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*Remarks of Featured Speaker:***

RECONSTRUCTING DOUBLE JEOPARDY:
SOME THOUGHTS ON THE RODNEY KING CASE

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Yesterday I tried to suggest, that in doing Constitutional Law, we must think about the founding vision and also about how that founding vision may have been modified by a reconstruction vision. Yesterday's application of this approach involved freedom of expression and religious liberty. Today I would like to focus on a different application—double jeopardy. The double jeopardy clause of the Fifth Amendment provides that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”

In order to think about some of the issues that this clause raises, I am going to meditate on a famous case—the so-called Rodney King case. We all remember that Los Angeles police officers beat Rodney King. Video tapes captured the beating and were broadcast over, and over, and over again. State authorities prosecuted local police officials. The state trial basically resulted in the acquittal of the officers. After considerable consternation—the recent unpleasantness in Los Angeles—a federal prosecution ensued under federal civil rights laws. In the federal prosecution of these officers, a couple were convicted.

The first question that arises is, “Gee, how is that possible? Weren't those officers in effect twice subjected to jeopardy by these two trials?” And the short answer to that, in our legal culture, is the dual sovereignty doctrine. This doctrine states that a prosecution by the federal government does not count as the same offense as a prosecution by the state government. The prosecutions are entirely different because they involve

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different governments. We will talk today about whether that doctrine makes sense.

Even if the officers cleared the first hurdle, there would be a second question: Assuming we count the federal prosecution as possibly being the same as the state prosecution, were the two statutes at issue really the same—did they describe the same offense or different offenses? The state statute was basically an assault and battery statute. The federal statute was a federal civil rights law. Were those the same offense or different offenses?

And finally, I want to address one more set of issues in the Rodney King case that may have troubled some people: the composition of the initial Simi Valley jury—the state court jury in the first Rodney King trial. In that first trial, as many of you will recall, no blacks were chosen to sit on the jury. And, of course, it was a racially charged case. Suppose, just for the sake of argument, that the no-black jury resulted from unconstitutional racial manipulation by the defense attorneys. Let us say they used peremptory challenges in an unconstitutional way, or got a venue transfer solely to manipulate the composition of that jury. Would that be at all relevant, in trying to decide whether that jury's acquittal should be absolutely final for double jeopardy purposes? How should we think about race discrimination in juries in the context of the double jeopardy idea? Suppose, for example, that *California* (the same government) proposed to re prosecute the officers, for the very same offense, under a theory that the first jury was somehow rigged. The defendants, by hypothesis, were responsible for that manipulation. So California argues, let us suppose, that the acquittal should not count. What should we think about that theory?

Those are three different sets of issues we will talk about today. In addressing these questions, we have to think holistically about a single Constitution. We teach the double jeopardy clause in one part of our curriculum—criminal procedure. Does teaching the clause only in that part of the curriculum obscure its meaning? Does it cause us to miss certain connections between the Rodney King case and other parts of the Constitution that we often teach in other courses? We should think, for example, about how our double jeopardy jurisprudence connects up to larger issues of federalism—the relationship between the state and the federal government,

and between the states. In addition, we should think about double jeopardy in comparison to other big constitutional issues such as separation of powers. Thus, the impeachment clause of the Constitution, which is one of our separation of powers provisions, casts interesting light on double jeopardy. We should also see double jeopardy in light of the importance of jury trials. We talked a lot yesterday about jury trials, and today we will ponder the connection between double jeopardy and jury trials, and in turn the connection between jury trials and more basic issues of representation. Who is on the jury? Does the jury really represent the people? Does it look like America? Is it the kind of body that is worthy of respect, and does that in any way depend on who gets to be on it and how they are selected? So we must think about the connection between double jeopardy and jury trials, and between jury trials and democratic representation theory more generally. These are issues that resemble voting rights issues—who is in the legislature and what does our legislature look like?

Consider also the jurisprudence of plain meaning. In constitutional law in the last twenty years, attention has been focused on the possibility that the Constitution could be interpreted in a straightforward way: just read the words. This big idea in constitutional theory was championed by the great Hugo Black, about whom I spoke briefly yesterday, and is today championed by Justice Scalia. Oddly enough, this big idea has not quite seeped into conversations about criminal procedure, largely because we have segregated criminal procedure. We teach it in a separate course. So in thinking about what is the *same offense*, we should consider a plain meaning approach—same means same—and then ask what that plain meaning approach would look like.

Finally and most fundamentally, we must think about this clause in the context of the reconstruction—about how this clause is an example of the need to focus not just on the founding vision of our Constitution but on the reconstruction vision too.

This is just a general map of some of the issues I will discuss. My talk today is based on an article that appeared in the January issue of the Columbia Law Review. I co-authored that article with a former student, Jon Marcus. Our article is called *Double Jeopardy Law After Rodney King*.¹

¹ 95 COLUM. L. REV. 1 (1995).

I. THE DUAL SOVEREIGNTY DOCTRINE

First, let us consider the dual sovereignty doctrine. Maybe the best way to describe the dual sovereignty doctrine is to tell you about a case from right here in Alabama, *Heath v. Alabama*.² This case, which was decided by the United States Supreme Court in 1985, is the Supreme Court's most recent exposition of the so-called dual sovereignty doctrine. The facts, I must warn you, are quite grisly.

Mr. Heath apparently hired a couple of people to murder his wife. They kidnapped her in Alabama and then apparently dragged her across the state line to Georgia where the murder took place. Heath was prosecuted in Georgia for murder. After pleading guilty, he was sentenced to life imprisonment. But then Alabama decided that the sentence was not quite enough, so Alabama prosecuted Heath for the same murder. The question was whether Alabama could prosecute Heath when he had obviously already been subjected to jeopardy—there had already been one conviction.

Double jeopardy is about three basic ideas: (1) *autrefois convict*—once convicted, one cannot be re-prosecuted for the same crime; (2) *autrefois acquit*—once acquitted, one cannot be re-prosecuted for the same crime; and (3) *pardon*—once pardoned, one cannot be prosecuted for the same crime.

Heath was basically saying, “*autrefois convict*. I have already been convicted of this same murder. A murder is the same in Alabama as it is in Georgia. There is no difference.” And Alabama said, “No, that was a Georgia case. And a Georgia case under Georgia law is just different from an Alabama case under Alabama law. So by definition this really is not the same offense. This is a different offense because it is an Alabama prosecution rather than a Georgia prosecution.”

The Supreme Court of the United States agreed with Alabama. And so Heath was subject to and did indeed receive the death sentence. I do not know if it was actually carried out, but the Supreme Court said that the second proceeding was perfectly acceptable because the dual sovereignty doctrine applies the double jeopardy clause *within* a state or *within* a jurisdiction but not *across* jurisdictions.

Now here is one aspect of double jeopardy that is somewhat odd. From Larry Gene Heath's perspective it looks like we have prosecuted him twice for the same murder. Suppose

² 474 U.S. 82 (1985).

he had been *acquitted* in the Georgia proceeding—proved *innocent*. Using the Supreme Court's logic, that would not matter either because by definition the Alabama case would be different from the Georgia case. He would have to run the gauntlet a second time. In essence, he would be on trial twice for one murder. Here the double jeopardy language of "life or limb" is not metaphoric. He is really on trial for his life even after he had been acquitted in a full and fair trial, because of the logic of the dual sovereignty doctrine: Georgia prosecutions do not count for Alabama purposes.

Now, here is another oddity from Heath's perspective: The Fourteenth Amendment made many rights applicable against the states—jury rights, freedoms of speech and press, and many other privileges and immunities. In particular, *double jeopardy* was made applicable against the states. So the double jeopardy clause applies against Alabama, through the Fourteenth Amendment. It also applies against Georgia through the Fourteenth Amendment. The federal Constitution protects against two prosecutions by Georgia, and against two prosecutions by Alabama. But somehow it does not protect against two prosecutions when the two governments are acting in tandem.

Here is another odd aspect of the dual sovereignty doctrine. The double jeopardy clause comes from English common law. In England, at the time of the founding and when the Fourteenth Amendment was adopted, the English principle was that if you had been tried by a foreign government—South Africa, Portugal, Thailand—that prosecution, conviction or acquittal, could bar re prosecution in an English court. This is still the English rule today. So in England, the law would enable you to plead double jeopardy if you had been tried in a foreign court. What is strange, then, is that England in 1985 would *not* have re prosecuted Heath. They would have said, a Georgia prosecution counts for an English one. England would have given more respect to that Georgia adjudication than the sister state of Alabama did. Of course, there is an especially close relationship between Alabama and Georgia—they are sister states in the federal union. For God's sake, England would even give respect to a *French* judgment! And yet Alabama refuses to give respect to a sister state's judgment, and refuses on the basis of the very same English common law idea that is word for word in our federal Constitution. This very same English law, via the Fourteenth Amendment, now applies against the states.

Well, where did we get this dual sovereignty doctrine? *Heath* was an unusual case. It was a state-state case. The heart of the dual sovereignty doctrine, however, is tied to the early period of our nation's history when thought revolved around federal-state relations more than state-state federalism.

Let us go back to the era of *Barron v. Baltimore*.³ Remember that *Barron* was a famous case in the 1830's where Chief Justice Marshall said that the Bill of Rights did not apply against the states. Keep in mind, though, that *Barron* was not addressing the very complicated situations that arise when both state and federal governments act together as in cases with a state prosecution and a federal prosecution or when federal mails are delivered but the postmasters comply with state law. *Barron* was not addressing some of those tricky state-federal interactions. But the cases after *Barron* read it to mean the following: In essence, double jeopardy applies against the federal government. The federal government cannot prosecute anyone twice. But the state can prosecute an individual as many times as it wants. As a matter of federal constitutional law, the double jeopardy clause does not apply. And indeed, what the two governments can do separately they can do in tandem too. So as long as the Feds do not prosecute twice, double jeopardy rights have been honored. If the states prosecute you once, and then the Feds prosecute you, that is acceptable. If the Feds prosecute you once and then the states prosecute you, that is okay too. Because of *Barron*, you are privileged only from two prosecutions by the federal government.

In 1969, the Supreme Court, in a case called *Benton v. Maryland*,⁴ said, "You know, double jeopardy *does* apply against the states, just as freedom of speech applies against the states. The freedom of the press, the free exercise of religion, the establishment clause, jury trial and so on—they all apply against the states."

So now, double jeopardy does apply against the states. And it seems a bit bizarre that although we have repudiated the *Barron* idea, we still retain the dual sovereignty doctrine. The dual sovereignty doctrine at one level seems a legacy of *Barron*. We have rid ourselves of *Barron*, so why do we still keep the dual sovereignty doctrine? If you are privileged from dual

³ 32 U.S. (7 Pet.) 243 (1833).

⁴ 395 U.S. 784 (1969).

prosecution by the Feds and you are privileged from dual prosecution by, say, Alabama, then why shouldn't you also be privileged from dual prosecution by the two of them together? Especially when the Feds and the Alabama police departments often work together.

Now take that one step further. Just substitute California for Alabama, and you have the argument of the defendants in the Rodney King case: "We are protected from two prosecutions by California. We are protected from two prosecutions by the Feds. Why shouldn't we be protected from two prosecutions by the two governments acting in tandem?"

There are a couple more arguments they could make—arguments from precedent. These arguments have to do with search and seizure law and also with incrimination law. First, consider search and seizure law. For a long time, the rule has been that the Feds cannot seize evidence unconstitutionally and then use it against an individual in a prosecution. This is the so-called exclusionary rule. (For the record, I am opposed to the exclusionary rule, but that is the rule.) But the Fourth Amendment under *Barron* did not originally apply to the states. So for many years there was no federal exclusionary rule that applied to state police officers.

So then what happened? State police officers would search and seize, sometimes unreasonably. Then, they might hand the evidence over to the federal officials, saying, here you can use it. Or vice-versa, federal officials might search and seize unreasonably and hand the evidence over to state prosecutors. This was the so called silver platter doctrine: one government would unreasonably search, get evidence, and hand it over on a silver platter to the other. For a while such practices were allowed. But, eventually the Supreme Court decided a case called *Wolf v. Colorado*⁵ and held (in effect) that the Fourth Amendment privilege against unreasonable searches and seizures was also applicable against state governments.

The Court did not apply the exclusionary rule yet, but it said states could not unreasonably search and seize. After that case was decided, states continued to engage in unreasonable searches and seizures, and would at times give the evidence over to the Feds. So then the Supreme Court said that these actions were no longer acceptable. Once it was decided that Fourth Amendment principles were applicable against the

⁵ 338 U.S. 25 (1949).

states, this sort of debasement of the exclusionary law was no longer acceptable on the dual sovereignty premise that these were separate governments. At the time that incorporation was occurring in the Fourth Amendment, we got rid of dual sovereignty—but only in the exclusionary rule context.

Now we come to self-incrimination. For a long time the rule was that the Fifth Amendment Self-Incrimination Clause did not apply against the states. So here is what happened: The Feds would force an individual to testify, say before Congress. In return, they would grant that person immunity from federal prosecution. But here is the kicker: The state could then take that testimony and use it to prosecute that person. Or the states could force someone to testify before the state legislature, granting immunity, with the promise that that person would not be prosecuted. But, then, the Feds would take that testimony and use it to prosecute. In theory, both governments were acting within their rights; neither the federal nor the state government, in each respective case, technically broke its promise. And the Supreme Court upheld all of this. Because of *Barron* and dual sovereignty, the Constitution was only applicable when the federal government *both* forced someone to testify, and then used the evidence to prosecute. But the very day the Court incorporated the self-incrimination clause against the states in a 1965 case called *Malloy v. Hogan*,⁶ the Justices, in a companion case, said that since they had incorporated the clause against the states, they were not going to let the governments play this dual sovereignty game.

So here is the odd thing: at the very time we incorporated, in effect, the Fourth Amendment against the states, we got rid of dual sovereignty in the Fourth Amendment context. The very day we incorporated self-incrimination against the states, we got rid of dual sovereignty in that context. But we never got rid of dual sovereignty in the double jeopardy context, when we incorporated double jeopardy against the states.⁷ That seems a little odd.

Now, what is the argument on the other side? It also focuses on incorporation. Incorporation is a key ingredient in

⁶ 378 U.S. 1 (1964).

⁷ The Supreme Court Justices have never explained why they got rid of dual sovereignty in the Fourth Amendment and self-incrimination contexts, while keeping it for double jeopardy.

this whole equation. It is not just the original founding vision that matters but the Fourteenth Amendment, too.

Here is a Fourteenth Amendment argument on the other side that is dramatized by the Rodney King case. In the context of the Fourth Amendment, if states unreasonably search and seize, the Feds can still prosecute as long as they do it independently. In the self-incrimination context, if the states force someone to give immunized testimony, the Feds, in theory, can still prosecute as long as it is done independently. However, in the double jeopardy context, if we got rid of the dual sovereignty doctrine, and the states prosecuted and acquitted someone, that would altogether bar federal prosecution: *autrefois acquit*. And then there would not be federal prosecution at all. In effect, that would give states the ability to veto a federal prosecution.

And that would partially nullify federal criminal law. (Y'all know about "nullification," right?) In short, a state government could pardon someone, but without the dual sovereignty doctrine, that pardon would not only absolutely bar state prosecution but federal prosecutions as well. What seems really odd, as evidenced in the Rodney King case, is the asserted reason why the federal government could not prosecute state officers for federal criminal civil rights violations—the Fourteenth Amendment and reconstruction. Think about the picture. White state officers, acting under state law, beat up a black citizen. The federal government tries to come in and prosecute these officers on the grounds that such actions were an abuse of the black citizen's federal civil rights. But the claim is that the federal government cannot do this *because of the Fourteenth Amendment!* Yet, on one level the Fourteenth Amendment was precisely about giving the federal government power to engage in just these kinds of federal criminal prosecutions.

Indeed the Fourteenth Amendment was largely about providing a firm constitutional foundation for the Civil Rights Act of 1866. Section Two of the Civil Rights Act of 1866 explicitly states that it is a federal crime for state officials to violate citizens' civil rights. Section Two of the Civil Rights Bill, which the Fourteenth Amendment was designed to constitutionalize, is the very statute the Los Angeles Police Department officers were charged with violating. And so it seems a little strange that the reason the Feds cannot prosecute is because of the Fourteenth Amendment itself—an amendment that was about authorizing just those kinds of prosecutions. Conse-

quently, there could be a fear that state governors might offer quick pardons for abusive state officers or that state courts might even acquit them in whitewashed or patty cake trials, thereby thwarting federal criminal enforcement of the civil rights laws.

In essence there are two basic ideas. On the one hand there is the basic argument after the Fourteenth Amendment that if one is privileged against the Feds and also privileged against the states, one should be privileged against both governments together. On the other hand, there is the Fourteenth Amendment argument that asks why the federal government should be prevented by the Fourteenth Amendment itself from enforcing federal civil rights laws against state officers.

Resolving this question is not entirely simple since there exists no magical piece of historical evidence that solves that puzzle or any word in the Constitution that definitively spells out an answer. However, Jon Marcus and I have tried to propose a sensible accommodation: *Ordinary citizens* should generally not be subject to two prosecutions by different governments. Let us say for example that someone is alleged to have committed a murder or a bank robbery. Since that person is privileged against one government and against the other government, that individual should be privileged from dual prosecution by the two of them together. However, there should be different rules for *state officials* because here we may be more suspicious of state prosecution; it might be a sham or a fraud. Therefore, we may wish to allow the federal government to prosecute afterwards, vindicating federal supremacy and enforcing the civil rights laws.

Why, you might ask, should we have special rules for government officials? Our answer is that they wield more power than ordinary citizens. If they do not want to be subjected to this dual prosecution regime, they should not take office. No one has forced them to enter office and wield this kind of power. With a special monopoly of power over fellow citizens, they are capable of much greater abuses. And we are also more suspicious that their state prosecution may be collusive—a sham, a patty cake, whitewash trial.

Here is where impeachment comes into play. The separation of powers analogy suggests that because federal officials wield tremendous power over fellow citizens, they, and only they, are typically subject to two federal prosecutions. First they may be tried in a quasi-criminal court of impeachment,

that not only removes them from office, but dishonors them and sometimes even disqualifies them from any future office. After this penal, quasi-criminal proceeding, they are also subject to ordinary criminal prosecution in an ordinary criminal trial. In essence, the impeachment clause actually says that there should be some special rules for government officials because they wield so much power over people. And so we might need to modify double jeopardy principles slightly because we are generally concerned about government power.

Maybe you do not buy that particular resolution, and maybe you do. What I hope you see is the big point: In thinking about this issue, we must not only think about the founding but also about reconstruction. Furthermore, we should think about how the reconstruction values play out on both sides of this issue. In the Rodney King case, we saw how the police officers made strong Fourteenth Amendment arguments. But at the same time, we should see the Fourteenth Amendment concern on the other side—the concern that states not be able to nullify federal criminal enforcement of the Civil Rights Act of 1866, which today is Section 242 of the Criminal Code.

II. WHAT IS THE *SAME OFFENSE*?

Moving on to the second topic, let us suppose that these individuals were not government officials, but rather ordinary citizens. How should we decide whether two different prosecutions are really for the same offense or for different offenses? We have two statutes. They are prosecuted in the first trial under statute A, and then they are prosecuted in the second trial under statute B. For now, let us say that both prosecutions are by the same government; let us, in other words, assume away the dual sovereignty problem.

The question then revolves around the criminal laws themselves. Is this the same law or are they different laws? The courts have gone around and around on this issue. Sometimes they use a test called “Blockburger,” which, in effect, states that if one offense is a lesser-included one within the other, then they count as the same offense. In other cases, courts review the transaction to see whether the two crimes came out of the same crime spree or episode, and involved the same factual set of events. Under this transaction test, if they do involve the same set of events, they should be considered the same offense, even if one is murder and one is kidnapping.

But I suggest that there is an even cleaner and simpler understanding of sameness. And it is a literal one. Same really means same. Murder is the same as murder; it is not the same as attempted murder, even though attempted murder is a lesser-included offense. Robbery is the same as robbery, but is not the same as armed robbery, even though armed robbery is a greater offense and robbery is a lesser-included offense. Murder and kidnapping are different, even if they came out of the same transaction.

At first, this might not seem to be at all protective of defendants, because the government can prosecute you once, say, for armed robbery; and then if they do not get you for that, then they can turn around and prosecute you for robbery; then if they do not get you for that, they can try bank robbery. And each one is technically different from every other. So we need to supplement the "same means same" approach with additional principles.

First, if you, the defendant, have won an acquittal or if you prevail on any issue, you should be able to prevent the government from relitigating that issue. This is the principle of collateral estoppel. However, collateral estoppel here is asymmetric in two ways. First, it protects those who are innocent more than those who are guilty, because it works only if the defendant was acquitted of something in the first proceeding. On the other hand, double jeopardy is symmetrical—autrefois convict, autrefois acquit. Let us reconsider the *Heath* case. Some of you probably had different responses to that case, depending on whether Heath got acquitted or convicted in the first trial. Most of us are probably more concerned about the person who was acquitted in the first trial. In this way, our intuition is asymmetric, and so is the collateral estoppel principle.

But it is asymmetric in one other way. The government can never use collateral estoppel against you if you lose. If they re-prosecute after you have lost the first trial, they have to prove your guilt all over again. But if you win the first trial, you have won forever—no questions asked. They can never try to relitigate that issue against you. It is asymmetric just like proof beyond a reasonable doubt is asymmetric. That, in essence, is the collateral estoppel issue. Under this principle, once you have beaten the government on an issue, you have beaten them forever. You do not ever have to relitigate. So, for example, once you have been acquitted of robbery you cannot be charged with bank robbery because you have already been

acquitted of one element of that offense. They can never prove that robbery against you. And if they cannot prove the robbery, they cannot prove armed robbery either.

In addition to this due process idea, there is another due process idea that applies in cases where the government prosecutes someone twice. If the offenses grow out of the same transaction, even for different offenses like robbery and kidnapping, the government must explain why it did not prosecute you in a single proceeding. In short, government officials must justify why they are choosing to prosecute you in a piecemeal fashion. Sometimes there are good reasons for prosecution in such a disjointed fashion—even in greater and lesser-included offenses. For example, let us say that a defendant stabs the victim. The victim is mortally wounded, but has survived thus far. The defendant is charged with attempted murder and convicted. Immediately after that conviction, the victim dies from injuries proximately caused by the stabbing. The prosecutor then tries to charge the defendant with murder. The prosecutor then says, “Look, the reason I did not bring the murder charge to begin with is because the death had not yet occurred.” This is an acceptable, non-vexatious reason for having prosecuted in two bites, rather than one. So in order to prosecute twice, the prosecutor must explain why she chose to go after someone in two bites rather than one.

I propose that in deciding what constitutes a “same offense,” we employ three simple principles. First, same offense means same offense—same in fact and in law. Murder is murder, which is not the same as attempted murder. Second, collateral estoppel means that once you have beaten the government once on an issue, you have won forever. And third, if government is going to prosecute you for different offenses the government must provide good reason. This overall three-pronged approach satisfies plain meaning; it basically includes most cases and better explains our moral intuitions.

III. THE JURY

Finally, we turn to a topic that is even more controversial: tainted juries. Suppose an individual is on trial for murder. Let us say that the defendant bribes the jury, and is, unsurprisingly, acquitted. Clearly the defendant can be charged with bribery, but can this person ever be charged with murder, under the theory that the first acquittal did not count? Several states, using this very theory, would charge this defendant with

murder. A sham acquittal—a collusive or fraudulent acquittal—does not count. So if someone bribed the jury, or intimidated the jury, the resulting acquittal should not count.

Now consider a much trickier question: What if the jury is racially rigged? If the jury is racially stacked in an unconstitutional way, because of a defendant's peremptory challenges, should that taint the jury verdict? Perhaps so on the theory that this jury is not a real jury. This acquittal is not a real acquittal; it does not speak for the people. And therefore, perhaps we should allow re prosecution. Indeed, there are some similarities to the bribery example. However, there are some differences. Bribery is a crime, but a peremptory challenge, even if in violation of *Batson*⁸ and *McCullum*,⁹ is not exactly a crime. It might be unconstitutional, but it is not a crime. One occurs secretly, and the other in open court.

Double jeopardy law is fundamentally linked to jury trial. But double jeopardy law generally says that once acquitted, someone has been acquitted forever. This is partly because our system gives that first jury the power even to nullify a law. The real question is then: Do we really believe in this theory—even when we do not truly trust the first jury or when we think the first jury is somehow skewed so that does not represent the people?

There is yet another linkage. Jury trial must be thought of in connection with other political rights—voting and representation. The Fifteenth Amendment, for example, bans race discrimination in voting, and, I suggest, applies not just to voting for legislatures, but voting in juries as well. And if you have race discrimination in who gets to vote on a jury, then maybe that body is no longer representative. If that body is not representative—if it is a sort of mal-constituted body—do we really want to give finality to a judgment of acquittal? This question is clearly provocative and difficult. And we must not limit our thought to the founding vision and our love for juries, but we must also think in terms of a reconstruction vision.

Who should be on our juries? Should our juries be composed of blacks as well as whites? These questions arose after the Fifteenth Amendment. And after the Nineteenth Amendment, we should include women as well as men. If they

⁸ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁹ *Georgia v. McCollum*, 505 U.S. 42 (1992).

have a right to vote for legislatures, don't they also have the right to be voted for and to vote *in* a legislature? Doesn't a similar reasoning apply to juries—to the right to vote in a jury? And if blacks, as political equals, have a right to political equality, how should we think about skewed juries that result from racial manipulation? Once again, we must think not only about the founding, but also about reconstruction.

