1993 Supplement to

CASES AND MATERIALS ON CONSTITUTIONAL LAW

THEMES FOR THE CONSTITUTION'S THIRD CENTURY

Daniel A. Farber
William N. Eskridge, Jr.
Philip P. Frickey

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CONSTITUTIONAL LAW

THEMES FOR THE CONSTITUTION'S THIRD CENTURY

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PREFACE

You might think it odd for a 1993 casebook to have a 1993 supplement. Nonetheless, we have found this Supplement to have been worthwhile, for the following reasons.

First, we finished our casebook long before the Supreme Court decided the most interesting cases of the 1992 Term. Although this was not a constitutionally momentous Term, there were doctrinally significant developments in several areas, including racially motivated electoral districting, regulation of hate crimes, the Establishment and Free Exercise Clauses, political questions, and ripeness and standing.

Second, there were several constitutionally significant developments in Congress in early 1993, including the serious possibility that a comprehensive new lobbying reform bill would be enacted. We have included a detailed discussion of them in the First Amendment chapter.

Third, the Supplement gave us an opportunity to report on areas of constitutional growth and agitation for the future. For example, discrimination on the basis of language, of particular importance for Latinos and Latinas, is not treated in the casebook, and we reproduce a very interesting 1991 Supreme Court decision on this issue in Chapter 3. Also, 1993 might well be the commencement of a "Gay Nineties" in constitutional law, as the courts, the legislatures, and the executives all over America confront issues raised by lesbian, gay, and bisexual activists. Two key issues—same-sex marriage and the exclusion of gay men, lesbians, and bisexuals from the U.S. military—are treated in detail by this Supplement. These issues may well remain prominent throughout the decade.

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July 1993

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Chapter 1

A PROLOGUE ON CONSTITUTIONAL HISTORY

Page 31. Insert the following at the bottom of the page:

In March 1993, Justice Byron White announced his retirement, to take effect upon the completion of the current Term. In June, President Clinton nominated Judge Ruth Bader Ginsburg of the United States Court of Appeals for the District of Columbia Circuit to replace White. If she is confirmed, she will be the second woman to serve on the Supreme Court.

Ginsburg was a professor at Columbia University Law School in 1980 when President Carter tapped her for the D.C. Circuit. She was well known for her role in leading the Women's Rights Project of the American Civil Liberties Union. During the 1970s, she participated either as counsel for a party or as *amicus* in the leading gender discrimination cases of the day, including *Reed v. Reed* (casebook, p. 305), *Frontiero v. Richardson* (casebook, p. 306), and *Craig v. Boren* (casebook, p. 315). In light of this background, she has surprised many observers by her nonactivist, middle-of-the-road behavior as a D.C. Circuit judge. She is now widely viewed as the least liberal of the four Carter appointees to that court.

Chapter 3

THE CONSTITUTION AND RACIAL DISCRIMINATION

Page 163. Insert the following case right before Part C:

HERNANDEZ v. NEW YORK

__ U.S. __, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion in which **THE CHIEF JUSTICE [REHNQUIST]**, **JUSTICE WHITE** and **JUSTICE SOUTER** join.

Petitioner Dionisio Hernandez asks us to review the New York state courts' rejection of his claim that the prosecutor in his criminal trial exercised peremptory challenges to exclude Latinos from the jury by reason of their ethnicity. If true, the prosecutor's discriminatory use of peremptory strikes would violate the Equal Protection Clause as interpreted by our decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). We must determine whether the prosecutor offered a race-neutral basis for challenging Latino potential jurors and, if so, whether the state courts' decision to accept the prosecutor's explanation should be sustained.

Petitioner and respondent both use the term "Latino" in their briefs to this Court. Amicus briefs on both sides employ instead the term "Hispanic," and the parties referred to the excluded jurors by that term in the trial court. Both words appear in the state court opinions. No attempt has been made at a distinction by the parties and we make no attempt to distinguish the terms in this opinion. We will refer to the excluded venirepersons as Latinos in deference to the terminology preferred by the parties before the Court.

[Hernandez was convicted of attempted murder and possession of a weapon. After nine jurors had been impanelled, defense counsel objected to the prosecutor's striking several Latino jurors. In response,] the prosecutor volunteered his reasons for striking the jurors in question. He explained:

> Your honor, my reason for rejecting the—these two jurors—I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel

very uncertain that they would be able to listen and follow the interpreter.

After an interruption by defense counsel, the prosecutor continued:

> We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury.

[Defense counsel moved for a mistrial, which was denied; the denial was affirmed by the New York Court of Appeals.]

In *Batson*, we outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. * * * First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. * * *

Petitioner contends that the reasons given by the prosecutor for challenging the two bilingual jurors were not race-neutral. In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law. A court addressing this issue must keep in mind the fundamental principle that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights*. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney* [casebook, pp. 159, 336].

A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

* * *

The prosecutor here offered a race-neutral basis for these peremptory

strikes. As explained by the prosecutor, the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals. The prosecutor's articulated basis for these challenges divided potential jurors into two classes: those whose conduct during *voir dire* would persuade him they might have difficulty in accepting the translator's rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos. While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a *per se* violation of the Equal Protection Clause.

* * *

Once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, "[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination." *Batson*. While the disproportionate impact on Latinos resulting from the prosecutor's criterion for excluding these jurors does not answer the race-neutrality inquiry, it does have relevance to the trial court's decision on this question. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another." *Washington v. Davis*. If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination.

In the context of this trial, the prosecutor's frank admission that his ground for excusing these jurors related to their ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact were race-based peremptory challenges. This was not a case where by some rare coincidence a juror happened to speak the same language as a key witness, in a community where few others spoke that tongue. If it were, the explanation that the juror could have undue influence on jury deliberations might be accepted without concern that a racial generalization had come into play. But this trial took place in a community with a substantial Latino population, and petitioner and other interested parties were members of that ethnic group. It would be common knowledge in the locality that a significant percentage of the Latino population speaks fluent Spanish, and that many consider it their preferred language, the one chosen for personal communication, the one selected for speaking with the most precision and power, the one used to define the self.

The trial judge can consider these and other factors when deciding whether a prosecutor intended to discriminate. For example, though petitioner did not suggest the alternative to the trial court here, Spanish-speaking jurors could be permitted to advise the judge in a discreet way of any concerns with the translation during the course of trial. A

prosecutor's persistence in the desire to exclude Spanish-speaking jurors despite this measure could be taken into account in determining whether to accept a race-neutral explanation for the challenge.

[But the trial judge believed the prosecutor's race-neutral explanation for striking the two jurors in question, and the Court held that appeals courts must defer to trial court findings under *Batson*. The Court found such deference particularly appropriate because *Batson* cases will turn on the credibility of prosecutors and their explanations.]

* * *

Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer. Indeed, some scholarly comment suggests that people proficient in two languages may not at times think in one language to the exclusion of the other. The analogy is that of a high-hurdler, who combines the ability to sprint and to jump to accomplish a third feat with characteristics of its own, rather than two separate functions. This is not to say that the cognitive processes and reactions of those who speak two languages are susceptible of easy generalization, for even the term "bilingual" does not describe a uniform category. It is a simple word for a more complex phenomenon with many distinct categories and subdivisions. Sanchez, Our Linguistic and Social Context, in Spanish in the United States 9, 12 (J. Amastae & Elias-Olivares 1982); Dodson, Second Language Acquisition and Bilingual Development: A Theoretical Framework, 6 J. Multilingual & Multicultural Development 325, 326-327 (1985).

Our decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases. It is a harsh paradox that one may become proficient enough in English to participate in trial, see, e.g., 28 U.S.C. §§ 1865(b)(2), (3) (English-language ability required for federal jury service), only to encounter disqualification because he knows a second language as well. As the Court observed in a somewhat related context: "Mere knowledge of [a foreign] language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable." *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It

may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. Cf. *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926) (law prohibiting keeping business records in other than specified languages violated equal protection rights of Chinese businessmen); *Meyer v. Nebraska* (striking down law prohibiting grade schools from teaching languages other than English). And, as we make clear, a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us.

[**JUSTICE O'CONNOR**, with whom **JUSTICE SCALIA** joined, concurred in the judgment. Her view was that the plurality opinion contained dicta unnecessary to the decision which invited language-based challenges to jury venires.]

JUSTICE BLACKMUN, dissenting.

I dissent, essentially for the reasons stated by Justice Stevens in Part II of his opinion.

JUSTICE STEVENS, with whom **JUSTICE MARSHALL** joins, dissenting.

I

An avowed justification that has a significant disproportionate impact will rarely qualify as a legitimate, race-neutral reason sufficient to rebut the prima facie case because disparate impact is itself evidence of discriminatory purpose. *Arlington Heights*; *Washington v. Davis*. An explanation based on a concern that can easily be accommodated by means less drastic than excluding the challenged venireperson from the petit jury will also generally not qualify as a legitimate reason because it is not in fact "related to the particular case to be tried." *Batson*. And, as in any other equal protection challenge to a government classification, a justification that is frivolous or illegitimate should not suffice to rebut the prima facie case.

If any explanation, no matter how insubstantial and no matter how great its disparate impact, could rebut a prima facie inference of discrimination provided only that the explanation itself was not facially discriminatory, "the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson*. The Court mistakenly believes that it is compelled to reach this result because an equal protection violation requires discriminatory purpose. The Court overlooks, however, the fact that the "discriminatory purpose" which characterizes violations of the Equal Protection Clause can sometimes be established by objective evidence that is consistent with a decisionmaker's honest belief that his motive was entirely benign. "Frequently the most probative evidence of intent will be objective evidence of what actually happened," *Washington v. Davis* (STEVENS, J., concurring), including evidence of disparate

impact. See, e.g., *Yick Wo v. Hopkins*; *Gomillion v. Lightfoot.* The line between discriminatory purpose and discriminatory impact is neither as bright nor as critical as the Court appears to believe.

The Court therefore errs in focusing the entire inquiry on the subjective state of mind of the prosecutor. In jury selection challenges, the requisite invidious intent is established once the defendant makes out a prima facie case. No additional evidence of this intent is necessary unless the explanation provided by the prosecutor is sufficiently powerful to rebut the prima facie proof of discriminatory purpose. By requiring that the prosecutor's explanation itself provide additional, direct evidence of discriminatory motive, the Court has imposed on the defendant the added requirement that he generate evidence of the prosecutor's actual subjective intent to discriminate. Neither *Batson* nor our other equal protection holdings demand such a heightened quantum of proof.

II

The prosecutor's explanation was insufficient for three reasons. First, the justification would inevitably result in a disproportionate disqualification of Spanish-speaking venirepersons. An explanation that is "race-neutral" on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice. Second, the prosecutor's concern could easily have been accommodated by less drastic means. As is the practice in many jurisdictions, the jury could have been instructed that the official translation alone is evidence; bilingual jurors could have been instructed to bring to the attention of the judge any disagreements they might have with the translation so that any disputes could be resolved by the court. Third, if the prosecutor's concern was valid and substantiated by the record, it would have supported a challenge for cause. The fact that the prosecutor did not make any such challenge should disqualify him from advancing the concern as a justification for a peremptory challenge.

NOTES ON *HERNANDEZ*

We include this 1991 decision in this 1993 Supplement for three reasons. First, our discussion of race discrimination in Chapter 3 pays little attention to discrimination against Latinos and Latinas, the second-largest minority group in this country. Discrimination against Latinos and Latinas may well operate somewhat differently from discrimination against African Americans.

One obvious difference is our second reason for including *Hernandez*: Discrimination on the basis of language is an important phenomenon affecting Latinas and Latinos. See generally Juan Perea, Hernandez v. New York: *Courts, Prosecutors, and the Fear of Spanish*, 21 Hofstra L. Rev. 1 (1992). Some do not speak English, which is sometimes a basis for discrimination under the law (note that one cannot serve on a jury unless one speaks and understands English). Some Latinos and Latinas are bilingual, and *Hernandez* helps us see how that too might work against them. And some discrimination against Latinas and Latinos is based upon their accents. Mari J. Matsuda, *Voices of America: Accent,*

Antidiscrimination, and a Jurisprudence for the Last Reconstruction, 100 Yale L.J. 1329 (1991), argues that accent discrimination is widespread and unjustified in our society. The EEOC and at least one court has said that accent discrimination violates Title VII's prohibition against discrimination on the basis of national origin. *Fragante v. Honolulu*, 888 F.2d 591, 595 (9th Cir. 1989). Consider the ways in which the prosecutor and/or the Supreme Court in *Hernandez* may have been driven by unconscious stereotypes in their willingness to exclude bilingual jurors.

Third, the *Batson* issue of discriminatory use of peremptory challenges by attorneys is one that has several interesting ramifications for constitutional doctrine. In the casebook (pages 204-10) we use the *Batson* issue for state action purposes, and in Chapter 4 of this Supplement we reproduce a recent state court decision extending *Batson* to gender discrimination. The American jury and its composition remain a fierce battleground for justice and constitutional interpretation.

Page 286. Insert the following at the end of the Chapter:

D. FACIALLY NEUTRAL CLASSIFICATIONS AND "MAJORITY-MINORITY" ELECTORAL DISTRICTING: AFFIRMATIVE ACTION, REVERSE DISCRIMINATION, OR SOMETHING ELSE ALTOGETHER?

In the affirmative action cases, the Supreme Court considered a state's use of race in governmental decisionmaking highly suspicious. In this context of a facial racial classification, The Court rejected the idea that a governmental desire to help minorities is analytically and legally distinct from a governmental desire to harm whites.

Would the Court be equally suspicious of all *facially neutral* classifications attributable at least in part to racial considerations? *Washington v. Davis* may suggest that all such facially neutral classifications trigger strict scrutiny because they are racial classifications in disguise. In our judgment, however, the question is more complicated than that.

Recall that in *Davis* and similar cases, the statutory scheme has a disparate impact on minorities. Because the statute is facially neutral, *Brown* and its progeny do not require applying strict scrutiny. *Davis* held that this discriminatory impact creates no serious constitutional problem unless the government adopted the law at least in part out of a desire to achieve those effects; "selective racial indifference" is not enough to state a claim. Thus, the practical harm caused by the statute (in *Davis*, failure to get a government job) must be linked to another kind of injury to be actionable. Exactly why such racial motivation is the right kind of extra harm is left unclear in *Davis*.

One explanation is that *Davis* adopts an intentional-tort model: Injury is not actionable unless the actor intended it to occur. Thus, the decisionmaker's negligence or selective racial indifference—i.e., failure to

focus upon and avoid foreseeable racially discriminatory effects through reasonable steps—provides no basis for relief. This *mens rea* requirement may be supportable in many ways, but we will identify two that seem particularly relevant here.

First, from the perspective of the victim, this model may assume that injury does not legally "count" unless it is accompanied by the realization that the government intended it to happen. This explanation links *Davis* to the *Brown* tradition through the requirement of "stigma." *Brown* suggested that the problem with "separate *but equal*" school segregation was stigma—the "brand of inferiority" that it placed upon even those African American children receiving an otherwise allegedly equal education. School segregation sent a message of the inferiority of African American children, even the antipathy of white society toward them. The presence of *Davis* intent surrounding the adoption of a government employment test signals similar antipathy or stereotypes of inferiority, causing stigma to the excluded individual and assaulting her dignity. When no *Davis* intent is shown, the injury hurts less and is just a disappointment that must be borne in a complex society.

This conclusion about the "individuation" of the cause of action in *Davis*, whereby group effects are beside the point (except where they are so dramatic as to suggest wrongful intent) and individual disappointment must be linked with individual psychological harm, is suggested by a passage in *Davis* (found in the last full paragraph on page 155 of the casebook). After noting that no one has a constitutional claim just because she fails the employment test in question, the Court continued:

> The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

Although this passage leaves obscure exactly why illicit intent would demonstrate an equal protection violation, it does suggest that there must be some harm to the individual beyond the loss of the job. One understanding of that additional injury is a requirement of dignitary harm.

Second, from the perspective of the government, the *Davis* approach avoids imposing limitations upon governmental decisionmaking that may be unrealistic. The government often finds itself in "zero sum" situations where helping one group disadvantages another. Scarce resources prevent the government from addressing all social problems. Moreover, the government has an interest in expeditious decisionmaking. Holding the government responsible for "negligent failure to take reasonable steps to avoid racially discriminatory effects" could seriously intrude upon these interests, perhaps to the point of suggesting separation of powers concerns about courts invading the legislative domain. Moreover, the "negligent failure" theory would place in constitutional jeopardy all sorts of government actions. This political-process and "slippery slope" defense of