



ESSAY

What Justice Thomas Gets Right About *Batson*

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Introduction

In *Flowers v. Mississippi*, the Supreme Court vacated the capital conviction of Curtis Flowers; prosecutor Doug Evans was “motivated in substantial part by discriminatory intent” when he used a peremptory strike to exclude a black potential juror, the Court held, violating a prohibition against such conduct first announced in *Batson v. Kentucky*.¹ *Flowers* marks the Court’s third significant encounter with the *Batson* doctrine in the past eleven years: As before, the Court granted relief to a black man sentenced to death; as before, an all-white or nearly all-white jury in the Deep South delivered the verdict; as before, the Court’s opinion was narrow and authored by a member of the Court’s conservative wing. Justice Thomas, joined in part by Justice Gorsuch, penned a lengthy dissent.

Justice Thomas’s dissent has been met with disdain in the popular press. In the *New Yorker*, Jeffrey Toobin declared Justice Thomas’s opinion “astonishing”;² another commentator described the dissent as “too wacky, too hostile, and aggrieved to merit a response.”³ To be sure, the dissent—which advocates a radical overhaul of how we police racial discrimination in jury

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1. No. 17-9572, slip op. at 3 (U.S. June 21, 2019) (quoting *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016)).
2. Jeffrey Toobin, *Clarence Thomas’s Astonishing Opinion on a Racist Mississippi Prosecutor*, *NEW YORKER* (June 21, 2019), <https://perma.cc/Y8MD-N73S>.
3. Mark Joseph Stern, *Brett Kavanaugh’s Latest Opinion Protects Black Defendants Against Racist Prosecutors*, *SLATE* (June 21, 2019, 2:33 PM), <https://perma.cc/P7J6-VD6A>. See also Andrew Cohen, *The Supreme Court Rights a Historic, Racist Wrong in Mississippi*, *BRENNAN CTR. BLOG* (June 24, 2019), <https://perma.cc/3VHU-3KAB> (describing the dissent as “shameful” and “worthy of great disdain”); Bennett Gershman, *Clarence Thomas’s ‘Cruel and Dishonest’ Opinion Shouldn’t Be Forgotten*, *L. & CRIME* (July 1, 2019, 3:41 PM), <https://perma.cc/4YNY-4WQJ> (describing Justice Thomas’s opinion as “cruel and dishonest”).

selection—is underwhelming in conspicuous ways. But Justice Thomas’s dissent also gets right many things about the *Batson* doctrine and race in the courtroom that the Court’s liberal wing has proven loath to confront. Those who cheer the result in Curtis Flowers’s case—full disclosure: I am one—should not so blithely dismiss Justice Thomas’s provocations.

Part I of this Essay provides a brief introduction to *Batson* claims and the extraordinary case of Curtis Flowers. Part II then briefly surveys some major flaws in Justice Thomas’s dissent. These shortcomings notwithstanding, Part III argues for a more careful reading of the opinion. Four themes, in particular, warrant deeper engagement: racism’s enduring role in American life and criminal justice; Justice Thomas’s insistence that “race matters in the courtroom” in ways that *Batson* denies; *Batson*’s doctrinal incoherence; and the possibility that *Batson* has actually inhibited more productive ways of thinking about race and the jury.

I.

A party may exercise a peremptory strike during jury selection for almost any reason—including “implausible,” “fantastic,” “silly,” or “superstitious” ones⁴—but, under *Batson* and its progeny, the Equal Protection Clause prohibits purposeful discrimination on the basis of race or sex.⁵ *Batson* challenges proceed in three stages: (1) the opponent of a peremptory strike must make a *prima facie* case of proscribed discrimination; (2) if established, the proponent tenders a race-neutral or sex-neutral explanation for the strike; and (3) once such an explanation is offered, the challenger must prove that this justification is pretextual.⁶ Since it was first announced in 1986, this framework has received sustained criticism from scholars and some jurists,⁷ and there is substantial evidence that it has failed to meaningfully curtail discrimination in jury selection.⁸

Curtis Flowers has been tried six times over two decades, with the same District Attorney serving as lead prosecutor in each trial, for a quadruple murder inside a furniture store in Winona, Mississippi (population 5,000). The first, second, and third trials all led to convictions by all-white or nearly all-white juries; all three convictions were vacated by Mississippi courts on direct

4. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam).

5. *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (sex); *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (race).

6. *Purkett*, 514 U.S. at 767-68.

7. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 266-67 (2005) (Breyer, J., concurring) (advocating the abolition of peremptory strikes).

8. See, e.g., Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1419, 1423-29 (2018) (describing “remarkable” racial disparities in use of peremptory strikes by prosecutors and defense attorneys in North Carolina felony trials in 2011).

appeal due to prosecutorial misconduct or *Batson* violations. Flowers's fourth and fifth trials ended with hung juries; notably, the juries in those trials included five black jurors and three black jurors, respectively. In Flowers's sixth trial, as in the previous ones, the State disproportionately targeted black potential jurors with its peremptory strikes: Doug Evans accepted one black juror and then used five of six peremptory strikes to exclude black prospective jurors. The jury, comprised of eleven white jurors and one black juror, convicted Flowers and recommended death.⁹

The Supreme Court reversed Flowers's conviction and remanded for a new trial. Justice Kavanaugh's fact-bound opinion emphasized that the Court was "break[ing] no new legal ground."¹⁰ An unusual confluence of factors—including the remarkable procedural history of the case, disparate questioning of black potential jurors by prosecutors, and the dubious rationale proffered for striking one particular black juror in the final trial—supported the conclusion that the trial court committed clear error when it found no *Batson* violation had occurred.¹¹ Justice Alito joined and added a short concurring opinion to further underscore "the unique combinations of circumstances present" (including the "risky" involvement of the same prosecutor in all six trials).¹²

Justice Thomas's dissent spanned forty-two pages, the bulk of which was devoted to explaining his view that all five of the contested peremptory strikes were "amply justified on [non-pretextual] race-neutral grounds timely offered by the State."¹³ None of the excluded black jurors "was remotely comparable to the seated white jurors," Justice Thomas reasoned, and evidence that the majority viewed as indicative of racial bias (e.g., lengthier questioning of black jurors) had benign explanations.¹⁴ Winona is a small town, after all, and many of the black potential jurors had connections to the Flowers family; prosecutors were understandably more interested in probing these jurors for bias. In the dissent's final section (which Justice Gorsuch did not join), Justice Thomas then attacked *Batson* itself as fundamentally "misguided."¹⁵ His dissent concluded on a dark note, suggesting the sole "redeeming quality" of the Court's opinion is that Mississippi remains "perfectly free to convict Curtis Flowers again."¹⁶

9. *Flowers v. Mississippi*, No. 17-9572, slip op. at 3-7, (U.S. June 21, 2019).

10. *Id.* at 3.

11. *Id.* at 31.

12. *Id.* at 1-2 (Alito, J., concurring).

13. *Id.* at 6, 42 (Thomas, J., dissenting).

14. *Id.* at 6, 19-20.

15. *Id.* at 36 (Thomas, J., dissenting) (quoting *Campbell v. Louisiana*, 523 U.S. 392, 404 n.1 (1998) (Thomas, J., concurring in part and dissenting in part)).

16. *Id.* at 42 (Thomas, J., dissenting). *But see generally In the Dark, Season 2*, APM REP., <https://perma.cc/6YMM-79MR> (identifying significant evidence suggesting Flowers is factually innocent).

II.

First, the low-hanging fruit: Justice Thomas’s dissent is sufficiently intemperate, dishonest, and confusing to warrant much of the criticism it has received. Justice Thomas alleges the seven Justices in the majority were not engaged in a good-faith effort to discern whether racial bias infected jury selection in Flowers’s case; rather, he claims, the majority sided with Flowers to “boost its self-esteem.”¹⁷ It’s not an original move: Justice Scalia played the same card in another jury discrimination case—with more glee and less sneer—twenty-five years ago.¹⁸

Such jabs might land softer if Justice Thomas weren’t so sloppy (or mendacious) with the statistical evidence in the case. Justice Thomas writes, for instance, that “49 of the State’s 50 peremptory strikes in Flowers’ previous trials were race neutral.”¹⁹ As Michael Dorf points out, this claim—made without citation to the record—just isn’t true.²⁰ Justice Thomas similarly highlights that Flowers’s attorneys “exercised peremptory strikes against 11 white jurors and 0 black jurors” in the final trial.²¹ But these figures are misleading, at best, as Justice Thomas undeniably knows. At oral argument, Justice Thomas broke a three-year silence to ask about this racial disparity in the defendant’s peremptory strikes. In response, Justice Sotomayor promptly explained that defendants in Mississippi cannot wield peremptory strikes until after the State has first accepted that juror. In Flowers’s case, prosecutors had purged all but one black juror before it was Flowers’s turn to use his strikes; in other words, Flowers’s attorney “didn’t *have* any [potential] black jurors to exercise

17. *Id.* at 42 (Thomas, J., dissenting).

18. See *J.E.B. v. Alabama*, 511 U.S. 127, 156 (1994) (Scalia, J., dissenting) (“Today’s opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors.”).

19. *Flowers*, slip op. at 3 (Thomas, J., dissenting).

20. Michael C. Dorf, *Wrap-Up of Three End-of-Last-Week’s SCOTUS Cases and Anticipation of Today’s Coming Decisions*, DORF ON L. (June 24, 2019), <https://perma.cc/CY3Y-EHMP> (“[I]t seems like a mischaracterization of the record. Fake news!”). Perhaps Justice Thomas includes in his tally of “race neutral” strikes all 15 of the peremptory strikes from *Flowers III*, because the Mississippi Supreme Court opinion reversing Flowers’s conviction on account of multiple *Batson* violations garnered only a plurality. See *Flowers v. Mississippi*, 947 So. 2d 910 (Miss. 2007). But the Presiding Justice who provided the crucial fifth vote in *Flowers III* actually agreed that race motivated the prosecutor’s use of peremptory strikes; she just didn’t believe that a *Batson* violation, by itself, required a new trial. See *id.* at 939-40 (Cobb, P.J., concurring in result only) (“I write separately because I do not agree that this case is reversible on the *Batson* issue alone These [other trial errors] I would deem harmless error individually, but in the aggregate (including the errors noted in the majority opinion with regard to the *Batson* issue) lead me to find cumulative error sufficient to warrant reversal and remand for new trial.”).

21. *Flowers*, slip op. at 41 n.14 (Thomas, J., dissenting).

peremptories against.”²² But the U.S. Reports now memorializes Justice Thomas’s figure, with no hint that the statistic reveals much about the success of prosecutors’ efforts to eliminate black potential jurors and little about Flowers’s alleged anti-white biases. (To be sure, defense attorneys likely engage in just as much racially motivated juror striking as prosecutors,²³ which presumably was Justice Thomas’s point. But *Flowers v. Mississippi* was the wrong case to highlight the pattern.)

The most confounding part of Justice Thomas’s dissent, however, is when he insists that permitting more racially motivated decisionmaking in jury selection will accrue to the advantage of minority defendants like Flowers. By hindering black defendants’ ability to “stri[k]e potentially hostile white jurors,” Justice Thomas writes, *Batson* and its progeny erode an institution, the peremptory strike, that is “essential to the fairness of trial by jury.”²⁴ But basic arithmetic, the majority notes, undercuts Justice Thomas’s argument: Racial minorities, by definition, typically comprise a smaller share of any given jury venire than white jurors. Vesting both parties with the “equal” unchecked authority to strike jurors based on race is far more likely to generate all-white juries prone to convict minority defendants than it is to result in diverse juries disposed in their favor.²⁵ To this, Justice Thomas has no explicit reply.

III.

And yet. Behind it all—behind Justice Thomas’s steadfast refusal to see racial bias at work even when confronting “the extraordinary facts” (Justice Kavanaugh’s words) of Flowers’s case—there is more to Justice Thomas’s dissent than might initially meet the eye. Justice Thomas was wrong about the facts of *Flowers*, but, in some important ways, right about *Batson*.

A. The Persistent and Pervasive Force of American Racism

Given Justice Thomas’s reluctance to criticize prosecutor Doug Evans— “[a]ny competent prosecutor would have exercised the same strikes as [he] did in this trial,”²⁶ he writes—it would be easy to assume Justice Thomas believes racism plays little role in American life or in the criminal justice system.

22. Transcript of Oral Argument at 57, *Flowers v. Mississippi* (No. 17-9572) (emphasis added).

23. See Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1633-35 (2018); Wright et al., *supra* note 8, at 1430-31.

24. *Flowers*, slip op. at 41-42 (Thomas, J., dissenting).

25. Consider, for example, a pool of 36 qualified jurors, 67% of whom (24) are white and 33% of whom (12) are nonwhite. If both the defendant and prosecutors have 12 peremptory strikes, and may wield them in a racially discriminatory manner, the State can ensure an all-white jury in every case.

26. *Flowers*, slip op. at 26 (Thomas, J., dissenting).

The truth is far more complicated. As Corey Robin has argued—and will be arguing in his forthcoming book²⁷—Justice Thomas’s idiosyncratic worldview, shaped in significant part by his youthful engagement with black nationalism, embraces a profound “race pessimism, a belief in the perdurability and protean quality of racism.”²⁸ Perhaps more than anyone in the Court’s history, Justice Thomas “believes that racism is so profoundly inscribed in the white soul that you’ll never be able to remove it.”²⁹ Or, as (former Justice Thomas law clerk) Stephen Smith put it: “To anyone who cares to listen, Justice Thomas’s opinions thunder with the strong black-nationalist voice typically associated with one of Justice Thomas’s personal heroes, Malcolm X.”³⁰

“Thunder” is too strong when it comes to the *Flowers* dissent, but there are certainly rumblings of this worldview. Racial sympathies are “a matter of reality”—both historical and contemporary—not “assumptions,” Justice Thomas writes.³¹ This remains as true today as it was immediately after Reconstruction, when the Court first invalidated a state law prohibiting black jury service. The logic of cases like *Strauder v. West Virginia*³²—that “secur[ing] representation of the defendant’s race on the jury may . . . provide the defendant with a better chance of having a fair trial”³³—is anything but “obsolete” in 2019.³⁴ In the past four decades, *Batson* has proven to be a “misguided effort to remedy a general societal wrong,” with little or nothing to show for it.³⁵

Justice Thomas’s sober historical overview contrasts sharply with the whiggish tone that dominates the Court’s recent pronouncements on race and the jury. In *Peña-Rodriguez v. Colorado*, for instance, a 2017 case involving racial bias in jury deliberations, Justice Kennedy grandly announced: “It must become the heritage of our Nation to rise above racial classifications.”³⁶ He

27. COREY ROBIN, *THE ENIGMA OF CLARENCE THOMAS* (forthcoming Sept. 24, 2019).

28. Corey Robin, *Clarence Thomas’s Counterrevolution*, JACOBIN (May 9, 2014), <https://perma.cc/5Y6B-5WLR> [hereinafter Robin, *Counterrevolution*]; see also Corey Robin, *Eleven Things You Didn’t Know About Clarence Thomas*, JACOBIN (Apr. 20, 2014), <https://perma.cc/6W6M-8PC8> (asserting “Clarence Thomas does not believe in color-blindness” and quoting 1985 interview in which Thomas explained, “I don’t think this society has ever been color-blind . . . It wasn’t color-blind [under segregation] and America is not color-blind today . . . Code words like ‘color-blind’ aren’t all that useful”).

29. Robin, *Counterrevolution*, *supra* note 28; see also ROBIN, *supra* note 27, at 34-37 (discussing development of Thomas’s views of racism in America).

30. Stephen F. Smith, *Clarence X? The Black Nationalist Behind Justice Thomas’s Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583, 583, 586 (2009).

31. *Flowers*, slip op. at 41 (Thomas, J., dissenting).

32. 100 U.S. 303 (1880).

33. *Flowers*, slip op. at 37 (Thomas, J., dissenting) (quoting *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring in judgment)).

34. *Id.* at 41.

35. *Id.* at 36 (quoting *Campbell v. Louisiana*, 523 U.S. 392, 404, n.1 (1998) (Thomas, J., concurring in part and dissenting in part)).

36. 137 S. Ct. 855, 867 (2017).

lauded the “progress that has already been made,” while solemnly proclaiming “[t]he Nation must continue to make strides to overcome race-based discrimination.”³⁷ Such an end was within sight, Kennedy concluded, and could be accomplished through “thoughtful, rational dialogue.”³⁸ Justice Kavanaugh’s *Flowers* opinion traces a similarly optimistic arc. “*Batson* ended the widespread practice” of race discrimination in jury selection; it “immediately revolutionized the jury selection process . . . throughout the United States.”³⁹ Justice Kavanaugh provides no citations to support these bold claims.⁴⁰

The Court’s sole southerner, Justice Thomas also seems to resent the implication that American racism is the exclusive provenance of backwoods southern whites. As he wrote in his autobiography, “It was in Boston, not Georgia, that a white man had called me nigger for the first time. I’d already found New England to be far less honest about race than the South, and I bristled at the self-righteous sanctimony with which so many of the northerners at Yale glibly discussed the South’s racial problems.”⁴¹ In *Flowers*, Justice Thomas takes exception to this perceived condescension: “*Flowers*’ case . . . comes to us from a state court in the South. These courts are ‘familiar objects of the Court’s scorn,’ especially in cases involving race.”⁴² Of course, it does not follow that because racism is endemic in New England that the motivations of white southern prosecutors like Doug Evans are benign.⁴³ But Justice Thomas seems to be signaling something he’s said before: A realistic view of American racism requires us to focus not just on southerners who are “up front about their bigotry,” but also “the paternalistic big-city whites” he encountered at Yale Law School, whose support was contingent upon one’s adherence to liberal orthodoxy.⁴⁴

These insights—*i.e.*, recognition of racism’s enduring role across American criminal justice and *Batson*’s modest contribution to remedying the problem—provide a necessary starting point for thinking about race and the jury.

37. *Id.* at 871.

38. *Id.*

39. *Flowers*, slip op. at 15-16.

40. *But see* Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1129 (2011) (“Unfortunately, there is little evidence that the primary guarantor of race-neutrality in jury selection, the three-part test set forth in *Batson v. Kentucky*, is equal to the critically important task it has been given.”).

41. CLARENCE THOMAS, *MY GRANDFATHER’S SON: A MEMOIR* 78 (2007).

42. *Flowers*, slip op. at 5 (Thomas, J., dissenting) (quoting *United States v. Windsor*, 570 U.S. 744, 795 (2013) (Scalia, J., dissenting)). Interestingly, Justice Thomas has substituted “a state court in the South,” *id.*, for Justice Scalia’s “once-Confederate Southern state,” *Windsor*, 570 U.S. at 795.

43. *See also* Robin, *supra* note 27, at 25 (noting skepticism that Thomas truly had not heard the epithet previously).

44. Thomas, *supra* note 41, at 75-76.

“[C]artoonishly racist”⁴⁵ southern prosecutors like Doug Evans are convenient targets for liberal derision; as an added bonus, they offer the Court’s conservatives an opportunity to celebrate the virtues of colorblindness and burnish their anti-racist bona fides. But, despite the optimistic tone of Justice Kavanaugh’s majority opinion, it is an open secret that *Batson* ensnares only the “unapologetically bigoted or painfully unimaginative attorney.”⁴⁶ And racial disparities in the use of peremptory strikes are as profound in Philadelphia as they are in Louisiana or North Carolina.⁴⁷ Justice Thomas may be coming from a radically different place (and going a radically different direction), but he is right to ground his doctrinal critiques in these lived realities.

B. “Race Matters in the Courtroom”

Justice Thomas’s racial pessimism lets him state candidly an uncomfortable truth, one that our *Batson* jurisprudence refuses to acknowledge: Black and white jurors, examining precisely the same evidence, often come to different conclusions about a defendant’s guilt or innocence. Justice Thomas writes:

[R]ace matters in the courtroom [T]he racial composition of a jury c[an] affect the outcome of a criminal case The racial composition of a jury matters because racial biases, sympathies, and prejudices still exist. This is not a matter of “assumptions,” as *Batson* said. It is a matter of reality. The Court knows these prejudices exist [W]hy else say here that ‘Flowers is black’ and the ‘prosecutor is white’?⁴⁸

Where the majority sees peremptory strikes animated by dubious race-based “assumptions,” Justice Thomas sees rational decisionmaking that in no way denigrates the “competence, ability, or fitness” of potential jurors.⁴⁹ (By dishonestly pretending otherwise, Justice Thomas suggests, the Court inflicts greater dignitary harm on the excluded jurors than anything the prosecutor may have done.)

45. Toobin, *supra* note 2.

46. Bellin & Semitsu, *supra* note 40, at 1075-78.

47. Compare David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 55 (2001) (noting large racial disparities in use of peremptory challenges in Philadelphia capital cases in 1980s and 1990s) with Frampton, *supra* note 23, at 1626 (noting large racial disparities in use of peremptory challenges in Louisiana trials from 2012 to 2017), and Catherine M. Grosso & Barbara O’Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1549 (2012) (noting large racial disparities in use of peremptory challenges in North Carolina capital trials from 1990 to 2010).

48. *Flowers v. Mississippi*, No. 17-9572, slip op. at 36-37, 42 (U.S. June 21, 2019), (Thomas, J., dissenting).

49. *Id.* at 38.

Justice Thomas is right that “race matters” in jury deliberations, and a growing body of recent scholarship supports his claim.⁵⁰ To offer one example, a group of journalists in Louisiana recently compiled court records to analyze juror voting patterns in hundreds of nonunanimous felony cases. (In Louisiana and Oregon, at least for now, a valid criminal verdict can be returned upon the agreement of ten of twelve jurors.)⁵¹ In the 190 convictions where the race of every juror was ascertainable, black jurors cast 31.3% (n=714) of the total ballots, but 51.2% (n=144) of the “not guilty” votes. In other words, “black jurors found themselves casting ‘empty votes’⁵²—that is, ‘not guilty’ votes overridden by the supermajority vote of the other jurors—with 164% of the frequency we would expect if jurors voted ‘guilty’ and ‘not guilty’ in a racially balanced manner.”⁵³

Race also matters in shaping the perspectives and life experiences of potential jurors in ways that give rise to permissible—though, depending on one’s perspective, deeply problematic—“race neutral” bases for peremptory strikes. Numerous surveys and studies have shown that the “perspectives of blacks on crime and the criminal justice system diverge widely from those of whites,” often in ways that will matter to a prosecutor aiming to secure a conviction.⁵⁴ In Flowers’s case, significantly more black jurors than white jurors knew the defendant and had qualms with the death penalty. Justice Thomas hammers this point—“[T]he majority forgets that correlation is not causation”⁵⁵—and he’s right to do so. A significant amount of (perfectly lawful) racial exclusion occurs during jury selection that is clearly distinct from the narrow species of bigotry that *Batson* proscribes.

Normative objections to Justice Thomas’s constitutional vision shouldn’t preclude recognition that he has a powerful point: “[R]ace matters in the courtroom” in a host of ways that the *Batson* doctrine is ill-equipped to confront.⁵⁶

50. See, e.g., Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 J.L. & ECON. 189, 190-92 (2018).

51. *But see* Ramos v. Louisiana, 139 S. Ct. 1318 (Apr. 29, 2019) (No. 18-5924) (granting certiorari). In November 2018, Louisiana voters amended the state constitution to require unanimity for offenses committed after January 1, 2019. Nonunanimous verdicts for offenses committed *before* 2019 remain valid under Louisiana law, however, and prosecutions of such offenses could conceivably continue for many years (e.g., “cold cases” involving suspects identified through DNA evidence).

52. See Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1298 (2000).

53. Frampton, *Jim Crow Jury*, *supra* note 23, at 1637.

54. See, e.g., William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 180 (2001) (collecting surveys and studies).

55. Flowers v. Mississippi, No. 17-9572, slip op. at 18 (U.S. June 21, 2019), (Thomas, J., dissenting).

56. *Id.* at 36.

C. The *Batson* Doctrine Rests on the Fiction That (B) is Not True

Why does (B) matter? Such “racial candor” seems to hold special importance for Justice Thomas, in part for its own sake.⁵⁷ But it also has significant doctrinal implications. As Justice Thomas correctly notes, *Batson* and its progeny insist not only that race and gender are normatively improper categories upon which to base juror selection, but also (as Eric Muller has explored) that they are “flatly irrational predictors of juror perspective.”⁵⁸ Acknowledging that black and white jurors might decide like cases differently would require us to admit that prosecutors and defendants—even those truly free from any racial bias—could have good reason to use race as a heuristic in juror selection. And this, in turn, would complicate our traditional Equal Protection analysis. The Court would have to grapple with the fact that parties act rationally (and perhaps even have a compelling interest at stake) when they fail to act in a rigidly colorblind fashion.⁵⁹

Justice Thomas revels in this contradiction when he discusses whether criminal defendants should have Article III standing to advance a claim that a juror was discriminated against:

The only other plausible reason a defendant could suffer an injury from a *Batson* violation is if the Court thinks that he has a better chance of winning if more members of his race are on the jury. But that thinking relies on the very

57. Robin argues that Justice Thomas:

seems never to have developed a political or economic analysis of racism. His is primarily a moral account of racism. Racism is shape-shifting, often hidden; that is its poison. The antidote to racism, the moral answer to it, is race sincerity: being truthful with and to oneself, and seeking truth, in however malignant a form, in and from one's enemies. The goal is not, and never can be, color-blindness. The goal is racial candor or race sincerity, achieving a congruence between inner feeling and outward form.

Robin, *Counterrevolution*, *supra* note 28.

58. Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 101 (1996). *Accord* Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1825 (1993) (“In the Court’s utopian colorblind world, defendants would have no reason to care about the race of jurors because the jurors themselves would be colorblind.”); Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1910 (2015) (“The more liberal majority in the *Batson* cases, however, argued that the idea that race predicts belief in jury deliberations is irrational, and based upon ‘open hostility or from some hidden and unarticulated fear.’”) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991)).

59. *Cf.* Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 STAN. L. REV. 1, 42 (1992) (“The *Batson* decision redressed the historical-race problem of Blacks being barred from serving on juries and, therefore, was a significant step forward. However, Justice Powell’s statement that race is ‘unrelated’ invokes that unconnectedness of a juror’s formal-race classification to any other personal attributes which might relate to jury duty. This reliance upon unconnectedness was unnecessary and unfortunate: Use of unconnectedness separates the decision from the context of Justice Powell’s otherwise substantial reliance on historical-race analysis.”).

assumption that *Batson* rejects: that jurors might “be partial to the defendant because of their shared race.”⁶⁰

To be sure, Justice Thomas seems to want a massive overhaul of how we think about race discrimination and the jury, and he does not directly contest the principle that a black defendant is not entitled to a jury “of any particular composition.”⁶¹ But this specific passage is, at least in part, tongue-in-cheek. “[U]nder *Batson’s* logic” defendants should not have standing to challenge the racially motivated challenge of a juror, Justice Thomas argues,⁶² but Justice Thomas has already explained why “*Batson’s* logic” is deficient: because race always matters in the courtroom.

Curtis Flowers’s ordeal anecdotally illustrates this point all too well. From the perspective of the defendant, the racial composition of the jury is often a matter of life or death. In four trials, juries with zero or one black members sentenced Flowers to death; in the two trials where the jury included more than one black member (three in Trial #4, five in Trial #5) the group could not agree on a verdict. *Batson’s* commitment to colorblindness tiptoes around these stark facts, leaving black defendants with no legal framework to address verdicts returned by racially skewed juries (except in the most extreme of circumstances).

D. Failure to Grapple with (A), (B), and (C) Has Impeded Efforts to Address Racial Bias and the Jury

But the most provocative portion of Justice Thomas’s dissent is when he identifies the consequences of the foregoing: *Batson* has “produced distortions in our jurisprudence”⁶³ and “blinded the Court to the reality that racial prejudice exists and can affect the fairness of trials.”⁶⁴ This is a bold claim—that *Batson* is not only inadequate, but that it has actually *impeded* the fight against racial bias in jury adjudication—and it is one that Justice Thomas doesn’t fully develop. It is also an audacious claim, given Justice Thomas’s sanguine take on prosecutor Doug Evans’s Javert-like pursuit of Flowers over the past two decades.⁶⁵ But, if taken seriously, it is the most interesting (and important) thing anyone on the Court has written about race and the jury in many years.⁶⁶

60. *Flowers*, slip op. at 34 (Thomas, J., dissenting) (internal quotation omitted).

61. *Holland v. Illinois*, 493 U.S. 474, 483 (1990).

62. *Flowers*, slip op. at 33 (Thomas, J., dissenting).

63. *Id.* at 39.

64. *Id.* at 33.

65. Or his skepticism toward past *Batson* claims. See, e.g., *Foster v. Chatman*, 136 S. Ct. 1737, 1761 (2016) (Thomas, J., dissenting); *Snyder v. Louisiana*, 552 U.S. 472, 486 (2008) (Thomas, J., dissenting); *Miller-El v. Dretke*, 545 U.S. 231, 274 (2005) (Thomas, J., dissenting); *Miller-El v. Cockrell*, 537 U.S. 322, 354 (2003) (Thomas, J., dissenting).

66. It has been fourteen years since any member of the Court’s liberal wing has written an opinion (of any variety) in a *Batson* case. In 2005, Justice Souter authored the Court’s

What, exactly, does Justice Thomas envision? One possibility is that he simply wants the Court to overrule *Batson*: If a party strikes a potential juror because of their race or sex, the Constitution has nothing to say about it. Defendants should be free to strike potential jurors on account of their race; prosecutors should be free to do the same. In rejecting *Batson*, the dissent claims, the Court would be “return[ing] to litigants one of the most important tools to combat prejudice in their cases.”⁶⁷ This would certainly fit within Justice Thomas’s broader worldview, and the basic (if bleak) logic mirrors something Justice Thomas wrote nearly two decades earlier: “If society cannot end racial discrimination, at least it can arm minorities . . . to defend themselves from some of discrimination’s effects.”⁶⁸ For reasons spelled out earlier—namely, math—this would be an unwelcome development: It would lead to a proliferation of all-white juries and exacerbate racial bias in the jury system.

But Justice Thomas’s claim that *Batson* has obscured how “racial prejudice . . . can affect the fairness of trials”⁶⁹ also hints at something bigger and more useful. Here it is necessary to recall the distinction between a defendant’s claim under the Fourteenth Amendment’s Equal Protection Clause and those concerning the constitutional guarantee of a “fair trial” (rooted in the Due Process Clauses “but . . . define[d] . . . largely through the several provisions of the Sixth Amendment”).⁷⁰ Equal Protection claims generally require, at minimum, proof of a state actor’s discriminatory purpose.⁷¹ Under *Batson*, a party establishes a violation of the Equal Protection Clause by showing that the opposing party’s strike was “motivated in substantial part by discriminatory intent.”⁷² But Sixth Amendment claims, even when they implicate issues of race, are different. Consider, for example, the Sixth Amendment’s “impartial jury” requirement, under which a defendant is entitled to a jury chosen from “a fair cross section of the community.”⁷³ If any distinctive group of jurors is systematically excluded from the original pool summoned to the courthouse, the defendant’s Sixth Amendment rights are violated; such underrepresentation denies the defendant an “impartial jury,” whether the disparity is traceable to a bigoted clerk of court or an innocent computer

opinion in *Miller-El v. Dretke*, 545 U.S. 231 (2005), while Justice Breyer authored a concurring opinion pressing his view that it was “necessary to reconsider *Batson*’s test and the peremptory challenge system as a whole.” *Id.* at 273 (Breyer, J., concurring).

67. *Flowers*, slip op. at 36 (Thomas, J., dissenting).

68. *Zelman v. Simmons-Harris*, 536 U.S. 639, 683 (2002) (Thomas, J., concurring).

69. *Flowers*, slip op. at 33 (Thomas, J., dissenting).

70. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

71. *See Washington v. Davis*, 426 U.S. 229, 239 (1976).

72. *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008)).

73. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

glitch.⁷⁴ The Court in recent decades has carefully policed the line between these two species of claims: The Equal Protection Clause bars prosecutors from improperly targeting minority jurors with peremptory strikes, but a defendant in such a case cannot complain that he was denied his Sixth Amendment rights (even when he is convicted by the resultant all-white panel).⁷⁵

Justice Thomas repeatedly writes in his *Flowers* dissent that we should be focusing less on discerning the role of racism in individual peremptory strikes and more on the larger question whether a defendant truly received a “fair trial.” Perhaps Justice Thomas is just reiterating the distinction between the two species of constitutional claims, privileging the latter (“fair trial”) at the expense of the former (“race discrimination”). But the opinion itself fundamentally problematizes this bifurcation, and in a critical passage, Justice Thomas articulates an alternative way in which *Batson* has limited the Court’s analysis:

[W]e understood [in *Strauder v. West Virginia*] that allowing the defendant an opportunity to “secur[e] representation of the defendant’s race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial.”⁷⁶

Justice Thomas cites his concurring opinion in *Georgia v. McCollum*, where he made the same point even more explicitly: The *Strauder* Court “reasonably surmised . . . that all-white juries might judge black defendants unfairly,” even “without direct evidence [of racial discrimination] in any particular case.”⁷⁷ In other words, our Equal Protection jurisprudence once embraced a far more capacious understanding of how racial biases and prejudices could undermine the fairness of black defendants’ jury trials (even without the sort of proof of individual bigotry in a peremptory strike that *Batson* now requires).

If one were tasked with developing an alternative framework to *Batson*—one that meaningfully and coherently confronted the historical and contemporary role of race in jury adjudication—it’s hard to imagine a better starting point. Indeed, academics and advocates over the past several decades have advanced a variety of proposals animated, either implicitly or explicitly, by this very concern.⁷⁸ Perhaps juries should be chosen through “jural districting” designed around “communities of interest” (akin to electoral

74. *Duren v. Missouri*, 439 U.S. 357, 368 n.26 (1979); *Ambrose v. Booker*, 684 F.3d 638, 640 (6th Cir. 2012) (addressing Sixth Amendment claims where “unintentional computer glitch . . . caused the systematic underrepresentation of African-Americans in the jury pools of Kent County, Michigan”).

75. *Holland v. Illinois*, 493 U.S. 474, 487-88 (1990).

76. *Flowers v. Mississippi*, No. 17-9572, slip op. at 37 (U.S. June 21, 2019), (Thomas, J., dissenting) (quoting *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring in judgment) (alteration in original)).

77. 505 U.S. 42, 61 (1992) (Thomas, J., concurring in the judgment).

78. See generally Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993) (surveying proposals).

districts), wherein each of the twelve seats in the jury box would be filled with a juror drawn from one sub-district.⁷⁹ Perhaps we should focus not only on intentional discrimination, but also prohibit peremptory strikes wielded for “race-neutral” reasons that correlate with race (e.g., a potential juror’s prior contact with law enforcement officers; distrust of law enforcement; or personal ties to incarcerated persons).⁸⁰ Or perhaps, most directly, a defendant should have the right to insist on some minimal representation on the petit jury of a member of his own community. (There is some precedent for this approach within the American legal system: Under the Uniform Code of Military Justice, an enlisted member typically may insist on a jury that “include[s] enlisted members in a number comprising at least one-third of the total membership of the court.”⁸¹) If we took seriously the claim that “allowing the defendant an opportunity to ‘secur[e] representation of the defendant’s race on a jury”⁸² is critical to his “chance[s] of having a fair trial,”⁸³ a variety of radical changes becomes not only *permissible*, but perhaps even constitutionally *required*.

Batson’s narrow emphasis has “blinded the Court” in another area that Justice Thomas’s dissent (perhaps inadvertently) highlights: challenges for cause. Unlike peremptory strikes, which can be exercised for almost any reason, challenges for cause are subject to closer judicial scrutiny; the proponent must usually establish “a potential juror’s conflicts of interest or inability to be impartial.”⁸⁴ Also unlike peremptory strikes, which have received significant scholarly and judicial attention in recent decades, challenges for cause are almost never discussed. But in *Flowers’s* case, Justice Thomas notes, the process of “qualifying” the jury through challenges for cause shifted the racial composition of the jury pool from 42% black to 28% black. In the Supreme Court’s two most recent *Batson* cases before *Flowers—Foster v. Chatman*⁸⁵ and *Snyder v. Louisiana*⁸⁶—the same thing happened: The lion’s share of racial exclusion in the jury selection process occurred through challenges for cause,

79. See generally Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 358-59 (1999) (highlighting benefits and defending constitutionality of “jural districting” proposal).

80. In April 2018, the Washington Supreme Court adopted a rule making such rationales for peremptory strikes “presumptively invalid.” See Wash. Sup. Ct. Gen. R. 37.

81. 10 U.S.C. § 825, Art. 25. I am indebted to Jack Chin, who flagged for me this feature of the Uniform Code of Military Justice and connected it to debates in civilian jury-discrimination law.

82. *Flowers v. Mississippi*, No. 17-9572, slip op. at 37 (U.S. June 21, 2019), (Thomas, J., dissenting) (quoting *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring in judgment)).

83. *Id.*

84. *Flowers*, slip op. at 8.

85. 136 S. Ct. 1737 (2016).

86. 552 U.S. 472 (2008).

not peremptory strikes.⁸⁷ The pattern also holds in hundreds of lower-profile jury trials in Mississippi and Louisiana that I recently examined, wherein the racial disparities in challenges for cause exceeded the (also sizeable) racial disparities in the exercise of peremptory strikes.⁸⁸ To the extent all-white (or nearly all-white) juries endanger black defendants' right to a fair trial—and they do—challenges for cause are as much at fault as peremptory strikes. Yet, with *Batson* dominating the law of race and the jury for the past four decades, courts and legal scholars (1) have largely failed to notice the existence of this phenomenon,⁸⁹ and (2) lack a useful legal framework for thinking about racial exclusion that occurs in the challenge-for-cause context.

IV.

To be clear, there is little reason to hope that Justice Thomas (or the originalist commitments often ascribed to him) will pioneer innovations like those discussed above. There is a yawning gap between the common-sense insights foregrounded in the *Flowers* dissent and Justice Thomas's overall jurisprudence. For example, many academics have proposed that a more robust interpretation of the Sixth Amendment's "impartial jury" guarantee could serve as a useful basis for reconceptualizing the law of race discrimination and the jury.⁹⁰ Justice Thomas's contention that "an opportunity to secure representation of the defendant's race on the jury" leads to a "better chance[s] of having a fair trial" certainly sounds in this right. But in 2010, after noting that women and racial minorities did not begin serving on juries until the nineteenth century, Justice Thomas suggested abandoning altogether the Court's fair cross-section jurisprudence. The conclusion that women and minorities must be summoned as potential jurors, Justice Thomas mused, "seems difficult to square with the Sixth Amendment's text and history."⁹¹

87. See Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 117 MICH. L. REV. (forthcoming 2020) (manuscript at 14-21) (on file with author).

88. *Id.* at 8-14.

89. A notable exception is Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 118 (2016) (noting that the exclusion of potential jurors from capital trials based on their opposition to the death penalty had a considerable impact on the racial composition of the jury pool).

90. See, e.g., Herman, *supra* note 58, at 1840 (suggesting a "modest enhancement" of *Batson's* ability to increase racial diversity on juries would have occurred if "the right *Batson* recognized had been based on the Sixth Amendment" rather than the Equal Protection Clause); Muller, *supra* note 58, at 97 (discussing advantages of "deploy[ing] the *Batson* rule to protect the Sixth Amendment value of community representation on the jury"); Tetlow, *supra* note 58, at 1864, 1867 (arguing "[w]e should revisit the fork in the road and choose the Sixth Amendment over equal protection color blindness" for regulation of peremptory strikes).

91. *Berghuis v. Smith*, 559 U.S. 314, 334 (2010) (Thomas, J., concurring).

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But Justice Thomas's *Flowers* dissent asks all the right questions. If we are serious about confronting racial bias in jury adjudication, a clear-eyed analysis of *Batson*'s limitations and inconsistencies is overdue. At the center of this appraisal should be a candid reckoning with racism's stubborn intractability and a willingness to explore all the ways "race matters" when black defendants encounter American juries. Rather than being met with derision and scorn, Justice Thomas's *Flowers* dissent should serve as an invitation for creative thinking about what a "fair trial" means today.