical majority, whites on the whole have more money, higher social status and greater access to power than do Blacks. The trial of a Black person before an all-white jury gives the appearance of a privileged elite passing judgment over the fate of

249 See HANS & VIDMAR, supra note 247 at 248.
an inferior. At the symbolic level, the jury is no longer a neutral institution but one controlled, dominated and possessed by whites. In the racial turf war being played out behind the scenes of our criminal justice system, each component of the trial process is replete with meaning. A jury on which African-Americans are seriously underrepresented indicates that the defendant is on white turf. Stricken Black jurors reinforce this image of Black powerlessness and dependency.

In addition to these symbolic harms, Blacks may suffer a related psychic harm when they observe a racially biased use of the peremptory challenge system. To the Black defendant looking at a jury panel which contains only one or two Blacks, the sight of those Blacks being removed through peremptory challenge could understandably cause a sense of alarm. Given the milieu of racial oppression that pervades American society, a Black defendant subjected to discriminatory jury selection suffers psychic harm, a real, palpable, and categorizable form of fear akin to the fear generated by an assault. The nature of the race-based harm in this instance is no different than that engendered were the prosecutor to address the defendant by a racial slur. Furthermore, this harm is not limited to the defendant. Black venirepersons also may feel that they have suffered through a racist assault.

251 Although conscious racism in the jury context may sometimes be the result of the bias of some individuals against other individuals, as a political matter the jury has been used by one community of people as an instrument of oppression against another community of people. Racial bias cannot be seen as just an individual matter and jury bias cannot be solved simply by focusing on individuals.

252 This fear is no different than the apprehension many Blacks feel, for example, upon walking into a bar in, say, South Boston and noticing that they are the only Blacks in the place, or that many whites may feel when they are left alone in an elevator with three or four Blacks. While such moments of apprehension may be an unavoidable part of life in a multi-ethnic, but still racially divided society, they should not be permitted to invade the halls of justice. See Fla. Sup. Ct. Comm., Report, supra note 148, at 7 (“courts must remain the place where the injured can seek refuge without fear of being devoured by the serpent of hatred”).

Ultimately, the peremptory challenge of Black jurors reduces the faith that Blacks have in the trial, reduces the legitimacy of the legal system as a whole, and obscures any moral lessons of just retribution or deterrence that the Black defendant's conviction would otherwise illustrate.

B. The New Politics of Race

The Supreme Court's recent endorsement of colorblind philosophy in Powers and McCollum cannot be viewed in historical isolation. The approach of these cases deviates from a hundred-year tradition of concern for the plight of the Black defendant. However, if untrue to one historical tradition, Powers and McCollum have coincided with a more recent trend. Since the 1970s, there has been a general "white backlash" against affirmative action programs. Much of this backlash has been fueled by concern for so-called "innocent whites," supposedly victimized by race-conscious affirmative action remedies. Part of the Reagan Administration's pledge to "get the government off the backs of the people" was a thinly veiled promise to gut affirmative action programs. The adoption of colorblind constitutionalism, while perhaps motivated by different concerns, clearly furthers the political agenda of the neo-conservative right by defending and preserving white privilege.

Colorblind remedies for jury selection discrimination have limited effectiveness in eliminating racial subjugation. While helpful in their limited applications, Powers and McCollum fall far short of what is required to eliminate the impact of race on criminal jury trials. Both cases perpetuate the status quo by diverting attention and resources from corrective race-conscious solutions.

244 MARABLE, RACE, REFORM, AND REBELLION, supra note 32, at 152.
258 One reason why colorblindness is the political ideology of choice of the neoconservative right may be because it preserves white privilege without the negative moral connotations associated with blatant white supremacy as espoused by George Wallace and Strom Thurmond in their heyday and, more recently, David Duke.
Moreover, they actually pose potential threats to Black interests. As a result of Powers, the Equal Protection rights of Black venirepersons have been placed in the hands of untrustworthy fiduciaries. An extension of McCollum could easily deprive Black defendants of one of the most useful means of defending themselves from racial harm—the ability to peremptorily challenge white venirepersons.

Racial subjugation through the criminal process must be eliminated first, before colorblind jury selection procedures may be profitably implemented. A jury selection process that does not account for the racial subjugation of African-Americans will permit it to continue.

V. Seeking a Race-Conscious Remedy to the Jury Selection Problem

An anti-subjugation solution to the problem of race discrimination in the selection of juries would, of necessity, have three key elements. First, it would address the traditional concern regarding the racially discriminatory use of the peremptory challenge. That is, it would prevent prosecutors from using their peremptory challenges to reduce the numbers of Black venirepersons so that a Black defendant would be tried before a disproportionately white jury. Second, the remedy would prevent white defendants, in appropriate cases, from utilizing their peremptory challenges to remove Black jurors. Finally, a race-conscious jury discrimination remedy would avoid the flaw in the Powers-McCollum approach by permitting Black defendants to use the peremptory challenge to strike prospective jurors whom they suspect are racist and to strike white jurors in order to increase the likelihood of seating a Black juror at trial.

Such a race-conscious jury selection remedy would not be entirely unfamiliar to Supreme Court jurisprudence and would not require major changes in Equal Protection doctrine. Batson v. Kentucky already stands for the proposition that the Equal Protection Clause forbids the exclusion of Black jurors from the trials of Black defendants on racially motivated grounds (its major flaw being that it makes it too difficult for a defendant to prove that a
prosecutor's peremptory challenge of a Black juror was indeed racially motivated). The Court's requirement of shared racial identity between the defendant and the excluded juror demonstrates that Batson is directed toward eliminating the racial subjugation of African-American defendants. As a result, nothing in Batson forbids Black defendants from using the peremptory challenge to strike white jurors.

The case of Ristaino v. Ross provides an easy alternative to the remedy currently evolved from Powers and McCollum. In Ristaino, the Supreme Court decided that a trial court must accede to a defense request to inquire as to a juror's racial attitudes during voir dire whenever there is a "significant likelihood that racial prejudice might infect [the] trial." If the Supreme Court considers trial courts able to determine when a "significant likelihood that racial prejudice might infect the trial" exists for purposes of conducting voir dire, it ought to consider these courts competent to make a similar inquiry for deciding when the peremptory challenge of potential Black jurors would violate the Equal Protection Clause.

The best way to prevent the discriminatory use of the peremptory challenge for racial subjugation would be to prohibit its use for removing potential Black jurors from the venire in a criminal trial whenever there is a significant likelihood that racial issues might affect the trial. This remedy, based on Ristaino's language, is narrowly tailored to prevent the racial subjugation of African-Americans through the criminal process. Racial subjugation is the

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260 See supra, notes 146-150 and accompanying text.
262 See Colbert, Challenging the Challenge, supra note 90, at 120-25. Professor Colbert reaches a similar conclusion as to the appropriate remedy, advocating the abolition of peremptory challenges in "race-sensitive" cases based on the unconstitutionality of "all badges and incidents of slavery . . . ." Civil Rights Cases, 109 U.S. 3, 20 (1883).
263 Id. at 597. Of course, one might doubt the ability of a court to determine when a "significant likelihood" exists. Indeed, the Ristaino Court held that there was no such "significant likelihood," despite the fact that the case involved Black defendants on trial for violent crimes against a white security guard. Id. at 597. However, the "racial issues" standard proposed infra, notes 264-275 and accompanying text, would bring Ristaino automatically within its scope, given the defendants' race.
264 A test worded in this manner sets forth a less stringent standard than that in Ristaino. "Racial prejudice" implies that there must be some active dislike, which the term "infests" equates to a disease. The problem with the "disease model" of racial prejudice is that it requires the court to focus on identifying carriers of the disease who exhibit some demonstrable form of animus toward African-Americans. Concentrating on the absence or presence of "racial issues" should direct the court's inquiry away from the value choices of individual jurors or groups of jurors and instead highlight the factual context of the case.
harm that results from the use of the peremptory challenge to strike Black venirepersons, a fact which Batson recognized without resolving and which Powers and McCollum later simply ignored. Prohibiting the use of the peremptory challenge when racial issues pervade the trial would prevent the challenge when racial subjugation is most likely to result. Such a prohibition would also eliminate the need to litigate whether each peremptory challenge of a Black venireperson was made with a racially discriminatory motivation.

This prophylactic rule would be both uniform and easy to apply. No party, whether prosecution or defense, white or Black, would be able to peremptorily challenge African-American venirepersons once a court has determined that racial issues would affect the trial. In the event of such a finding, Black jurors could only be removed for cause.

This proposed remedy would further the Court's interest in preserving the peremptory challenge in its traditional discretionary form, while preventing its use as an instrument of racial harm. The remedy proposed here would still permit the peremptory challenge to be freely exercised to remove any juror when race is not implicated in the trial and any non-Black juror when race is a factor. Consequently, a Black defendant would be free to peremptorily challenge white jurors for the purpose of increasing the probability of Black participation on his or her jury.

Courts should broadly apply the test for whether there is a significant likelihood that racial issues might affect a trial. Whenever a Black defendant stands trial and there is possibility that peremptory challenges by the prosecution could reduce the number of African-American jurors to a number less than three, it may be presumed that racial issues would affect the trial. This presumption would be irrebuttable, although defendants could al-

265 See supra notes 163–166 and accompanying text.
266 See discussions of Powers and McCollum, supra notes 155–234 and accompanying text.
267 See, e.g., Batson, 476 U.S. at 98–99 (recognizing the importance of the peremptory challenge, but insisting that "requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges ... furthers the ends of justice").
268 This presumption would be based on those studies which have demonstrated that Black defendants stand a reduced chance of a fair trial when less than three African-Americans are seated on the jury. See supra sources cited at note 237.
269 To make the presumption rebuttable would fly in the face of all that experience and research has demonstrated about the nature of racial prejudice. The underrepresentation of African-Americans on juries can cause harm to Black defendants even if there are no other racial issues involved in the case.
ways waive their Equal Protection Clause rights with respect to the selection of their juries\textsuperscript{270} and the prosecution could challenge for cause when potential Black venirepersons demonstrated racial bias during voir dire.

When a white defendant is standing trial, there would be no presumption that racial issues would affect the trial. For the prosecution to be prevented from using its peremptory challenges to exclude African-American jurors, the trial of the white defendant would have to be related in some way to the subjugation of African-Americans due to their race. Upon such a finding, however, neither the prosecution nor the defense could use their peremptory challenges to exclude potential Black jurors from the trial jury.\textsuperscript{271}

Racial issues might affect the trial of a white defendant in a number of ways.\textsuperscript{272} The \textit{Powers} Court, for example, noted how "cynicism" as to the integrity of the verdict may be increased when Blacks are excluded from the jury:

\begin{quote}
The cynicism may be aggravated if race is implicated in the trial, either in a direct way as with an alleged racial motivation of the defendant or a victim, or in some subtle manner as by casting doubt upon the credibility or dignity of a witness, or even upon the standing or due regard of an attorney who appears in the cause.\textsuperscript{273}
\end{quote}

In circumstances such as these, Courts should not permit parties to peremptorily challenge potential Black jurors.

\textsuperscript{270} Defendants may wish to waive their Equal Protection rights and permit the prosecution to use its peremptory challenges against Black jurors in order to exclude Black jurors themselves, to expedite their trials or to curry favor with the prosecution or the court. Any such waiver, however, should be made in accordance with the "intentional relinquishment or abandonment of a known right or privilege" standard of \textit{Johnson v. Zerbst}, 304 U.S. 458 (1938).

\textsuperscript{271} This method of protecting the equal protection rights of Black jurors might seem unfair to white defendants, since the prosecution would be free to strike white jurors while the white defendant would be unable to strike Black jurors. One should remember, however, that the purpose of the restriction on strikes against Black jurors is to prevent every Black juror (or all but a few) from being removed from the venire. So long as a majority of the jurors on the venire are white, there would be no comparable fairness problem regarding the interests of the white juror. However, a white defendant who was in danger of being tried before a jury with less than three white jurors might have a legitimate argument that the peremptory challenge of white jurors should be suspended, if racial issues permeated his or her trial.

\textsuperscript{272} As a general rule, racial issues would affect a white defendant's case whenever the defendant was perceived to be identified with Black persons or causes. \textit{See} Underwood, \textit{Race Discrimination in Jury Selection}, supra note 99, at n.51 and accompanying text.

\textsuperscript{273} \textit{Powers}, 111 S. Ct. at 1371.
The McCollum facts provide another good illustration of relevant facts to consider in a case involving white defendants where racial issues might affect the trial. The crime in that case allegedly was racially motivated, and a leaflet calling for a boycott of the defendant's business was circulated in the African-American community. The Rodney King case, of course, provides a particularly striking example in which racial issues were implicated in the trial of white defendants.

Requiring white access to Equal Protection remedies to be considered in relation to Black subjugation prevents the Supreme Court's pre-Powers jury selection cases from being bleached of all meaning. The remedy proposed here recognizes the unique position of African-American citizens as victims of longstanding and persistent racial oppression.

Conclusion

At first glance, the Supreme Court's decisions in Powers v. Ohio and Georgia v. McCollum appear to make progress toward eliminating abuse of the judicial system, but there is a hidden and ultimately fatal flaw in the Court's approach. The Court views the problem as a simple question of "discrimination" in its most narrow sense. Thus, in the view of the Court, as long as Black and white defendants and Black and white jurors receive identical rights and privileges, the jury selection problem disappears. This approach not only fails to resolve the problem, but actually makes it worse. The use of colorblind principles to govern the ability of criminal defendants to affect the use of peremptory challenges masks the continuing racial oppression that Black defendants face and prevents those defendants from doing anything about it.

The key to resolving the problem of race discrimination in the jury selection process is to recognize it for what it is—one manifestation of a pervasive and persistent racial subjugation targeting
Ending race discrimination in the selection of juries calls for an explicitly color-conscious remedy governing the use of peremptory challenge: a blanket prohibition on the exclusion of African-American venirepersons when race is implicated in the trial.

The solution offered here is far from perfect. Even in a criminal justice system that is not “colorblind” to the oppression of African-Americans, future Rodney Kings may still be beaten, arrested, tried and convicted on the basis of their race. If there are no Blacks on the venire to begin with, and if racial attitudes remain polarized, then the ability to retain African-American jurors and exclude obvious racists will have little meaning. But until we reach that brighter day when, in fact, each of us is judged by the “content of our character,” race-conscious remedies provide perhaps the best hope for curtailing the use of the criminal justice system as a tool for racial injustice.

This racial subjugation has not escaped judicial attention. Consider, for example, the following observation:

[We . . . cannot deny that, 114 years after the close of the war between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.]