

Peremptory Challenges to Jury Selection

Swain v. Alabama, Batson v. Kentucky

The right to trial by jury dates back to twelfth-century England, but for the right to have meaning, the composition of the jury pool—the venire—as well as the panel selected to serve must be derived fairly. Peremptory challenges—objections to the seating of a particular juror for which counsel need not offer any reason or explanation—have played a part in the selection process since colonial times. They ensure a defendant’s ability to stand trial before an unbiased jury. Over time, however, both sides were allotted peremptory challenges, and that approach holds today.

In 1879, the Supreme Court held for the first time that the systematic exclusion of racial minorities from the venire violated a criminal defendant’s equal protection rights under the Fourteenth Amendment. It soon became apparent, however, that prosecutors were using peremptory challenges to exclude blacks from criminal juries. As late as 1965, in *Swain v. Alabama*, the Supreme Court sanctioned the use of peremptory challenges to remove all black jurors during the impaneling process. But only the systematic and repeated exclusion of blacks qualified as a constitutional violation.

Because *Swain* erected an almost insuperable obstacle to a successful challenge, it attracted much criticism. U.S. Court of Appeals Judge Theodore McMillian described *Swain* as “one of the most criticized Supreme Court decisions” over the two ensuing decades. In the wake of that criticism, the Supreme Court revisited the use of peremptory challenges in *Batson v. Kentucky*, in which it essentially reversed *Swain* and set a new standard for equal protection challenges to the process of jury selection.

Batson set out a three-part test to determine whether peremptory challenges were being used discriminatorily. After a defendant makes a prima facie (Latin for “at first appearance”) showing of challenges based on race, the prosecution bears the burden of showing a race-neutral basis for striking the juror in question. The trial court then determines whether purposeful discrimination has taken place. The Supreme Court has consistently expanded the *Batson* holding to include other protected groups (gender and ethnicity) and to govern the defense as well as the prosecution and all parties in civil cases.

SEE ALSO The Right to Counsel in State Court (1963); Miranda Warnings (1966).

Lawyers must balance their responsibility to seat people who will undertake jural duties conscientiously with their obligation not to use peremptory challenges to strike jurors in a discriminatory manner.

