

# Texas Independence: The Lone Star State Serves as an Example to Other Jurisdictions as it Rejects Mixed-Motive Defenses to *Batson* Challenges

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\* Rice B.A. 1997, Texas J.D. 2002; to clerk with Louis H. Pollak in EDPA upon graduation. To Emily, Mom, and Dad, who possess the three purest hearts God could bless someone with—keep me honest in the courtroom.

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## I. Introduction

Trouncing upon the Constitution is a relatively easy task these days, particularly when it comes to jury selection. Despite the United States Supreme Court's clear refusal to countenance racial profiling during voir dire, a lawyer with an ounce of resolve and a modicum of planning can easily ensure that no minorities will appear in a jury if she believes it strategically advantageous. The advocate can simply use peremptory strikes to remove all of the blacks and Hispanics from the jury. Her peremptory challenges are constrained by only one trifling limitation: she must make sure to find something unrelated to race that could conceivably explain the strike. It does not take much: lack of eye contact,<sup>1</sup> misspellings on a juror information card,<sup>2</sup> long hair,<sup>3</sup> a "suspicious looking" beard,<sup>4</sup> or the ability to speak another language.<sup>5</sup> Even if the other side can prove that race did factor into her decision, the peremptory strikes should be upheld with no problem. Judges in the state of Texas, however, have been bold mavericks in this area of the law, regularly striking down peremptory strikes based even partially on race.

1. *See, e.g.*, *United States v. Martinez*, 168 F.3d 1043, 1047 (8th Cir. 1999) (noting that eye contact or lack thereof could be a legitimate race-neutral reason for striking a juror); *United States v. Fields*, 72 F.3d 1200, 1206 (5th Cir. 1996) (same); *Polk v. Dixie Ins. Co.*, 972 F.2d 83, 85-86 (5th Cir. 1992) (same).

2. *Rice v. State*, 746 S.W.2d 356, 357 (Tex. App.—Fort Worth 1988, pet. ref'd).

3. *See Purkett v. Elem*, 514 U.S. 765, 766, 769 (1995) (permitting the prosecutor's strike of a juror who "had the longest hair of anybody on the panel by far" and "appeared . . . to not be a good juror for that fact").

4. *See id.* (affirming the sufficiency of a prosecutor's explanation that he struck two black men because their "mustaches and . . . beards look suspicious").

5. *See Hernandez v. New York*, 500 U.S. 352, 369-70 (1991) (finding no discriminatory intent in striking Latino jurors because they were bilingual).

In the 1986 *Batson v. Kentucky*<sup>6</sup> decision, the United States Supreme Court held that a prosecutor could not exercise peremptory strikes against jurors because of their race.<sup>7</sup> In subsequent decisions, the Court also forbade racial strikes on the part of criminal defendants and civil litigants.<sup>8</sup> Despite the clear intent of the *Batson* line of cases to completely eliminate racial considerations in jury selection, federal courts and several states have allowed a "mixed-motive defense" to vitiate the doctrine.

The mixed-motive defense permits the proponents of a peremptory strike to justify their consideration of race by showing that some race-neutral reason would have resulted in the same strike. In other words, to prove an equal protection violation, a party invoking *Batson* protection must show that the racial discrimination not only existed but was the but for cause of the peremptory challenge. The principle itself is not unique; the Supreme Court specifically endorsed it in the context of facially neutral legislative and administrative acts in *Mt. Healthy City School District Board of Education*<sup>9</sup> and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>10</sup>

In sharp opposition to the lower federal courts, Texas courts have forcefully rebuked the concept of mixed-motive defenses as applied to *Batson* challenges. The Texas decisions, while consistent in their treatment of the issue, are surprisingly succinct and lack extensive discussion of the matter. The courts treat mixed-motive defenses as so clearly incompatible with *Batson* that the issue does not warrant the spilling of much judicial ink. This Comment argues that Texas has recognized correctly that *Batson* and the mixed-motive defense are fundamentally inconsistent and that federal courts and the courts of other states should follow suit. At least three other states (South Carolina, Georgia, and Arizona) have cited extensively to Texas decisions in rejecting the mixed-motive defense. This Comment seeks to provide the unspoken underlying substantive

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6. 476 U.S. 79, 84 (1986).

7. *Id.* at 84.

8. See *Georgia v. McCollum*, 505 U.S. 42, 44 (1992) (holding that the Equal Protection Clause prohibited the criminal defendant from exercising peremptory challenges on the basis of purposeful racial discrimination); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 616 (1991) (denying private litigants in civil cases the ability to "exclude jurors on account of their race").

9. 429 U.S. 274, 287 (1977).

10. 429 U.S. 252, 264-65 (1977).

arguments justifying Texas's summary dismissal of mixed-motive defenses to *Batson* challenges. These arguments show that Texas has not merely made a discretionary choice in its jurisprudence. Rather, the departure from *Mt. Healthy* and *Arlington Heights* can be justified in a principled manner that other jurisdictions can and should emulate.

Across all jurisdictions, few cases have dealt with the mixed-motive problem. One might respond to the arguments of this Comment, therefore, with a shrug, reasoning that not much hangs in the balance. After all, how often will a litigant actually admit that race played a part in his jury strikes? Moreover, given the willingness of courts to accept almost any explanation as race-neutral, judges will rarely face situations in which they need to engage in mixed-motive analysis. To the cynics, the reply is that the response of the judicial system in the few cases with mixed-motive findings evinces the prevailing attitude toward racism in broader contexts. In other words, the treatment of the mixed-motive defense shows whether courts are truly committed to eliminating racism in all its forms or are willing to tolerate admittedly unequal treatment so long as it cannot be proven to have outward effects.

Part II of the Comment surveys the development of the federal *Batson* doctrine and details the chronological steps that the U.S. Supreme Court took in its attempts to accord the maximum protection of the Fourteenth Amendment to jurors. Examining the rationales and breadth of these decisions provides the necessary foundation for making normative decisions about the desirability of mixed-motive defenses. Part III describes the procedure behind challenging peremptory strikes by briefly outlining the three-step analysis to be performed when a litigant raises a *Batson* challenge.

Part IV examines the *Arlington Heights* and *Mt. Healthy* mixed-motive defense in their endemic context of facially neutral legislation and administrative acts. These two equal protection decisions represent the presumptive general rule to be applied when a party alleges unlawful discrimination. This Comment seeks to distinguish the jury selection process from other discrimination settings in order to justify an exception to that rule.

Part V describes the differing applications of *Batson* jurisprudence in federal and Texas courts. Examination of case law uncovers an unbending federal policy that has consistently permitted the *Arlington Heights/Mt. Healthy* defense; of the six federal circuit

courts that have broached the subject, none have rejected mixed-motive arguments.

Part VI is the heart of the Comment. It advances normative arguments for courts to follow Texas's lead in refusing to permit the mixed-motive defense in the context of peremptory challenges. Specifically, Part VI supports the Texas rule because of the unique need for equal protection within the judicial branch, the mandates of *Batson's* text, the lack of a constitutional right to a peremptory strike, and the continuing reality that attorneys do actively consider race when making jury selections.

## II. Development of Peremptory Challenge Jurisprudence

### A. *What is a Peremptory Challenge?*

The *Black's Law Dictionary* definition encapsulates the original understanding of the procedural device known as the peremptory challenge: "the right to challenge a juror without assigning, or being required to assign, a reason for the challenge."<sup>11</sup> In fact, the United States Supreme Court has noted that the most significant features of the peremptory challenge are that it requires no justification and that it is outside the Court's control.<sup>12</sup>

During the process of jury selection, or voir dire, parties may remove jurors from an initial panel using one of two procedural mechanisms. Litigators have long had the ability to dismiss a juror "for cause," that is, when a member of the panel exhibits some sort of bias against one of the parties during the voir dire process.<sup>13</sup>

Peremptory challenges provide for the circumstance in which an attorney cannot show a specific bias of a person sufficient for the court to dismiss the juror for cause but still believes that his client has reduced chances for success with that juror on the panel.<sup>14</sup> Accordingly, most jurisdictions afford trial participants a limited

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11. BLACK'S LAW DICTIONARY 1136 (6th ed. 1990).

12. *See Swain v. Alabama*, 380 U.S. 202, 220 (1965) ("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.").

13. *See* JAMES E. GOBERT & WALTER E. JORDAN, *JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY* § 7.03, at 196-98 (2d ed. 1990) (detailing Chief Justice Marshall's opinion from Aaron Burr's 1807 treason trial, which favorably discusses the practice of striking biased jurors).

14. *See id.* § 8.01, at 271.

allotment of peremptory challenges that require no explanation or cause.<sup>15</sup> Each side simply asks the judge to dismiss certain venirepersons without citing any justifying reasons.<sup>16</sup>

*B. Applying Fourteenth Amendment Equal Protection to the Peremptory Challenge*

As currently construed, “peremptory challenge” is a misnomer. Today’s courts often require a party to provide a reasonable explanation for such challenges.<sup>17</sup> Because unjustified juror strikes provide a safe harbor for attorneys to rid the venire of certain races, ethnicities, and genders, the notion of a completely unfettered challenge runs afoul of the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court has gradually but consistently narrowed attorneys’ discretion to exercise peremptory challenges in a line of cases collectively referred to as “the *Batson* doctrine.”<sup>18</sup> Examining the development of the doctrine reveals a clear, consistent expansion of equal protection rights in the jury box.<sup>19</sup> The unbroken string of decisions leaves little doubt that the Court takes discrimination in the courtroom very seriously.

In addition to showing the judicial momentum behind peremptory challenge equal protection, studying the *Batson* cases provides a working knowledge of the factors that the Justices consider important in shaping their decisions. These factors will be employed in Part VI’s normative analysis of the mixed-motive *Batson* defense.

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15. See JAMES E. V. HALE STARR & MARK MCCORMICK, *JURY SELECTION: AN ATTORNEY’S GUIDE TO JURY LAW AND METHODS* § 2.12, at 55 (2d ed. 1993) (“State statutes and rules vary, but all states allow peremptory challenges or provide a struck jury system [which also involves striking jurors without cause] in both civil and criminal cases.”).

16. See GOBERT & JORDAN, *supra* note 13, § 8.01, at 269-70 (“[A]n attorney ordinarily does not have to provide an explanation for a peremptory challenge.”).

17. See GOBERT & JORDAN, *supra* note 13, § 8.04, at 278 (noting that *Swain* first called the “unfettered discretion” of the peremptory challenge into question).

18. See 9 FED. PRAC. L. ED. § 22:1298 (describing the constitutional limits that *Batson* places on racially motivated peremptory challenges).

19. See *id.* § 22:1302 (outlining the extension of *Batson* to challenges based on ethnicity and gender).

1. Beginnings of Peremptory Challenge Equal Protection: Acknowledging the Need for a Fairly-Selected Jury

In the 1879 case of *Strauder v. West Virginia*,<sup>20</sup> the Supreme Court first ruled that a jury from which all of the members of a defendant's race were excluded violated Fourteenth Amendment equal protection principles.<sup>21</sup> The case involved not peremptory challenges but an outright legislative ban on jury service for any persons not "white male persons . . . twenty-one years of age and . . . citizens of [the] State."<sup>22</sup> The Court found that the murder conviction of Strauder, a black man, by an all-white jury deprived him of the protections that the Fourteenth Amendment specifically sought to provide to the recently emancipated blacks.<sup>23</sup> Notably, the

20. 100 U.S. 303 (1879).

21. *Id.* at 308.

22. *Id.* at 305 (quoting West Virginia law).

23. *Id.* at 306. Justice Strong, in writing for the Court, explained the rationale behind the Fourteenth Amendment in terms extremely paternalistic and racist by today's standards:

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the

Justices found defects in *Strauder's* conviction not because his particular jury did not happen to have any black members, for he had no right to a "petit jury composed in whole or in part of persons of his own race," but because the West Virginia jury system precluded even the possibility of his jury containing blacks.<sup>24</sup> While the Court noted that denying black citizens the opportunity to participate in the administration of justice as a juror was tantamount to a "brand of inferiority,"<sup>25</sup> the decision ultimately relied upon the "denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State," not the discrimination visited upon the jurors.<sup>26</sup>

Almost a century after *Strauder*, the issue of race-based peremptory challenges reached the Warren Court in *Swain v. Alabama*,<sup>27</sup> in which an Alabama jury convicted the black defendant Robert Swain of rape and sentenced him to death.<sup>28</sup> Swain appealed, citing *Strauder* and noting that the prosecutor struck six blacks from the venire, completely eliminating from the jury all members of Swain's race.<sup>29</sup> The Supreme Court recounted a brief history and description of the peremptory challenge. The Court commented that subjecting the prosecutor's strikes in a given case to equal protection scrutiny would necessarily vitiate the usefulness of this litigation tool.<sup>30</sup> Accordingly, the Court refused to extend Fourteenth Amendment protection to peremptory challenges and upheld Swain's conviction.<sup>31</sup> Justice White's opinion left open the possibility of a successful equal protection challenge when a prosecutor consistently exercises peremptory strikes against blacks in numerous cases without regard to circumstances, defendant, or victim.<sup>32</sup>

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general government, in that enjoyment, whenever it should be denied by the States.

*Id.*

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

25. *Id.* at 308.

26. *Id.* at 310.

27. 380 U.S. 202 (1965).

28. *Id.* at 203.

29. *Id.* at 205.

30. *Id.* at 212-22. Moreover, the Court implied that unfettered peremptory challenges do not deny any given group the equal protection of the laws: "In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." *Id.* at 222.

31. *Swain*, 380 U.S. at 221-22.

32. *Id.* at 223-24. While the Court's decision mentions the possibility of a valid claim in the face of systematic prosecutorial discrimination, it seems to set