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Comments

GEORGIA V. McCOLLUM: ELIMINATING THE RACE-BASED PEREMPTORY CHALLENGE ONCE AND FOR ALL

I. INTRODUCTION

The American jury is understood as an important institution of democratic government, helping to ensure a fundamental tenet: the right to a fair trial by impartial triers.¹ Implicit in the defendant's right to a fair trial is the right to a jury "whose members are selected pursuant to nondiscriminatory criteria."² This right, however, has never conferred upon the defendant the right to a jury "composed in whole or in part"³ of persons of his or her own race.⁴ Yet, racism in jury selection has plagued our court system for at least one hundred years.⁵

Historically, peremptory challenges have played an integral role in the selection of juries in both civil and criminal cases, and are recognized primarily

1. See *infra* note 29.

2. *Martin v. Texas*, 200 U.S. 316, 321 (1906). These rights cut to the heart of how juries are selected. Following is a brief review of the jury selection process: Once a pool of potential jurors has been summoned and impaneled, a process known as *voir dire* takes place. *Voir dire* is the preliminary examination that the court and the attorneys make of prospective jurors to determine their suitability to serve on the jury. BLACK'S LAW DICTIONARY 1575 (6th ed. 1990). During this examination, both the defense and prosecution are allotted a certain number of challenges. Challenges allow each side to remove potential jurors. There are two types of challenges: challenges for cause and peremptory challenges. Challenges for cause remove prospective jurors for actual biases; therefore, the attorney must give a legally cognizable reason for the challenge for cause. Peremptory challenges allow the removal of potential jurors who have allegedly hidden biases; therefore, the attorney is allowed to peremptorily remove a juror without giving any stated reason. Typically, peremptory challenges are fewer in number than challenges for cause. See generally, J. M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 139-76 (1977).

3. *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879).

4. The Court has explained that "[t]he number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection." *Akins v. Texas*, 325 U.S. 398, 403 (1945).

5. Racial discrimination in the selection of juries has been under constitutional attack since at least 1870 when the Supreme Court held in *Strauder*, 100 U.S. at 308, that a state statute denying a juror a right to sit on a jury because of the juror's race is an equal protection violation against that juror. See *infra* text accompanying note 36.

as a device with which defendants obtain juries they believe are impartial.⁶ However, peremptory challenges have never been constitutionally protected.⁷

Before *Georgia v. McCollum*,⁸ cases gradually diminished the unfettered use of the peremptory challenge, prohibiting both the state and the private civil litigant from exercising race-based peremptories.⁹ The defendant, however, was still allowed unfettered use of the peremptory challenge. *McCollum* changed that. The *McCollum* Court revolutionized the peremptory challenge by holding that a defendant's discriminatory exercise of a peremptory challenge violates the excluded juror's equal protection rights.¹⁰

First, this Comment reviews the legal background of the peremptory challenge, examining the Supreme Court cases which led to *McCollum*. Second, this Comment analyzes the *McCollum* Court's holding and reasoning. Third, this Comment discusses possible consequences of the *McCollum* decision. Finally, this Comment offers a perspective from which to view *McCollum*.

II. STATEMENT OF THE CASE

On August 10, 1990, a grand jury returned a six-count indictment charging respondents Jerry, William, and Ella McCollum with aggravated assault and simple battery. The indictment alleged that the McCollum family, who are white, beat and assaulted Myra and Jerry Collins, who are African-American.¹¹ Soon after the event, leaflets were widely distributed urging members of the African-American community not to patronize the respondents' business.¹²

6. *Swain v. Alabama*, 380 U.S. 202, 242 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986). See also *infra* notes 47-50 and accompanying text.

7. See *infra* notes 29-34, 172-179, 201 and accompanying text.

8. 112 S. Ct. 2348 (1992).

9. See *infra* notes 47-101 and accompanying text.

10. *Id.* at 2359. See *infra* text accompanying note 180. See also *infra* notes 102-116 and accompanying text.

11. *McCollum*, 112 S. Ct. at 2351. An amicus brief filed in support of the petitioner revealed the additional factual information that the McCollum family owns a dry cleaning business and that the Collins, customers of the same business, were allegedly beaten and assaulted at the time the Collins came to pick up their clothing on January 5, 1990. Brief for the United States as Amicus Curiae Supporting Petitioner at 5, *Georgia v. McCollum*, 112 S. Ct. 2348 (U.S. 1992) (No. 91-372) (LEXIS, Genfed library, Brief file).

12. The distributed leaflet read in pertinent part,

BE INFORMED . . . The McCollum Family, owners of McCollum's Dry Cleaners located at 1703 E. Broad Ave. in Albany [Georgia] attacked, kicked, and beat a young black woman and her husband with a baseball bat, several days ago as they attempted to pick up clothing and dry cleaning. This Community must respond to this violent act with non-violence & direct action. We urge you to select another Dry Cleaners for your clothing. The McCollums have no respect for your black sister & brother, your daughter & son, your wife & husband.

At the trial level, before jury selection began, the state moved to prohibit respondents from exercising their peremptory challenges in a racially discriminatory manner.¹³ The state explained that it intended to prove race was a factor in the alleged assault. Consequently, the state sought an order providing that if it succeeded in making out a prima facie case of racial discrimination in the use of peremptories by the respondents, the burden of proof would shift to the respondents to come forward with a neutral explanation for the challenge.¹⁴ The trial judge denied the state's motion, holding that the defendant is not prohibited from using peremptory strikes in a racially discriminatory manner under Georgia or federal law.¹⁵

The Supreme Court of Georgia, in a 4-3 decision, affirmed the trial court's ruling.¹⁶ The court explained that, given the "long history of jury trials as an essential element of the protection of human rights, this court declines to

Spend your money with people who respect you.

Id. at 6. See also *infra* notes 112-116 and accompanying text.

13. *McCollum*, 112 S. Ct. at 2351. The impetus for this motion, the state asserted, was that the respondents' attorney clearly indicated an intention to use peremptory challenges in a racially discriminatory manner. The state feared that the respondents' alleged intention coupled with the circumstances of the case (explained below) would enable the respondents to exclude all African-American citizens from the jury. *Id.* The relevant circumstances of the case follow: Under Georgia law, the petit jury in a felony trial is selected from a panel of 42 persons. GA. CODE ANN. § 15-12-160 (Michie 1990). Both the defendant and the state may challenge jurors for cause. *Id.* § 15-12-163. Moreover, both the defendant and the state have the right to use peremptory challenges, and when the indictment is for an offense carrying a penalty of four or more years of imprisonment, the defendant "may peremptorily challenge 20 of the jurors impaneled to try him [or her]." *Id.* § 15-12-165. Therefore, because forty-three percent of the county's population is African-American, if a statistically representative jury panel was assembled for selection, 18 of the potential 42 jurors would be African-American. Thus, respondents could remove all the potential African-American jurors with the respondents' allotted 20 peremptory strikes. See *McCollum*, 112 S. Ct. at 2351.

14. The state, at the trial level, primarily relied on *Batson v. Kentucky*, 476 U.S. 79 (1986) which held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from using peremptory challenges in a racially discriminatory manner and required prosecutors to come forward with neutral explanations for peremptory challenges that are prima facie racially discriminatory. *Id.* at 97. In *McCollum*, the state argued that this prohibition against prosecutors should be extended to defendants. *McCollum*, 112 S. Ct. 2351-52. See *infra* notes 52-65 and accompanying text.

15. *Georgia v. McCollum*, 112 S. Ct. at 2348, 2352 (1992).

16. *State v. McCollum*, 405 S.E.2d 688 (Ga. 1991). In this three-paragraph majority decision, the Supreme Court of Georgia noted that since the trial court's order, the United States Supreme Court had decided *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991), which generally extended *Batson* to civil cases disallowing civil litigants the right to exercise their peremptory challenges in a racially discriminatory manner. *McCollum*, 405 S.E.2d at 689. The Supreme Court of Georgia, however, distinguished the *McCollum* case from *Edmonson*, interpreting *Edmonson* as applying to civil cases only. *Id.* See *infra* notes 81-96 and accompanying text.

diminish the free exercise of peremptory strikes by a criminal defendant."¹⁷ The Supreme Court of the United States granted certiorari to resolve a question left open by the Court's prior cases: "whether the Constitution prohibits a criminal defendant from engaging in purposeful discrimination in the exercise of peremptory challenges."¹⁸

III. LEGAL BACKGROUND OF THE CASE

The peremptory challenge dates back to medieval England where the crown selected jurors on the basis of those who had the most relevant knowledge of the case.¹⁹ Consequently, the prosecution had an unlimited number of peremptory challenges.²⁰ Due to abusive practices by the crown and the shift in the jury from a body of "fact knowers" to a body of fact finders, the prosecutor's right to peremptory challenges was revoked by the 1305 *Ordinance for Inquests*.²¹ Instead, the prosecution was allowed to ask jurors to "stand aside."²² Because the 1305 statute also gave defendants the right to exercise peremptory challenges,²³ it was this 1305 statute that placed the defendant's right to the peremptory challenge within the received common law of the United States.²⁴

In the United States, the peremptory challenge has been widely used in

17. *McCullum*, 405 S.E.2d at 689. Three judges dissented, positing cogent arguments that both *Batson* and *Edmonson* establish that race-based peremptory challenges by a criminal defendant violate the Constitution. *Id.* at 689-93.

18. *Georgia v. McCollum*, 112 S. Ct. 2348, 2352 (1992).

19. One commentator noted that "[i]n essence, these juries merely accused individuals but did not determine guilt or innocence. Thus, the crown's officers dismissed from juries those with no knowledge of crimes." THEODORE F.T. PLUCKETT, *A CONCISE HISTORY OF THE COMMON LAW* 433 (5th ed. 1956).

20. Marvin B. Steinberg, *The Case for Eliminating Peremptory Challenges*, 27 *CRIM. L. BULL.*, May-June 1991 at 217-20; James J. Gobert, *The Peremptory Challenge—An Obituary*, *CRIM. L. REV.*, Aug. 1989, at 528-30. See also *Swain v. Alabama*, 380 U.S. 202, 212-23 (1965).

21. Steinberg, *supra* note 20, at 217.

22. *Id.* at 218. This practice was essentially the same as a peremptory challenge but had one limiting element: if there were not enough jurors to compose a jury, the prosecution would have to support its request to stand aside with a reason for cause. Gobert, *supra* note 20, at 528-29.

23. Steinberg, *supra* note 20, at 217. Blackstone described the defendant's right to peremptory challenge as "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous." 4 WILLIAM BLACKSTONE, *COMMENTARIES* 353 (15th ed., 1809).

24. Steinberg, *supra* note 20, at 218 (citing J. Van Dyke, *Our Uncertain Commitment to Representative Panels, in JURY SELECTION PROCEDURES* 148-49 (1977)). Interestingly, in the late 19th and early 20th centuries the peremptory challenge was rarely used in England. See *Swain*, 380 U.S. at 213. And, in 1988, by the Criminal Justice Act of 1988, the English peremptory challenge was ultimately abolished. See Gobert, *supra* note 20, at 529. See also Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 166 (1989) (explaining that the English peremptory challenge faded, in part, due to the relative homogeneity of English society).

criminal and civil cases both at the federal and state levels.²⁵ In part, the popularity of the American peremptory challenge has been attributed to the large cross-section of heterogeneous members of society serving on the venire; it is thought that in selecting members from a disparate body of potential jurors, detected biases are often difficult to support with challenges for cause.²⁶

The Supreme Court previously explained that while challenges for cause allow exclusion of jurors based on a narrowly specified, provable, and legally cognizable basis of partiality, the peremptory challenge allows exclusion of jurors based on real or imagined partiality that is less easily demonstrable.²⁷ The function of the peremptory challenge "is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."²⁸ Such rhetoric may reflect constitutional values found in the Sixth Amendment's²⁹ right to an "impartial jury," or the Fourteenth Amendment's³⁰ right to "equal protection of the laws." However, the Supreme Court has ruled on numerous occasions that, although the peremptory challenge is intended to remove bias against either side, thus insuring an impartial jury,³¹ it is not "essential to the fairness of trial by jury."³² While the peremptory challenge is admitted to be "one of the most important of the rights secured to

25. 28 U.S.C.A. § 1870 (West, 1968); Fed. R. Crim. P. 24(b),(c) (West, 1975); *Swain*, 380 U.S. at 220.

26. *Swain*, 380 U.S. at 220. The "venire" is the pool of prospective jurors from which the jury will be selected. In accordance with the Sixth and Fourteenth Amendments, the venire should be prepared with the goal of creating "a fair cross-section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

27. *Hayes v. Missouri*, 120 U.S. 68, 70 (1887).

28. *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

29. The Sixth Amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

U.S. CONST. amend VI.

30. The Fourteenth Amendment reads:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

31. *Holland v. Illinois*, 493 U.S. 474, 484 (1990).

32. *Lewis v. United States*, 146 U.S. 370, 376 (1892).

the accused,³³ it is not a constitutional requirement; rather, it is a “creature of statute.”³⁴ Thus, limiting the peremptory challenge does not violate the Constitution.

For more than a century, the Supreme Court ruled that statutes excluding citizens from serving on juries because of their race violate the Constitution, specifically the Sixth Amendment’s right to an impartial jury and the Fourteenth Amendment’s right to equal protection.³⁵ In *Strauder v. West Virginia*,³⁶ the Court invalidated a state statute that limited grand and petit jury service to “all white male persons who are twenty-one years of age and who are citizens of this state”³⁷ under the Fourteenth Amendment’s Equal Protection Clause.³⁸ The *Strauder* Court reasoned that “[t]he very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them.”³⁹ The Court concluded that such a state-sponsored act is repugnant to “that equal justice which the law aims to secure.”⁴⁰

The Court was slower to protect jurors from race-based usage of the peremptory challenge on a constitutional basis.⁴¹ Despite the egalitarian spirit from which the peremptory challenge originated in the United States, it is undisputed that the challenge has long been used in a racially discriminatory manner.⁴² As one commentator put it, although the Supreme Court rulings

33. *Pointer v. United States*, 151 U.S. 396, 408 (1894).

34. *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988); accord *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991); *Holland*, 493 U.S. at 474; *Batson v. Kentucky*, 476 U.S. 79 (1986); *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Stilson v. United States*, 250 U.S. 583 (1919) (“Accordingly, the conclusion that the Equal Protection principles are violated by the defendant’s invidious use of peremptory challenges does not require a balancing of competing rights; the excluded juror’s right to be free from racial discrimination is paramount to the defendant’s right to exercise a particular challenge.”). *Stilson*, 250 U.S. at 586.

35. *Georgia v. McCollum*, 112 S. Ct. 2348, 2351 (1992).

36. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

37. *Id.* at 305.

38. *Id.* at 310.

39. *Id.* at 308.

40. *Id.*

41. Not until the 1960s did the race-based peremptory challenge confront a constitutional attack before the Supreme Court, which limited its breadth. See generally *Swain v. Alabama*, 380 U.S. 202 (1965). See *infra* notes 47-50 and accompanying text.

42. Steinberg, *supra* note 20, at 227 (citing Shari Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985)) (analyzing discrimination in jury selection). See also *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1557-94 (1988). See generally Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it Anyway?*, 92 COLUM. L. REV. 725 (1992). See also *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring) (“Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant.”).

from 1935 to 1965 allowed some African-Americans to sit on juries, the decisions had "little effect on the racially segregated jury box,"⁴³ because "prosecutors relied on the unfettered exercise of peremptory challenges as the ultimate trump card for attaining all-white juries."⁴⁴ It is also undisputed that the peremptory challenge has been used to discriminate by means other than race.⁴⁵

The early Supreme Court cases ruling on the race-based peremptory challenge, while attempting to correct the problem, riddled its remedy with heavy evidentiary burdens.⁴⁶ Later cases reveal that the major obstacles in correcting the racially discriminatory use of the peremptory challenge lay in the areas of state action and standing. Thus, evidentiary burden, state action, and standing are the main issues enmeshed in the evolution of the *McCollum* decision. Following is a review of the major cases involved in this evolution.

The Supreme Court confronted the peremptory challenge as an instrument for excluding jurors on racial grounds for the first time in the 1965 case *Swain v. Alabama*.⁴⁷ In *Swain*, the Court held that the racially discriminatory use of the peremptory challenge by the state violates the Equal Protection Clause, but only if the defendant makes out a prima facie case of "systematic use of peremptory challenges against Negroes"⁴⁸ throughout the particular jurisdiction. This meant that the systematic exclusion of all African-American venirepeople in any one given trial did not count as a constitutional violation.⁴⁹ Thus,

43. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 93 (1990).

44. *Id.*

45. See Alschuler, *supra* note 24, at 210-11 (printing, in part, a "confidential" jury-selection manual used by Dallas, Texas prosecutors. The introduction read: "You are not looking for a fair juror, but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree." *Id.* at 210. The manual goes on, "You are not looking for any member of a minority group. . . you are not looking for the free thinkers and flower children. . . women. . . extremely overweight people. . . intellectuals. . ." etc.).

46. See *infra* notes 47-64 and accompanying text.

47. *Swain v. Alabama*, 380 U.S. 202 (1965). The Court reaffirmed its position that jurors should be selected "as individuals, on the basis of individual qualifications, and not as members of a race." *Id.* at 827 (quoting *Cassell v. state of Texas*, 339 U.S. 282 (1950)).

48. *Swain*, 380 U.S. at 839.

49. One court called *Swain's* evidentiary burden "Mission Impossible." *McCray v. Abrams*, 750 F.2d. 1113, 1120 (2d. Cir. 1984), *vacated* 478 U.S. 1001 (1986). There is also some skepticism as to the *Swain* Court following its own "systematic" standard. In Justice Goldberg's dissent, he persuasively, and logically, asserts that the defendant did meet the standard set down by *Swain*. In pertinent part, Justice Goldberg states the following:

The petitioner established by competent evidence and without contradiction that not only was there no Negro on the jury that convicted and sentenced him, but also that no Negro within the memory of persons now living has ever served on any petit jury in any civil or criminal case tried in Talladega County, Alabama. Yet, of the group

Swain's evidentiary burden made it virtually impossible for African-American defendants to prove equal protection violations in the prosecutorial use of the peremptory challenge, even if such violations did exist.⁵⁰

In 1986, the Court overruled *Swain's* evidentiary burden in the seminal case *Batson v. Kentucky*.⁵¹ The *Batson* court referred to the *Swain* requirements as constituting a "crippling burden of proof."⁵² *Batson* acknowledged that the practical difficulties created by *Swain's* evidentiary formulation⁵³ allowed the prosecutor's peremptory challenge to be "largely immune from constitutional scrutiny."⁵⁴ The Court also held that "a defendant may make a prima facie showing of purposeful discrimination in the selection of the venire by relying solely on the facts concerning its selection in his case."⁵⁵

The *Batson* decision redefined the peremptory challenge by allowing the Fourteenth Amendment's Equal Protection Clause to take on added significance,⁵⁶ thus laying the groundwork for *McCullum*. *Batson* created a three-prong test to establish the defendant's prima facie case of racial discrimination in the use of the peremptory challenge.⁵⁷ First, the defendant is required to show that he or she is "a member of a cognizable racial group"⁵⁸ and that the "prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."⁵⁹ Second, the defendant is "entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to

designated by Alabama as generally eligible for jury service in that county, 74% (12,125) were white and 26% were Negro.

Swain, 380 U.S. at 236 (Goldberg, J., dissenting).

50. Colbert, *supra* note 43, at 94-95.

51. *Batson v. Kentucky*, 476 U.S. 79, 92 (1986).

52. *Id.*, at 79.

53. *Id.* at 92 n.17 (listing lower court rulings noting the practical difficulties of proving that the state systematically used race-based peremptory challenges to keep African-Americans from serving on the jury).

54. *Id.* at 92-93.

55. *Id.* at 95.

56. See generally E. Vaughn Dunnigan, Note, *Discrimination By the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355 (1988).

57. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

58. *Id.* at 96 (citing *Castaneda V. Partida*, 430 U.S. 482, 494 (1977)). Because every citizen can be classified as a member of a racial group, the court included this requirement to single out those defendants belonging to racial groups that have been historically discriminated against. See WALTER E. JORDAN, *JURY SELECTION* 8, 285 (2d ed. 1990). But see *infra* note 59.

59. *Batson*, 476 U.S. at 96. But see *Powers v. Ohio*, 111 S. Ct. 1364, 1370-74 (1991) (holding that a white criminal defendant has standing to raise the equal protection rights of black jurors wrongfully excluded from jury service). *Batson's* first prong can now be met by the third-party standing requirement set down in *Powers*. See *infra* notes 70-80 and accompanying text.

discriminate.”⁶⁰ Third, the defendant “must show that these facts and any other relevant circumstances⁶¹ raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.”⁶² *Batson* further held that once a defendant makes out a prima facie case, the burden shifts to the state to prove a neutral explanation⁶³ for the exclusion.⁶⁴ The *Batson* Court emphasized that the harms of racial discrimination in jury selection extend beyond those harms incurred by the accused and the excluded juror and reach the entire community in that such invidious discrimination “undermines public confidence in the fairness of our system of justice.”⁶⁵

Justice Marshall applauded the majority decision in *Batson* as an “historic step toward eliminating the shameful practice of racial discrimination in the selection of juries,”⁶⁶ but called for the abolition of the peremptory challenge altogether as the “only” way to eliminate the racial discrimination that peremptories inject into the jury-selection process.⁶⁷ While Justice Marshall thought *Batson* did not go far enough, Chief Justice Burger thought it went too

60. *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. at 559, 562 (1953)).

61. The *Batson* Court gave “illustrative” examples of what it considered “relevant circumstances,” such as “a ‘pattern’ of strikes against black jurors included in the particular venire” and the “prosecutor’s questions and statements during *voir dire*.” *Batson*, 476 U.S. at 96-97. The Court stated: “We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.” *Id.* at 97. This so-called “confidence” in the trial courts is criticized quite harshly. See *infra* notes 63-67.

62. *Batson v. Kentucky* 476 U.S. 79, 96 (1986).

63. *Batson* left trial courts relatively clueless as to what exactly qualifies as a “neutral explanation,” the closest in definition being that the explanation “need not rise to the level justifying exercise for a challenge for cause.” *Id.* at 97. However, the Court did say what the neutral explanation could not be: a mere statement based on the assumption or intuitive judgment that the juror would be partial to the defendant due to their shared race. *Id.*

The assignment of the responsibility to the trial court to determine what does or does not meet the prima facie case and what does or does not meet the “neutral explanation” requirement has elicited much contention. See Alschuler, *supra* note 24, at 169 (quoting William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 134 (1987)) (describing *Batson* as an “enforcement nightmare”). See also Steinberg, *supra* note 20, at 229 (“The courts are now grappling with the limits and applications of *Batson*, and the continued use of the peremptory challenge gives rise to confusing and conflicting results.”).

64. *Batson*, 476 U.S. at 97.

65. *Id.* at 87 (citing *Ballard v. United States*, 329 U.S. 187, 195 (1946)). See also HARV. L. REV., *Developments in the Law*, *supra* note 42, at 1559-87 (for a more extensive discussion of the harms of underrepresentation).

66. *Batson*, 476 U.S. at 102 (Marshall, J., concurring).

67. *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring). Marshall also criticized the *Batson* remedy as illusory because “[a]ny prosecutor can easily assert a facially neutral reason for striking a juror, and trial courts are ill equipped to second-guess those reasons.” *Id.* at 106.

far by forcing “the peremptory challenge [to] collapse into the challenge for cause.”⁶⁸ Furthermore, *Batson* clearly left open the *McCullum* question and predicted its unfolding.⁶⁹

In 1991, the Supreme Court extended the *Batson* framework to two untested areas surrounding the peremptory challenge: standing and state action. Standing was addressed in *Powers v. Ohio*,⁷⁰ and state action was addressed in *Edmonson v. Leesville Concrete Co.*⁷¹ In *Powers*, the Court held that all criminal defendants, regardless of race, may object to the prosecutor’s race-based exclusion of jurors.⁷² The Court’s conclusion was based on a two-part analysis. First, the Court made it clear that the state’s racially discriminatory peremptory challenge violated the equal protection rights of excluded jurors.⁷³ Second, the Court relied on the “limited exception”⁷⁴ of third-party standing to allow defendants to raise the excluded juror’s equal protection rights.⁷⁵

Standing, however, was the key issue in *Powers*. Although the general rule of standing is that a party may raise only his or her own rights in mounting a constitutional challenge,⁷⁶ the *Powers* Court explained that third-party standing

68. *Id.* at 127 (Burger, C.J., dissenting) (quoting *United States v. Clark*, 737 F.2d 679 (1984)). Burger also argued that the decision had gone too far in that the petitioner did not even raise the equal protection question that the *Batson* Court decided. *Batson*, 476 U.S. at 112 (Burger, C.J., dissenting). See also Alschuler, *supra* note 24, at 168 (“In an effort to avoid a direct confrontation with *Swain v. Alabama*, the defendant [in *Batson*] expressly disclaimed reliance on the Equal Protection Clause.”).

69. The *Batson* Court stated, “We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.” *Batson*, 476 U.S. at 89 n.12. Chief Justice Burger, in his dissent, asked, “[o]nce the Court has held that prosecutors are limited in their use of peremptory challenges, could we rationally hold that defendants are not?” *Id.* at 126 (emphasis in original) (Burger, C.J., dissenting). Chief Justice Burger quoted *United States v. Leslie*, 783 F.2d 541 (5th Cir. 1986), for the proposition that “[e]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited.” *Batson* 476 U.S. at 126 n.6.

70. *Powers v. Ohio*, 111 S. Ct. 1364 (1991).

71. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991).

72. *Powers*, 111 S. Ct. at 1366. The *Powers* Court reiterated the harms addressed in *Batson* and extended them to *Powers*, emphasizing that the “barriers to a suit by an excluded juror are daunting.” *Id.* at 1373.

73. *Id.* at 1366-70.

74. *Id.* at 1370.

75. *Powers v. Ohio*, 11 S. Ct. 1364, 1374 (1991).

76. *Singleton v. Wulff*, 428 U.S. 106, 112-16 (1976). The question of standing has been explained as depending upon if the party alleged a “personal stake in the outcome of the controversy.” *Baker v. Carr*, 369 U.S. 186, 204 (1962) (ensuring that “the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution”). *Id.* See also *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

will be allowed if the litigant: 1) suffered an "injury in fact"⁷⁷ giving him or her a "sufficiently concrete interest"⁷⁸ in the outcome of the issue; 2) had "a close relation to the third party,"⁷⁹ and 3) had "some hindrance to the third party's ability to protect his or her own interests."⁸⁰

In *Edmonson*, the Court held that private civil litigants cannot use their peremptory challenges in a racially discriminatory manner.⁸¹ The Court reaffirmed its third-party standing doctrine outlined in *Powers*.⁸² However, state action was the key issue in *Edmonson*.⁸³ Since the Supreme Court has not attempted to define or apply state action as a bright-line concept, determining the level of the state's involvement requires a "factbound inquiry."⁸⁴ The *Edmonson* Court relied on a prior case, *Lugar v. Edmondson Oil Co. Inc.*,⁸⁵ for its two-part state action analysis.⁸⁶ The *Lugar* test asks the following: first, "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in a state authority."⁸⁷ Second, "whether the private party charged with the deprivation could be described in all fairness

77. *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991) (citing *Singleton*, 428 U.S. at 2873).

78. *Id.* The *Powers* Court found such an injury "because racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt." *Id.* at 1371 (citing *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

79. *Powers*, 111 S. Ct. at 1370 (citing *Singleton*, 428 U.S. at 113-14). The *Powers* Court found such an injury through *voir dire* which, the Court reasoned, "permits a party to establish a relation, if not a bond of trust, with the jurors." *Id.* at 1372.

80. *Powers v. Ohio*, 111 S. Ct. 1364, 1370-1371 (1991). The *Powers* Court found such a hindrance because "the barriers to a suit are daunting." *Id.* at 1373. The Court went on to explain that, "[p]otential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion." *Id.* The Court also noted the practical difficulties of an excluded juror to obtain declaratory or injunctive relief and to prove invidious exclusion. *Id.* The Court concluded that "[t]he reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Id.*

The Court also noted that "[b]y similar reasoning, we have permitted litigants to raise third-party rights in order to prevent possible future prosecution." *Id.* at 1371. *But see* Justice Scalia's ardent dissent criticizing the Court for contradicting "well established law in the area of equal protection and of standing." *Id.* at 1374-79 (Scalia, J., dissenting).

81. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991).

82. *Id.* at 2087-88.

83. *Id.* at 2082-87.

84. *Id.* at 2083. *See also* Dunnigan, *supra* note 56, at 359.

85. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1988).

86. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2082-83 (1991).

87. *Id.* at 2082 (citing *Lugar*, 457 U.S. at 939-41). The *Edmonson* Court said the peremptory challenge in question qualified as such authority because it was "permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury." *Id.* at 2083.

as a state actor."⁸⁸

The *Edmonson* Court further defined the second part of the *Lugar* state-action test as requiring three separate inquiries:⁸⁹ first, "the extent to which the actor relies on governmental assistance and benefits";⁹⁰ second, "whether the actor is performing a traditional government function";⁹¹ third, "whether the injury caused is aggravated in a unique way by the incidents of governmental authority."⁹²

The *Edmonson* decision elicited ardent dissents from Justices O'Connor, Rehnquist, and Scalia.⁹³ The dissenting Justices attacked the majority's extension of state action to the private civil litigant.⁹⁴ This friction foreshadowed the division of the Court in *McCollum*.⁹⁵ In fact, Scalia, looking

88. *Id.* at 2083 (citing *Lugar*, 457 U.S. at 941-42).

89. *Edmonson*, 111 S. Ct. at 2083. The Court explained that "[a]lthough we have recognized that this aspect of the analysis is often a factbound inquiry, our cases disclose certain principles of general application." *Id.*

90. *Id.* at 2083 (citing *Burton v. Wilmington Park Authority*, 365 U.S. 715 (1961)) (holding that state action existed for the purpose of establishing a violation of equal protection where a private business located in a public building refused to serve an African-American because of his race). The *Edmonson* Court found that "without the overt, significant participation of the government, the peremptory challenge system . . . simply could not exist." *Edmonson*, 111 S. Ct. at 2084. The Court described the government's involvement as a chain of several events beginning with assembling the voter registration list (for choosing the venire) and including the judge's significant influence while conducting *voir dire*. *Id.*

91. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2083 (1988) (citing *Terry v. Adams*, 345 U.S. 461 (1953)) (holding that an equal protection violation existed when a private organization that had a significant influence on the state's election process conducted a whites-only primary). The *Edmonson* Court found that selecting a criminal jury is such a traditional function of the government: "The peremptory challenge is used in selecting an entity that is a quintessential government body, having no attributes of a private actor." *Id.* at 2085.

92. *Id.* at 2083 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (holding that an equal protection violation and state action existed when a private citizen asked to have a restrictive covenant, which restricted an African-American couple from purchasing property, judicially enforced). The *Edmonson* Court found that the injury caused by the racial discrimination of the juror is "made more severe because the government permits it to occur within the courthouse itself." *Edmonson*, 111 S. Ct. at 2087. The Court further explained that "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceeding conducted there," emphasizing the *Batson* harm to the community in the public confidence of the integrity of the system. *Id.*

93. *Id.* at 2089-96.

94. *Id.* at 2089-95 (O'Connor, J., dissenting). Justice O'Connor points out, "our cases deciding when private action might be deemed that of the state have not been a model of consistency." *Id.* at 2089. Yet, Justice O'Connor disagrees that any of the standards set down by the Court were met in *Edmonson*. *Id.*

95. The *Edmonson* dissenters, Justices O'Connor, Rehnquist, and Scalia, also dissented in *McCollum*, with the exception of Justice Rehnquist who stated in his *McCollum* concurrence that he continues to believe *Edmonson* was wrongly decided, but because it is the law, "it controls the disposition of this case on the issue of 'state action' under the Fourteenth Amendment." *McCollum*

to the future, lamented the *Edmonson* consequences when he wrote that “[t]he effect of today’s decision (which logically must apply to criminal prosecutions) will be to prevent the *defendant* from [so using race-based strikes].”⁹⁶

A year after deciding *Edmonson*,⁹⁷ the Supreme Court was faced with the question reserved in both *Batson*⁹⁸ and *Edmonson*:⁹⁹ whether the Constitution prohibits a criminal defendant from exercising race-based peremptory challenges.¹⁰⁰ The obstacles to extending *Batson* to criminal defendants in *McCollum* were issues of standing and state action. On one side, prosecutors argued that they had standing to challenge defendants’ race-based peremptories on behalf of excluded jurors. On the other side, defendants argued they could not be in an adversarial relationship to the state and be state actors at the same time.¹⁰¹

IV. ANALYSIS OF THE CASE

The *McCollum* Court¹⁰² began by reviewing the Court’s century-long dedication to the belief that “racial discrimination by the state in jury selection offends the Equal Protection Clause,”¹⁰³ and applauding the fact that “in an almost unbroken chain of decisions, this Court gradually has abolished race as a consideration for jury service.”¹⁰⁴ The Court went on to highlight its holding in *Batson*,¹⁰⁵ juxtaposing the *Batson* holding with the Court’s extension of *Batson* to both *Powers*¹⁰⁶ and *Edmonson*.¹⁰⁷

The Court’s brief overview certainly foreshadowed its holding. However, the most telling clue was the Court’s inclusion of Justice Marshall’s famous

v. Georgia, 112 S. Ct. 2348, 2359 (1992) (Rehnquist, C.J., dissenting).

96. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2095 (1991) (Scalia, J., dissenting).

97. *Edmonson* was decided on June 3, 1991. Within eight months, the Court heard oral argument on *Georgia v. McCollum* (February 26, 1992).

98. *Batson v. Kentucky*, 476 U.S. 79, 126-30 (1986); see also *supra* note 69.

99. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2095 (1991) (Scalia, J., dissenting).

100. *McCollum*, 112 S. Ct. at 2350.

101. *Georgia v. McCollum*, 112 S. Ct. 2348, 2354-57 (1992).

102. Here and for the remainder of this comment, I use “the Court” to refer to the majority decision, unless stated otherwise. *McCollum* was decided by Justices Blackmun (author of the opinion), White, Stevens, Kennedy, Souter, and Chief Justice Rehnquist for the majority; Chief Justice Rehnquist also concurred in the judgment; Justice Thomas concurred; and Justices O’Connor and Scalia dissented. *Id.* at 2350.

103. *Id.* (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

104. *Id.* at 2352.

105. *McCollum*, 112 S. Ct. at 2353-56. See also *supra* notes 52-69 and accompanying text.

106. *Georgia v. McCollum*, 112 S. Ct. 2348, 2353-54 (1992). See also *supra* notes 72-80 and accompanying text.

107. *McCollum* 112 S. Ct. at 2355. See also *supra* notes 81-96 and accompanying text.

statement that "our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'"¹⁰⁸ The Court explained that, in making the decision whether race-based peremptories exercised by criminal defendants violate the Constitution, four questions must be answered.¹⁰⁹

First, the Court considered whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*.¹¹⁰ Relying primarily on *Powers* and *Edmonson*, the Court held in the affirmative, deducing that "[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same."¹¹¹ In *McCullum*, the Court again underscored the importance of preventing the harm to the community:

The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes.¹¹²

Although the Court is silent on the matter, this case was decided soon after the Rodney King verdict and the ensuing riots in south central Los Angeles.¹¹³ To appreciate the significance of the Court's unstated but probable concern,⁷ it is important to remember that the incident underlying *McCullum* was alleged to

108. *McCullum*, 112 S. Ct. at 2353 (citing *Batson*, 476 U.S. at 107 (citing *Hayes v. Missouri*, 120 U.S. 68, 70 n.4 (1887)) (Marshall, C.J., concurring)).

109. *McCullum*, 112 S. Ct. at 2353. The four questions follow:

First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case.

Id.

110. *Id.* at 4576. Generally, the *Batson* harms were to the juror, the defendant, and to the entire community (public confidence in the integrity of the courts and the legal system). See also *supra* text accompanying note 65.

111. *Georgia v. McCullum*, 112 S. Ct. 2348, 2353 (1992). The Court also cited several state cases that ruled that "criminal defendants have no greater license to violate the equal protection rights of prospective jurors than have prosecutors." *Id.* at 2354 n.6.

112. *Id.* at 2354.

113. See *Race Against Time: Rodney King Verdict Aftermath—Reducing Black Underclass*, THE NEW REPUBLIC, May 25, 1992, available in LEXIS, Nexus library, Newrep file (providing an example of the popular press's version of the incidents surrounding the Rodney King verdict).

be a racially motivated attack by whites against African-Americans.¹¹⁴ As one commentator put it, "If there was any doubt as to the outcome of [*McCollum*], I think the King situation ended it."¹¹⁵ While this statement is assuredly an oversimplification of the entire *McCollum* question, the rioting in Los Angeles was more than likely a consideration in the Court's resolution of the controversy.¹¹⁶

The second question in *McCollum* was whether the exercise of the peremptory challenge by a criminal defendant constitutes state action for purposes of the Equal Protection Clause.¹¹⁷ State action was the key issue in *McCollum*, and the most controversial one.¹¹⁸ The Court noted that its prior criminal cases concerning race-based peremptories dealt with clear state actors: prosecutors.¹¹⁹ The Court also noted that in *Edmonson* it held, by using the *Lugar* state-action framework, that private civil litigants were state actors when exercising peremptory challenges.¹²⁰ Thus, the Court applied the *Edmonson-Lugar* state-action analysis to *McCollum*.¹²¹

The first part of the *Lugar* test asked if "the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority."¹²² The Court held that *McCollum*, like *Edmonson*,

114. *McCollum*, 112 S. Ct. at 2350. The situation escalated to an organized effort of the African-American community in Albany, Georgia to distribute leaflets asking people not to patronize the McCollums' business. See also *supra* notes 11-12 and accompanying text.

115. Marcia Coyle, *Jury Case May Spark More Suits*, NAT'L L.J., June 29, 1992 at 1 (quoting Professor Albert Alschuler).

116. The Court did not state that the King verdict and ensuing riots were part of its decision. This is something I am positing in agreement with Professor Alschuler. See *supra* note 114. See generally J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 S.CAL. L. REV. 1015, 1015-17 (1989); see also Michael Sullivan, Note, *The Prosecutor's Right to Object to a Defendant's Abuse of Peremptory Challenges*, 93 DICK. L. REV. 143, 143-44 (1988).

117. *Georgia v. McCollum*, 112 S. Ct. 2348, 2353 (1992). The Court stated that "[r]acial discrimination, although repugnant in all contexts, violates the Constitution only when it is attributable to state action." *Id.* at 2354. Generally, the Fourteenth Amendment's Equal Protection Clause does not prohibit private discrimination, only discrimination that can be said to be fairly attributable to the state. See *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 172 (1972). See also Tanford, *supra* note 116, at 1056 ("Important social principles are in conflict. The defendant has an individual right to present a defense to an impartial jury that conflicts with the community's desire to be free from racism.").

118. See *infra* notes 143-150 and accompanying text.

119. *McCollum*, 112 S. Ct. at 2355. When the action is performed by a clear state actor, such as a prosecutor, the state action question is easily answered in the affirmative.

120. *Id.* See *supra* notes 85-92.

121. *McCollum*, 112 S. Ct. at 2355.

122. *Georgia v. McCollum*, 112 S. Ct. 2348, 2355 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932 (1988)). See *supra* note 87 and accompanying text.

satisfied this part of the *Lugar* test because the peremptory challenge in question—and the defendants' right to use it—is established by state law.¹²³ The second part of the *Lugar* test asked if “the private party charged with the deprivation could be described in all fairness as a state actor.”¹²⁴ The *McCullum* Court applied the same three inquiries to this question as they had done in *Edmonson*.¹²⁵

First, the Court held that a criminal defendant relies on government assistance and benefits when he or she exercises peremptory challenges.¹²⁶ Second, the Court found that a criminal defendant performs a traditional government function when using peremptories, since selecting a criminal jury “fulfills a unique and constitutionally compelled government function.”¹²⁷ Third, the Court looked at “whether the injury caused is aggravated in a unique way by the incidents of governmental authority.”¹²⁸ The *McCullum* Court adopted the *Edmonson* view that injury caused by race-based peremptory challenges “is made more severe because the government permits it to occur within the courthouse itself.”¹²⁹ Again the *McCullum* Court underscored the

123. *McCullum*, 112 S. Ct. at 2355 (citing Ga. Code. Ann. 13, § 15-12-165 (1990)).

124. *Id.* (citing *Lugar*, 457 U.S. at 941-42). See *supra* notes 88-92.

125. *Id.*

126. *McCullum*, 112 S. Ct. 2348, 2355 (1992) (citing *Edmonson*, 111 S. Ct. at 2083). See also *supra* note 90 and accompanying text. The *McCullum* Court reasoned that, like the civil peremptory challenge system in *Edmonson*, the criminal peremptory challenge system (in *McCullum*) is also grounded in significant statutory authority:

Georgia provides for the compilation of jury lists by the board of jury commissioners in each county and establishes the general criteria for service and the sources for creating a pool of qualified jurors representing a fair cross section of the community. GA. CODE ANN. at 15-12-40. State law further provides that jurors are to be selected by a specified process, @ 15-12-42; they are to be summoned to court under the authority of the state, @ 15-12-120; and they are to be paid an expense allowance by the state whether or not they serve on a jury, @ 15-12-9. At court, potential jurors are placed in panels in order to facilitate examination by counsel, @ 15-12-131; they are administered an oath, @ 15-12-132; they are questioned on *voir dire* to determine whether they are impartial, @ 15-12-164; and they are subject to challenge for cause, @ 15-12-163.

McCullum, 112 S. Ct. at 2355. Therefore, the *McCullum* Court held that “the defendant in a Georgia criminal case, relies on ‘governmental assistance and benefits that are equivalent to those found in the civil context in *Edmonson*’.” *Id.*

127. *Georgia v. McCullum*, 112 S. Ct. 2348, 2355 (1992). See also *supra* note 91. In *Edmonson*, the Court found that the peremptory challenge performs a traditional government function because it is used “in selecting an entity that is a quintessential government body” *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991). The Court in *McCullum* reasoned that this same conclusion applies “with even greater force in the criminal context” *McCullum*, 112 S. Ct. at 2355.

128. *McCullum*, 112 S. Ct. at 2348 (citing *Edmonson*, 111 S. Ct. at 2083).

129. *McCullum*, 112 S. Ct. at 2356. See also *supra* note 92. Note that this is essentially a reiteration of the *Batson* harms. See *supra* note 65 and accompanying text.

importance of the harm to the community by further reasoning that “[r]egardless of who precipitated the jurors’ removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the state.”¹³⁰

Thus, the Court held that the defendants’ discriminatory exercise of a peremptory challenge violated the Equal Protection Clause by finding that the defendants are state actors in exercising a peremptory challenge. But first, the Court disposed of the respondents’ and the dissenters’ cogent arguments. Relying on *Polk County v. Dodson*,¹³¹ the respondents argued that they could not be adversaries to the state and be state actors at the same time.¹³² In *Dodson*, the Court held that a public defender does not qualify as a state actor when “performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.”¹³³ The respondent in *McCollum* argued that the adversarial relationship present in *Dodson* precluded a finding of state action in *McCollum*. The Court rejected that argument, reasoning that *Dodson* “held that this adversarial relationship prevented the attorney’s public employment from alone being sufficient to support a finding of state action.”¹³⁴ The Court’s reasoning was sound; as the *Dodson* Court explicitly stated in concluding that the attorney in question was not a state actor, “we do not suggest that a public defender never acts in that role.”¹³⁵

Furthermore, the Court explained that whether a public defender is a state actor “depends on the nature and context of the function he is performing.”¹³⁶ The Court cited *Branti v. Finkle*¹³⁷ to support a finding of state action via a public defender.¹³⁸ In *Branti*, a pre-*Dodson* case, the Court held that a public defender who fired his assistant public defenders because of their political

130. *McCollum*, 112 S. Ct. at 2356.

131. *Polk County v. Dodson*, 454 U.S. 312 (1981) (noting that a defendant alleged that a public defender violated his constitutional rights by failing to represent him adequately). Note that *Dodson* determined whether the public defender’s actions fell “under color of state law,” but a subsequent case, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), held that such a determination is the same as a state action determination. *Id.* at 838.

132. *Georgia v. McCollum*, 112 S. Ct. 2348, 2356 (1992). See also Respondents’ Brief on the Merits, *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), (No. 91-372) (LEXIS, Genfed library, Brief file) [Hereinafter Respondent’s Brief].

133. *Dodson*, 454 U.S. at 325.

134. *Georgia v. McCollum*, 112 S. Ct. 2348, 2356 (1992).

135. *Dodson*, 454 U.S. at 324-25. The *Dodson* Court went on to list some areas in which such a holding could be found. *Id.* The Court then reiterated its point: “[W]e decide only that a public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.” *Id.*

136. *McCollum*, 112 S. Ct. at 2356 (citing *Branti v. Finkle*, 445 U.S. 507 (1980)).

137. *Branti*, 445 U.S. at 507.

138. *Id.*

persuasions violated their First Amendment rights.¹³⁹ The *Branti* Court reasoned that a public defender, in making personnel decisions on behalf of the state, is a state actor who must comply with constitutional requirements.¹⁴⁰ The *McCullum* Court described the defendant who uses a race-based peremptory challenge as making such a personnel decision for the state by "wielding the power to choose a quintessential governmental body."¹⁴¹ Thus, the *McCullum* Court concluded, "as we held in *Edmonson*, when 'a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality.'"¹⁴²

This did not sit well with the *McCullum* dissenters.¹⁴³ Justice O'Connor argued that because *Dodson* established that public defenders are not state actors when performing a lawyer's traditional functions,¹⁴⁴ and "[s]ince making peremptory challenges plainly qualifies as a traditional government function," defendants and their lawyers cannot be construed as state actors.¹⁴⁵ Justice

139. *Branti*, 445 U.S. at 515.

140. *Georgia v. McCollum*, 112 S. Ct. 2348, 2356 (1992) (citing *Branti*, 445 U.S. at 520).

141. *McCullum*, 112 S. Ct. at 2356. The *McCullum* Court also stated that in *Dodson*, the Court noted, without deciding, that a public defender may be a state actor "while performing certain administrative, and possibly investigative, functions." *Id.* (citing *Polk County v. Dodson*, 454 U.S. 312, 325 (1981)).

142. *McCullum*, 112 S. Ct. at 2356 (citing *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991)).

143. *McCullum*, 112 S. Ct. at 2361-65. Justice O'Connor called the Court's state-action determination a "perverse result." *Id.* at 2361. (O'Connor, J., dissenting). Justice Scalia called it "terminally absurd." *Id.* at 2364 (Scalia, J., dissenting).

144. *Id.* at 2362 (O'Connor, J., dissenting) (citing *Dodson*, 454 U.S. at 325). Justice O'Connor did, however, acknowledge that *Dodson* held that a public defender could be a state actor while "carrying out administrative or investigative functions outside a courtroom" *Id.*

145. *Id.* (citing *Swain v. Alabama*, 380 U.S. 202, 212-19 (1965)). Justice O'Connor also distinguished *Edmonson* in principle, in that *Edmonson* (which dealt with two private civil litigants) was not based on an adversarial relationship with the state. Therefore, O'Connor argued that *Edmonson*, "[c]ertainly . . . did not render *Dodson* and its realistic approach to the state action inquiry dead letters." *Id.* at 2363. *But see* Justice Scalia's dissent, "I see no need to add to her [Justice O'Connor's] discussion, and differ from her views only in that I do not consider *Edmonson* distinguishable in principle—except in the principle that a bad decision should not be followed logically to its illogical conclusion." *Id.* at 2365 (Scalia, J., dissenting). *See also* Justice Rehnquist's concurring opinion, "I was in dissent in *Edmonson*. . . , and continue to believe that case to have been wrongly decided. But so long as it remains the law, I believe that it controls the disposition of this case on the issue of 'state action' under the Fourteenth Amendment." *Id.* at 2359 (Rehnquist, C.J., concurring). Note that Justices O'Connor, Scalia, and Chief Justice Rehnquist dissented in *Edmonson*. *See Edmonson*, 111 S. Ct. at 2089-96. *See also supra* notes 93-96 and accompanying text.

Justice Thomas in his concurring opinion also notes that he would have held that the criminal defendant's use of a peremptory challenge cannot violate the Fourteenth Amendment "because it does not involve state action." *Georgia v. McCollum*, 112 S. Ct. 2348, 2354 (1992) (Thomas, J.,

O'Connor, however, failed to distinguish the *Branti* decision; in fact, O'Connor remained silent on *Branti* throughout her entire dissent. However, as the *Dodson* Court noted, *Branti* established that a public defender can be a state actor under some circumstances.¹⁴⁶ Moreover, *Branti* specifically supports the interpretation of a peremptory challenge as a delegated function of the state, by which the state chooses its employees, not a traditional function of defense counsel as an adversary of the state.¹⁴⁷

Furthermore, Justice O'Connor emphasized that the adversarial relationship precludes a finding of state action. In her view, the peremptory challenge is used "to further [the parties'] own perceived interests, not as an aid to the government's process of jury selection."¹⁴⁸ This premise, however, contravenes the Court's prior interpretations of the peremptory challenge as a device intended to remove bias against either side, thus insuring an impartial

concurring). However, Justice Thomas acknowledged, as did Chief Justice Rehnquist, that *Edmonson* controls the state action question in *McCollum*. Moreover, Justice Thomas astutely points out that since "the respondents do not question *Edmonson*, . . . we must accept its consequences." *Id.* A reading of the respondent's brief on the merits proves Justice Thomas' assertion is true. See Respondents' Brief, *supra* note 132.

It is interesting to ponder how the Court would have ruled had the respondents questioned *Edmonson* in principle. Also interesting to note is that the *Batson* case began the reduction of the peremptory challenge power, under an equal protection analysis. Additionally, *Batson* was decided on equal protection grounds without the petitioner raising an equal protection question or positing an equal protection argument. See *Batson v. Kentucky*, 476 U.S. 79, 112 (1986) ("What makes today's holding extraordinary is that it is based on a constitutional argument that the petitioner[s] ha[ve] expressly declined to raise, both in this Court and in the Supreme Court of Kentucky.") (Burger, C.J., dissenting). The petitioner in *Batson* raised Sixth Amendment questions only, and the petitioner's brief noted the "irrelevance of the *Swain* analysis to the present case . . ." *Id.* at 113.

146. *Polk County v. Dodson*, 454 U.S. 312, 324-25 (1981).

147. *Branti v. Finkle*, 444 U.S. 507 (1980). See also Michael N. Chesney & Gerard T. Gallagher, Note, *State Action and the Peremptory Challenge: Evolution of the Court's Treatment and Implications for Georgia v. McCollum*, 67 NOTRE DAME L. REV. 1049 (1992):

The fact that the defense counsel uses peremptory challenges to strike unsympathetic jurors does not make their use the kind of traditional adversarial function envisioned by [*Dodson*]. As examples of traditional adversarial functions, the [*Dodson*] Court noted that the defense attorney's job is 'to enter not guilty pleas, move to suppress state's evidence, object to evidence at trial, cross-examine state's witnesses, and make closing arguments in behalf of defendants.' Unlike participation in the jury selection process, none of these tasks can be considered functions of the state delegated to the parties. (For example, it is difficult to imagine an adversarial system in which the state is obligated to object to its own evidence and has merely delegated the duty to a private party). [The prior tasks] go to the heart of our adversarial system. In contrast, peremptory challenges could be eliminated without diminishing the adversarial nature of our system in the least.

Id. at 1073-74.

148. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2094 (1991).

jury.¹⁴⁹ Therefore, the public defender, though an adversary to the state representing an individual defendant, is also working for the same goal as the state: an impartial jury.¹⁵⁰ From this perspective, the complete adversarial relationship between the defendant and the state itself is negated.

The third *McCullum* question was whether the state has standing to challenge a defendant's discriminatory use of peremptory challenges.¹⁵¹ The Court conveyed third-party standing to the state, using the third-party standing framework set out in *Powers* and the extension of that framework to *Edmonson*.¹⁵² First, the Court held that the state suffers "a concrete injury"¹⁵³ when a juror is excluded on the basis of race because "the fairness and integrity of its own judicial process is undermined."¹⁵⁴ Second, the Court held that the state's relation to a third party is even closer than the *voir-dire* relation established in *Powers* and *Edmonson*¹⁵⁵ because in the criminal context, the state is the "logical and proper party to assert the invasion of the

149. *Holland v. Illinois*, 493 U.S. 474, 484 (1990). See *supra* text accompanying notes 27-34.

150. *Chesney & Gallagher*, *supra* note 147, at 1071-74.

151. *Georgia v. McCollum*, 112 S. Ct. 2348, 2357 (1992).

152. For a recapitulation of the *Powers-Edmonson* three-prong analysis see *supra* text accompanying notes 76-80. This issue did not elicit near the amount of dissatisfaction, nor interest, as the state action issue did. The sum of the Respondent's argument on this point follows:

Finally, the state prosecutor is without standing to assert the claims of a juror in a criminal trial. Basically, the state prosecutor suffers no 'injury in fact' by virtue of the exercise of a peremptory challenge by a criminal defendant with relation to a juror. The state is deprived of no right. In addition, neither Congress nor the state of Georgia has conferred standing upon the state prosecutor to raise such claims. See generally *Sierra Club v. Morton*, 405 U.S. 727 (1972).

Respondents' Brief, *supra* note 132, at 8.

The only amicus brief filed in support of the respondents makes no mention of the standing issue. See Amicus Curiae Brief for National Association of Criminal Defense Lawyers in Support of Respondent, *Georgia v. McCollum*, 112 S. Ct. 2348 (U.S., 1992), (No. 91-372) (LEXIS, Genfed library, Brief file).

Similarly, the dissenting and concurring Justices in *McCullum* do not raise the standing issue either, except in their general disapproval of *Edmonson*. See *McCullum*, 112 S. Ct. at 2359-65.

153. *Id.* at 2357 (citing *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991)).

154. *McCullum*, 112 S. Ct. at 2357. The *McCullum* Court explained that *Powers* found such injury because "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." *Powers* at 1371 (citing *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). See *supra* notes 77-78 and accompanying text. The Court further explained that *Edmonson* found these harms in the civil system as well. *McCullum*, 112 S. Ct. at 2357 (citing *Edmonson*, 111 S. Ct. at 2084).

155. The Court explained that both *Powers* and *Edmonson* established such a relation through *voir dire*: "*voir dire* permits a defendant 'to establish a relation, if not a bond of trust, with jurors . . .'" *McCullum*, 112 S. Ct. at 2354 (citing *Powers*, 111 S. Ct. at 1372). See *supra* note 79 and accompanying text.

constitutional rights of the excluded jurors."¹⁵⁶ Third, the Court held that the barriers to an excluded juror in challenging race-based exclusion are as formidable in the criminal context as they are in the civil context.¹⁵⁷

The last question *McCollum* asked was whether the interests served by *Batson* give way to the rights of a criminal defendant.¹⁵⁸ Specifically, the Court discussed the defendant's Sixth Amendment rights both to trial by an impartial jury and effective assistance of counsel; it also discussed the defendant's attorney-client privilege. The Court restated the age-old law by holding that the peremptory challenge has statutory, and not constitutional, origins.¹⁵⁹ At this point, because the Court had already held that the defendant's race-based use of the peremptory challenge was a constitutional violation against the excluded juror,¹⁶⁰ the only defense rights that would allow a balancing of considerations in this case would have to be constitutional as well.¹⁶¹ This lack of the peremptory's constitutional grounding was by far the largest overall obstacle to the respondents in *McCollum*.¹⁶²

The Court held that the constitutional right to a fair trial does not include the right to exercise race-based peremptories, emphasizing that to allow this would be an "affront to justice . . ." ¹⁶³ that "accept[s] as a defense to racial discrimination the very stereotype the law condemns."¹⁶⁴ The Court held that the rights of effective assistance of counsel and the attorney-client privilege are also not violated by a prohibition against the defendant's use of race-based

156. *Georgia v. McCollum*, 112 S. Ct. 2348, 2357 (1992). The Court emphasized that "[i]ndeed, the Fourteenth Amendment forbids the state from denying persons within its jurisdiction the equal protection of the laws." *Id.*

157. *McCollum*, 112 S. Ct. at 2357.

158. *Id.*

159. *Id.* See also *supra* notes 29-34 and accompanying text.

160. See *McCollum* 112 S. Ct. at 2358.

161. See *supra* note 34.

162. Although the respondents and the amicus for the respondents argued these rights vehemently and at length, the Court summed up the issue quickly, relying on the fact that the peremptory challenge has no constitutional underpinning.

163. *Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992). The Court took much of its language directly from the petitioner's brief on the merits. It read:

Because peremptory challenges have such a long history, an argument can be made that the availability of the peremptory strikes is a significant part of what is conceived of as a 'fair trial.' However, it is submitted that it would be an affront to justice to argue that the notion of a 'fair trial' includes the right to discriminate against a group of citizens based upon their race. In fact, it is difficult to envision a practice that would be more at odds with the concept of 'fairness' in a court of law.

Petitioners' Brief on the Merits, at 7, *Georgia v. McCollum*, 112 S. Ct. 2348 (U.S. 1992) (No. 91-372) (LEXIS, Genfed library, Brief file).

164. *McCollum*, 112 S. Ct. 2348, 2359 (1992) (citing *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991)).

peremptories.¹⁶⁵ The Court reasoned that an attorney can “ordinarily explain the reasons for peremptory challenges without revealing anything about trial strategy or any confidential client communications.”¹⁶⁶

Thus, the *McCullum* Court reached its ground-breaking decision:

We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Accordingly, if the state demonstrates a prima facie case of racial discrimination by defendants, the defendants, must articulate a racially neutral explanation for peremptory challenges.¹⁶⁷

V. IMPORT OF THE DECISION

Although the *McCullum* Court was explicit in its holding, much still needs clarification. *McCullum*, as an extension of *Batson*, inherits many of the *Batson*-created problems. One such problem is that the “neutral explanation” requirement is still no closer to definition in *McCullum* than it was in *Batson*.¹⁶⁸ Thus, one exercising a race-based peremptory challenge can still “easily assert facially neutral reasons for striking a juror”¹⁶⁹ because the trial courts are still “ill equipped to second-guess those reasons.”¹⁷⁰ Given this propensity, it seems likely that *McCullum* may fail to reach its desired effect because, as was noted above, *Batson* itself held that one may rely “on the fact . . . that peremptory challenges constitute a jury selection practice that permits

165. *McCullum*, 112 S. Ct. at 2358.

166. *Id.* The Court also stated that in the rare case in which confidential or strategic information might be revealed by explaining the reason underlying the peremptory strike, an in-camera meeting could be arranged.

167. *Id.* at 2359.

168. See Alschuler, *supra* note 24, at 173-77. See also *supra* note 63 and accompanying text.

169. See *supra* note 67.

170. *Id.* Colbert noted the following:

Trial courts have rejected defendants' *Batson* challenges and upheld prosecutors' peremptory challenges because the potential black juror was young and single, was 'of age and married but was too pregnant,' or had a last name similar to the defendant's last name. Other courts have accepted a wide range of explanations for the peremptory dismissal of black jurors: they were either unemployed or underemployed; they worked as social workers, federal employees, scientists, or associates of radio or television stations that aired programs considered to be anti-law-enforcement. Courts have also upheld prosecutors' disqualifications of black jurors living in the same neighborhood or similar 'high crime' district as the accused or for not having graduated from high school.

Colbert, *supra* note 43, at 97-98. See also *supra* note 63.

'those to discriminate who are of a mind to discriminate.'¹⁷¹ Furthermore, as one commentator has noted, as a result of *Batson* "there will be litigation forever over what constitutes a prima facie case of discriminatory strikes."¹⁷² If administrative court costs boomed after *Batson*¹⁷³ and *Edmonson*, costs will increase even more because of *McCollum*.

Certainly, *McCollum* has further threatened the existence of the peremptory challenge whose unfettered use has been slowly conditioned since *Swain*.¹⁷⁴ The *McCollum* decision realizes Justice Burger's lament in *Batson*: the peremptory challenge has "collapsed into the challenge for cause."¹⁷⁵ In fact, *McCollum* and its progenitors do mark the death of the truly unfettered exercise of the peremptory challenge in all spheres: criminal and civil, prosecutorial and defense. Yet, the fact that they have racially conditioned the peremptory challenge does not mean it has lost all its functions and benefits,¹⁷⁶ just those with racially discriminatory motives.¹⁷⁷

A more illuminating and pragmatic question to ask is, where does *McCollum* draw the line? As Justice Thomas pointed out in his

171. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

172. Coyle, *supra* note 115, at 3. Alschuler noted the following, in relation to the *Batson* detection and sanctioning problems:

This procedural hurdle [the two-stage procedure for evaluating *Batson* claims] may offer substantial comfort to a prosecutor who wishes to continue pre-*Batson* patterns of [racial] discrimination. In every case, *Batson* may afford this prosecutor one or two 'free shots'—opportunities to discriminate against blacks without accounting for his or her action. When only one or two blacks appear of the panel of prospective jurors, the prosecutor may need no more ammunition. Moreover, whenever the prosecutor holds hid or her fire and allows one or two blacks to serve on a jury, he or she may gain additional opportunities to discriminate.

Alschuler, *supra* note 24, at 172-73.

Alschuler also noted a state case that withholds "free shots" by requiring prosecutors to supply reasons whenever they excluded members of a defendant's race from the jury. *Id.* at 173 n.81. Alschuler makes a good point. However, if the Supreme Court were to rule that every peremptory challenge excluding a member of the defendant's race required a reason, it would seem that *Powers* would extend the equal protection to all races, that is minorities as well as non-minorities. If that were the case, every peremptory challenge would then require a reason. Thus, the peremptory challenge would become even more like the challenge for cause. Compare with notes 66-67, *supra*, and accompanying text.

173. Pizzi noted: "If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than *Batson*." Pizzi, *supra* note 63, at 155.

174. *Swain v. Alabama*, 380 U.S. 202 (1965).

175. See *supra* text accompanying note 68.

176. See *supra* text accompanying notes 28-31.

177. It might not do that well anyway. See *supra* notes 168-73 and accompanying text.

concurrence,¹⁷⁸ *McCullum* has “taken us down a slope of inquiry with no clear stopping point.”¹⁷⁹ Is the Court now obliged to extend *McCullum* to gender,¹⁸⁰ religion,¹⁸¹ and other areas to which equal protection analysis has traditionally been applied?¹⁸² Bearing on this question is how traditional equal protection analysis will be implicated in reviewing the exercise of peremptory challenges. Even if *McCullum* is extended to other classifications, it will be more difficult to prevail where the government has to satisfy only a rational basis or an intermediate standard. Or, as Professor Alschuler has noted,

Whether some nonracial forms of discrimination are as invidious as racial discrimination remains a subject of dispute. Nevertheless, in determining what restraints the Equal Protection Clause imposes on the jury selection process, the issue is not whether the discrimination on the basis of gender, religion, ethnicity, national origin, political affiliation, or the like is ‘as bad as’ racial discrimination. It is simply whether this discrimination is ‘bad.’¹⁸³

Alschuler’s point is well taken. Still, if the Court confines *McCullum* to race-based peremptory challenges, the failure to extend the same reasoning to traditionally constitutionally protected areas such as gender seems hardly defensible.¹⁸⁴

McCullum affects an area that, although not constitutionally protected, has been jealously guarded as such: the right of the criminal defendant to exercise peremptory challenges in any way he or she feels is necessary to attain an

178. *Georgia v. McCollum* 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring).

179. *Id.*

180. A pre-*McCullum* Ninth Circuit decision so held, *United States v. DeGross*, 960 F.2d 1933 (9th Cir., 1992) (March 25, 1992), applying the *Batson* framework.

181. *See State v. Gilmore*, 511 A.2d 1150, 1159 n.3 (N.J. 1986) (holding that the New Jersey Constitution precludes the exercise of peremptory challenges on the basis of religious principles, gender, race, national origin, and possible other grounds).

182. “But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex . . . religious or political affiliation . . . mental capacity . . . number of children . . . living arrangements . . . employment in a particular industry . . . or profession.” *Batson v. Kentucky*, 476 U.S. 79, 124 (1986) (Burger, C.J., dissenting).

183. Alschuler, *supra* note 24, at 181-82. Alschuler concluded, “[o]nce courts have recognized that the Equal Protection Clause limits the use of peremptory challenges for trial-related reasons, challenges justified only by a prosecutor’s judgment that I don’t want women on a jury because I can’t trust them’ should be intolerable.” *Id.* at 182. Alschuler’s quoted example is taken from a practice manual’s discussion of women jurors. *Id.* at 182 n.113.

184. *But see* Alschuler’s reaction to the *McCullum* decision: “I could predict today’s decision, but not one involving discrimination on the basis of gender, or religion or ethnicity.” Coyle, *supra* note 115, at 4.

impartial jury.¹⁸⁵ As an amicus for the respondents, the National Association for Criminal Defense Lawyers (NACDL) explained this concern well:

No defendant should be forced to trial with a jury whom he or she determines cannot be fair. No defendant, and particularly the defendant who is a racial minority, should be forced to explain how and why he or she senses danger in the group about to decide his or her fate.¹⁸⁶

Such a concern, however, discloses an assumption of partiality based on race that the Court has rejected.¹⁸⁷ The Court has firmly held that "we may not accept as a defense to racial discrimination the very stereotype the law condemns."¹⁸⁸ Moreover, as stated above, the peremptory challenge is not within the purview of the accused's Sixth Amendment rights.¹⁸⁹ Therefore, arguments exalting the defendant's peremptory challenge right above the excluded juror's equal protection right are tenuous at best. Furthermore, our system of justice does allow the defendant to remove jurors for legally cognizable bases of partiality with a challenge for cause.¹⁹⁰ Therefore, no defendant is forced to include a juror who the defendant can show is biased against the defendant.

185. Justice Scalia espoused this:

In the interest of promoting the supposedly greater good of race relations in the society as a whole (make no mistake that that is what underlies all of this), we use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair.

Georgia v. McCollum, 112 S. Ct. 2348, 2365 (1992) (Scalia, J., dissenting). The respondents also argued this:

The fundamentally difficult decision to make in this case is that we must continue to allow the exercise of the peremptory challenge without restriction by the criminally accused to ensure fair and impartial juries under the Constitution even though the exercise of such peremptory challenges may in certain cases exclude jurors because of racial factors.

Respondents' Brief, *supra* note 132, at 14.

186. Amicus Curiae Brief for National Association of Criminal Defense Lawyers in Support of Respondent at 22, *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), (No. 91-372) (LEXIS, Genfed library, Brief file). Gobert concluded that the peremptory challenge has been made the "illegitimate scapegoat for the government's legitimate concern about the deterioration in law and order." Gobert, *supra* note 20, at 538. See generally Katherine Goldwasser, *Limiting a Criminal Defendant's Use of the Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989). Compare with Joel H. Swift, *Defendants, Racism and the Peremptory Challenge: A Reply to Professor Goldwasser*, 22 COLUM. HUM. RTS. L. REV. 177 (1991).

187. *McCollum*, 112 S. Ct. at 2359. E.g., *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) ("The Equal Protection Clause . . . forbids the states to strike black veniremen on the assumption that they will be biased in particular cases simply because the defendant is black.").

188. *McCollum*, 112 S. Ct. at 2359 (citing *Powers v. Ohio* 1364, 1365 (1991)).

189. See *supra* notes 161-163 and accompanying text.

190. See 28 U.S.C.A. § 1870 (1988).

Interestingly, although the *McCullum* Court has ruled that a defendant's race-based peremptory challenge violates the Constitution, the Court may have ruled more narrowly than has yet been realized. As an amicus for the petitioner, the NAACP advocated a narrow extension of *Batson* to *McCullum*:

The use of all of the defendant's peremptories to strike majority-group jurors, where it is impossible to produce a jury on which there will be no such jurors sitting, presents a far different issue than the use of peremptories to strike all minority jurors, thus producing a monochromatic jury.¹⁹¹

The *McCullum* Court, however, makes no mention of such a narrow ruling. Yet, Justice Thomas attempts to narrow the ruling for the Court in his concurring opinion: "Today, we only decide that white defendants may not strike black veniremen on the basis of race. Eventually, we will have to decide whether black defendants may strike white veniremen."¹⁹² In a footnote, Justice Thomas admits that while this issue may remain "technically" open, "it is difficult to see how the result could be different if the defendants here were black."¹⁹³

It certainly would be difficult. Since *Powers* extends *Batson* to all criminal defendants of any race, it would seem to have foreclosed the narrow interpretation sought by the NAACP that excluded jurors who are minorities

191. The NAACP argued the following:

The ability to use peremptory challenges to exclude majority race jurors may be crucial to empaneling a fair jury. In any cases an African American, or other minority defendant, may be faced with a jury array in which his racial group is underrepresented to some degree, but not sufficiently to permit challenge under the Fourteenth Amendment. The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race.

Brief of the NAACP Legal Defense and Educational Fund, Inc., As Amicus Curiae Suggesting Reversal at 5, *Georgia v. McCollum* 112 S. Ct. 2348 (1992) (No. 91-372) (LEXIS, Genfed library, Brief file).

The NAACP concluded that:

[I]f the consideration set out in this brief militate against a decision that treats all defendants, whether white, African American, or other minority, as if their circumstances are necessarily the same. A holding that *Batson v. Kentucky* prohibits the respondents here from striking African Americans from the jury that will try them does not compel a broader ruling. For the foregoing reason, amicus suggest that the decision of the court below should be reversed, but the basis of that reversal be limited to the facts of this case.

Id. at 7.

192. *McCullum v. Georgia*, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring).

193. *Id.* at 2361 n.2.

should somehow be treated differently than excluded jurors who are white. The basis of constitutional protection from invidious discrimination in the exercise of the peremptory challenge is no less sound when the excluded juror is black or white. Regrettably, that the minority member of our society incurs more racial discrimination than the non-minority member is true,¹⁹⁴ but to allow minorities to invidiously discriminate on the basis of race is advocating two wrongs to make an insidious right.¹⁹⁵

Because of the eventual, if not present, limitation on minority defendants' use of race-based strikes against white venirepeople, Justice Thomas also asserts that the minority defendant "will rue the day this Court ventured down [the *Batson*] road" ¹⁹⁶ But, this assertion underestimates the benefits minorities will gain, in fact have gained, by the prohibition of the defendant's use of the race-based peremptory challenge.

Take, for example, the appalling 1986 Howard Beach incident, a racial assault similar to *McCollum* in which minorities were attacked by whites and racial emotions were running high in the community.¹⁹⁷ In Howard Beach, the white defendants used their peremptories to remove every African-American from the jury. The presiding trial judge invoked *Batson* to prohibit further race-based challenges and to require neutral explanations for future exclusions. The first African-American was seated shortly after this ruling. The white defendants were found guilty and appealed.¹⁹⁸ Two of the state's higher courts, under *Batson* tenets, affirmed the lower court's ruling.¹⁹⁹ Thus, if not

194. See *supra* notes 5, 42-45, 65 and accompanying text.

195. But see Stuart Taylor, *A Step Toward a Jury of One's Fears*, LEGAL TIMES, (June 29, 1992) available in LEXIS, Legnew library, Lgltme file. Taylor offers a good, concise reaction to *McCollum*, describing *McCollum* as a "classic example of good intentions gone wrong and step-by-step extensions of legal doctrine gone too far." *Id.*

196. *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring).

197. In the Howard Beach incident, an eleven-member mob of young white men attacked three African-American men whose car had broken down near the Howard Beach section of Queens, New York. One of the African-American men was severely beaten by the baseball bat-wielding youths. Another of the African-American men died as a result of running from the youths onto a busy highway and getting hit by a car. See Tanford, *supra* note 116, at 1015-17. Note, *McCollum* has not yet been decided on the merits of the original complaint, aggravated assault and simple battery. Therefore, because the Howard Beach incident prompted a conviction, the incident could be described as a "racial attack," for that is what the triers of fact found. *Id.* However, *McCollum* has not received a determination by the triers of fact; therefore, *McCollum* remains an alleged crime at this time.

198. Tanford, *supra* note 116, at 1015.

199. The New York Supreme Court, Appellate Division held the following:

Peremptory challenges exercised solely on the basis of race, whether it be by the prosecution or the defense, necessarily result in injury not only to the excluded juror but to the community at large and to society's confidence in and respect for our system of justice [T]he courts cannot permit such conduct; justice cannot remain

for the prohibition of the defense's race-based peremptory challenge, the surviving minority victims in Howard Beach may have seen a contrary result.²⁰⁰

Although *McCullum* has been viewed by some as an incursion into the rights of the defendant, there is a better perspective with which to view the *McCullum* decision. Again, as the Court makes clear, the right to the peremptory challenge is not and has not been synonymous with a "fair trial."²⁰¹ Limiting the peremptory challenge does not violate the Constitution. Racial discrimination, on the other hand, does violate the Constitution.²⁰² The better perspective is to view *McCullum* as an attack not on the defendant, but on the racial prejudice forming and contorting our juries. Although racism may always plague our society, our legal system of justice should not reflect that racism. If we understand *McCullum* to be not a denial of the defendant's rights, but an assertion of the equal protection rights of the invidiously excluded juror, we will be able to understand *McCullum* as corresponding to--and not contradicting with--our democratic ideals.

VI. CONCLUSION

Since 1965, the Supreme Court has been engaged in the step-by-step process of eliminating the race-based peremptory challenge. In *McCullum*, the Court abolished the last vestige of the race-based peremptory challenge: defendants can no longer use an unfettered peremptory challenge in obtaining what they consider an impartial jury. In obtaining an impartial jury, the statutory right of the defendant to the peremptory challenge has given way to the constitutional right of the racially excluded juror to equal protection of the laws.

There is speculation as to whether *McCullum* will reach its desired results, if *McCullum* will extend to other traditionally constitutionally protected areas, and if *McCullum* applies to minority as well as white defendants. Further, there

blindfolded, but rather must proclaim and insist that the guarantee of equal protection against all forms of racial discrimination, particularly in our system of justice, be enforced.

People v. Kern, 149 A.D.2d 187, 235 (N.Y. App. Ct. 1989). The New York Court of Appeals affirmed this decision, relying heavily on *Batson*. *People v. Kern*, 554 N.E.2d 1235, 1243-1244 (1990).

200. At the very least one would have to admit that if not for the prohibition on race-based defense strikes, the surviving victim's confidence in the integrity of our court system would have been frustrated.

201. See *supra* notes 161-163 and accompanying text.

202. Indeed, the Fourteenth Amendment was passed primarily to place minorities, specifically African-Americans, on equal footing with non-minorities. See *supra* note 30 and accompanying text.

is concern not only that *McCollum* threatens the very existence of the peremptory challenge, but that *McCollum* exalts the rights of the jurors over the more deserved rights of the defendants.

If we understand *McCollum* as an attack on the malignant race-based exclusion of potential jurors, and not as an attack against the rights of defendants, we can better see how *McCollum* serves our democratic ideals.

J. L. Harvancik

