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Edmonson v. Leesville Concrete Company: Pre-Empting Prejudice

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EDMONSON v. LEESVILLE CONCRETE COMPANY[1]: PRE-EMPTING PREJUDICE

> Our cultural patterns are an amalgam of black and white. Our destinies are tied together. There is no separate black path to power and fulfillment that does not have to intersect with white roots. Somewhere along the way the two must join together, black and white together, we shall overcome, and I still believe it.[2]

INTRODUCTION

In *Edmonson v. Leesville Concrete Co.*,[3] the United States Supreme Court decided the issue of whether parties in a civil case may use their peremptory challenges to exclude black venirepersons from the jury.

This Note will discuss the various limitations that courts have placed on the use of peremptory challenges, and the position of the Supreme Court. This Note will also discuss the Court's expansion of the state action doctrine, and the impact *Edmonson* will have on future cases.

BACKGROUND

The right to a jury trial is found in the Sixth and Seventh Amendments of the United States Constitution. The trial jury is chosen from a larger group of people called the venire. The venire necessarily consists of people who represent a fair cross-section of the community.[4] The trial jury is chosen from the venire through a process called voir dire. During voir dire, parties are permitted to question the venirepersons to determine any biases they might have which would have an effect on the outcome of the trial.[5] To request that a particular venireperson be excused, parties may assert either a challenge for cause or a peremptory challenge. A challenge for cause is "[a] request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons."[6] Each party has an unlimited number of challenges for cause.[7] A peremptory challenge is "[t]he right to challenge a juror without assigning . . . a

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[1] 111 S. Ct. 2077 (1991)

[2] Martin Luther King, Jr., THE WORDS OF MARTIN LUTHER KING, JR. SELECTED BY CORETTA SCOTT KING 23 (1983).

[3] 111 S. Ct. 2077 (1991).

[4] *See* 28 U.S.C. § 1861, which disallows excluding a person from jury service on account of race, color, religion, sex, national origin or economic status. The venire is commonly selected by randomly selecting names from a list of registered voters in the community.

[5] People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

[6] BLACKS LAW DICTIONARY 230 (6th ed. 1990).

[7] 28 U.S.C. § 1870.

reason for the challenge."[8] The number of peremptory challenges allowed usually varies with the type of case and number of parties involved.

Since the parties are generally not required to articulate a reason for exercising the peremptory challenge, this method has often been used to exclude blacks from the jury.[9] This use of the peremptory challenge has been subject to increasing scrutiny in recent years.

The Equal Protection Guarantee of the Fourteenth Amendment

The primary challenge to the discriminatory use of the peremptory challenge is that it violates the Equal Protection Clause of the Fourteenth Amendment.[10]

In 1874, Taylor Strauder, a black man, was convicted of murder by an all-white jury.[11] At the time, a West Virginia statute did not permit black people to participate on grand or petit juries.[12] The United States Supreme Court reversed the conviction.[13] The Court found that denying black people the opportunity to serve on juries denied them the equal protection of the laws.[14]

Nearly a century passed before the Court first addressed whether a prosecutor may use the peremptory challenge to exclude blacks from the jury.[15] Robert Swain, a black man, was indicted and convicted of rape.[16] Of the eight blacks on the venire, two were exempt, and six were peremptorily struck by the prosecutor.[17] Swain challenged the exclusion of the black jurors on equal protection grounds.[18] The Supreme Court found no constitutional violation.[19] Tracing the history of the peremptory challenge, the Court focused on the rationale behind permitting use of the peremptory challenge. "Since striking a jury allowed both sides a greater number of challenges and an opportunity to become familiar with the entire venire list, it was deemed an effective means of obtaining more impartial and better qualified

[8] BLACKS LAW DICTIONARY 1136 (6th ed. 1990).

[9] One study concluded that, in criminal cases with black defendants, the government exercised its peremptory challenges against black venirepersons, three times more often than one would expect. United States v. McDaniels, 379 F. Supp. 1243, 1244 (E.D. La. 1974).

[10] Another line of cases has been brought under the Sixth Amendment fair cross-section requirement. This argument has been successful when determining who should be eligible for jury duty (i.e. who makes up the venire). *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975). However, the Court has refused to find that the petit jury itself is required to represent a fair cross-section of the community. Holland v. Illinois, 110 S. Ct. 803, *reh'g denied*, 110 S. Ct. 1514 (1990).

[11] Strauder v. West Virginia, 100 U.S. 303, 304 (1880).

[12] *Id.* at 305.

[13] *Id.* at 312.

[14] *Id.* at 308.

[15] Swain v. Alabama, 380 U.S. 202 (1965).

[16] *Id.* at 203.

[17] *Id.* at 205

[18] *Id.* at 210-11.

[19] *Id.* at 221.

jurors."[20] The Court said that it was not necessary to inquire into the prosecutor's reasons for excusing a juror through the peremptory challenge.[21] The Court suggested that to raise a valid claim, "the defendant must . . . show the prosecutor's systematic use of peremptory challenges against [blacks] over a period of time."[22]

Shortly thereafter, courts began to develop alternative, less restrictive standards to show discrimination on the part of the prosecutor.[23] Finally, in 1986, the Supreme Court overruled the *Swain* decision in *Batson v. Kentucky*.[24] During the trial, Batson's prosecutor used his peremptory challenges to exclude all four black persons from the venire.[25] The Supreme Court decided that in a criminal case, where the defendant is black, the prosecutor may not use peremptory challenges to strike black jurors from the venire.[26] The decision overruled *Swain* in that it held that a defendant could establish a *prima facie* showing of discrimination based solely on the facts of his case.[27] Under *Batson*, a defendant can establish a *prima facie* case of discrimination by proving: "(1) [T]hat he is a member of a cognizable racial group"; and (2) that the prosecutor used peremptory challenges to strike members of the venire who are of the same race as the defendant.[28] In addition, the defendant can rely on facts and other circumstances that give rise to an inference that the prosecutor acted in a discriminatory manner.[29]

The holding in *Batson* was limited to the prosecutor's discriminatory use of the peremptory challenge to exclude black venirepersons in a criminal case where the defendant is black.[30] The basic rationale of *Batson* was that the public's faith in the justice system is harmed when the court permits discrimination to occur under its own roof.[31]

The most recent expansion of the *Batson* doctrine in a criminal setting occurred in *Powers v. Ohio*.[32] Powers, a white man, objected when the state used peremptory challenges to strike seven blacks from the venire.[33] The Court held that a criminal defendant has standing to raise an equal protection claim based on the

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[20] *Id.* at 217-18.
[21] *Id.* at 222. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. *Id.* at 221-22.
[22] *Id.* at 227.
[23] *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).
[24] 476 U.S. 79 (1986).
[25] *Id.* at 83.
[26] *Id.* at 84.
[27] *Id.* at 96.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 87.
[32] 111 S. Ct. 1364 (1991).
[33] *Id.* at 1366.

discriminatory use of the peremptory challenge, whether or not the defendant and the excluded jurors are of the same race.[34] The Court used a three-part test. First, the defendant must suffer a cognizable injury as a result of the discriminatory use of the peremptory challenge, and the defendant must have a "concrete interest" in challenging the practice.[35] This element was satisfied because the defendant was denied his right to a neutral jury selection process.[36] In addition, racial discrimination undermines the integrity of the judicial system.[37] Second, there must be a relationship between the defendant and the excluded jurors, so that the defendant can be an effective proponent of the jurors' rights.[38] The Court found this element was satisfied because of the shared interest in eliminating racial discrimination from the courtroom.[39] Third, it should be unlikely that the injured party will raise the claim on his or her own behalf.[40] This requirement was satisfied as well.[41] The Court found inconsequential the fact that the jurors and the defendant were of different races.[42]

Civil Application of Batson and the State Action Problem

Courts have split on the issue of whether the discriminatory use of peremptory challenges by private parties in civil cases violates equal protection.[43] At least one court has held that the interest of a civil litigant is sufficiently different from a criminal defendant's interest to justify permitting discriminatory use of the peremptory challenge in a civil case.[44] However, the majority of the controversy surrounds the issue of whether there is "state action."[45]

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall. . .deny to any person within its jurisdiction the equal protection of the laws."[46] The Supreme Court has held that restrictions imposed on the federal government through the Fifth Amendment are imposed in equal force upon the states through the Fourteenth Amendment.[47] However, the Fourteenth Amendment does

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[34] *Id.* at 1373.
[35] *Id.* at 1370
[36] *Id.* at 1371.
[37] *Id.*
[38] *Id.* at 1372.
[39] *Id.*
[40] *Id.* at 1370.
[41] *Id.* at 1372-73. The Court felt that a juror would be intimidated at bringing a suit. Factors the Court cited included difficulty in showing repeated discrimination, the expense of trial, and the small financial stake involved. *Id.* at 1373.
[42] *Id.*
[43] *See generally*, Note, *The Civil Implications of* Batson v. Kentucky and State v. Gilmore: *A Further Look at Limitations on the Peremptory Challenge*, 40 RUTGERS L. REV. 891 (1988).
[44] Esposito v. Bunome, 642 F. Supp 760, 761 (D. Conn. 1986).
[45] "State action" is a term of art used to describe involvement on the part of the federal, state, or local government.
[46] U.S. CONST. amend. XIV, § 1.
[47] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

not apply directly to private citizens. The invocation of equal protection rights necessarily requires the finding of state action.

The Supreme Court has developed several basic theories for finding state action.[48] One theory is based on a "symbolic relationship"[49] between the state and a private actor. In *Burton v. Wilmington Parking Authority*,[50] Burton, a black man, was denied service in the Eagle, a privately owned restaurant.[51] The Court found a symbolic relationship between the Eagle and the State because the Eagle was located in a building owned by the Wilmington Parking Authority, a state agency.[52]

State action may also be found if there is a "sufficiently close nexus" between the state and the challenged activity.[53] This argument usually arises when the challenged activity is supported by a state statute.

In a few cases, the Supreme Court has determined that activities undertaken by private individuals are activities that are traditionally undertaken by the state.[54] In *Marsh v. Alabama*,[55] a private corporation owned a town.[56] Marsh, a Jehovah's Witness, was convicted of trespassing.[57] The Supreme Court reversed the conviction on equal protection grounds, finding that the town's privately owned streets were, in effect, a public place.[58]

A fourth method for invoking the state action doctrine is the "joint action" theory. Under this theory, private entities acting jointly with public officials create state action. In *Lugar v. Edmonson Oil Company*,[59] the Supreme Court developed a two-part test for determining state action:

(1) [t]he deprivation must be caused by the exercise of some right or

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[48] *See* Schwartz, *State Action: Revival or One Night Stand?*, N.Y.L.J., Aug. 20, 1991, at 3, col. 1.
[49] *Id.*
[50] 365 U.S. 715 (1961).
[51] *Id.* at 716.
[52] *Id.* at 725. Subsequent cases have interpreted *Burton* very narrowly, distinguishing it on the grounds that the state profited from the private racial discrimination (i.e. that the Eagle leased property from the state agency, and that the Eagle's business would have been injured if blacks had been served).
[53] *But cf.* Flagg Brothers v. Brooks, 436 U.S. 149 (1978) (warehouseman's sale of goods entrusted to him for storage does not constitute state action just because it is permitted by state statute). *See also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (state licensing of a private club does not create state action sufficient to raise a Fourteenth Amendment claim).
[54] To decide the peremptory challenge issue under this theory, the court must decide whether the peremptory challenge process is a traditional state function.
[55] 326 U.S. 501 (1946).
[56] *Id.* at 502.
[57] *Id.* at 503-04.
[58] *Id.* at 506. Other activities considered to be public functions include: the maintenance of parks, Evans v. Newton, 382 U.S. 296 (1966) and regulating the election of public officials, Smith v. Allwright, 321 U.S. 649 (1944). *But see* Blum v. Yaretsky, 457 U.S. 991 (1982) (administration of nursing homes is not state action).
[59] 457 U.S. 922 (1982).

> privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible;[60] [and] (2) the party charged with the deprivation must be a person who may fairly be said to be a state actor. . .[either] because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.[61]

With the exception of one case,[62] the determination of whether *Batson* applies to civil cases has turned on whether there was state action. More specifically, the controversy centers around whether the second part of the *Lugar* test is satisfied. That is, whether there is a cognizable state actor.[63] The courts are generally in agreement that whenever state action is present, then the rationale of *Batson* applies in equal force to civil cases.[64]

In ruling on a due process claim, the Supreme Court held that a public defender does not become a state actor when representing an indigent defendant in a criminal proceeding.[65] The Court determined that the services of a defense lawyer are "essentially a private function."[66] The Fifth Circuit relied heavily on this case when deciding *Edmonson v. Leesville Concrete Co.*[67] The appellate court determined that private litigants in civil cases are not state actors and therefore *Batson* did not apply.[68]

On the other hand, the Eleventh Circuit took a different approach. In *Fludd v. Dykes*,[69] the Eleventh Circuit held that *Batson* applied to civil cases.[70] The *Fludd* court emphasized that it is the trial judge who makes a decision "to proceed to trial, over the party's objection" based on the discriminatory use of the peremptory challenge.[71] Therefore, the trial judge himself becomes the state actor.[72]

Critics argue that the *Fludd* court's approach may be too broad.[73] Their

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[60] *Id.* at 937.

[61] *Id.*

[62] *See* Esposito v. Buobome, 642 F. Supp 760 (D. Conn. 1986).

[63] The first part of the *Lugar* test in not really an issue in these cases. The right to use peremptory challenges is usually granted by statute. Therefore, it can fairly be considered a right or privilege created by the state.

[64] *See* Reynolds v. City of Little Rock, 893 F.2d 1004 (8th Cir. 1990). *See also* Clark v. City of Bridgeport, 645 F. Supp. 890 (D. Conn. 1986). In both of these cases, state action was not an issue because city attorneys were involved in the litigation.

[65] Polk County v. Dodson, 454 U.S. 312, 321 (1981). This is because of the adverse relationship between a public defender and the state. *Id.* at 320.

[66] *Id.* at 318-19.

[67] 895 F.2d 218, 222 (5th Cir. 1990) (en banc).

[68] *Id.*

[69] 863 F.2d 822 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 201 (1989).

[70] *Id.* at 829.

[71] *Id.* at 828.

[72] *Id.*

[73] *See, e.g., Equal Protection - Jury Selection - Eleventh Circuit Restricts the Discriminatory Use of Peremptory Challenges in Civil Litigation* - Fludd v. Dykes, *863 F.2d 822 (11th Cir. 1989)*, 103 HARV. L. REV. 586, 589-90 (1989).

primary concern is the possible effect this application will have on criminal defendants. "By finding state action in the judge's decision to proceed to trial, *Fludd* may implicitly require the courtroom actions of any attorney - including the defense attorney in a criminal case - to conform to the Equal Protection Clause."[74]

STATEMENT OF THE CASE

The Decision of the Trial Court

Plaintiff-appellant, Thaddeus Donald Edmonson was employed as a construction worker with the defendant-appellee, Leesville Concrete Company.[75] Edmonson sued Leesville, claiming that a Leesville employee negligently allowed one of the company's trucks to roll backwards and pin him against construction equipment.[76]

Of the originally impaneled venire, three members belonged to the black race.[77] During voir dire, Leesville used two of its three peremptory challenges authorized by statute[78] to remove blacks from the prospective jury.[79] Relying on the United States Supreme Court's decision in *Batson v. Kentucky*,[80] Edmonson requested that Leesville be required to state race-neutral reasons for excising the jurors.[81] The district court denied this request.[82] The court determined that *Batson* was not binding on civil cases.[83]

The impaneled jury consisted of eleven white persons and one black person.[84] The jury found in favor of Edmonson.[85] The jury valued total damages at $90,000.[86] However, the jury attributed 80% of the fault to Edmonson's contributory negligence, leaving him with an award of $18,000.[87]

The Decision of the Court of Appeals

Edmonson appealed to the United States Court of Appeals for the Fifth Circuit. A divided panel reversed the decision of the district court, holding that

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[74] *Id.* at 590.
[75] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2081 (1991).
[76] *Id.* at 2080.
[77] *Id.* Edmonson is also a member of the black race.
[78] 28 U.S.C. § 1870 states: "In civil cases, each party shall be entitled to three peremptory challenges...All challenges for cause or favor whether to the array or panel or to individual jurors shall be determined by the court."
[79] 111 S. Ct. at 2081.
[80] 476 U.S. 79, 94 (1986).
[81] 111 S. Ct. at 2081.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*

private litigants in civil cases may not use the peremptory challenges to exclude jurors on the basis of race.[88] Following the spirit of *Batson*, the court found that prejudicial use of the peremptory challenge violated the Equal Protection Clause of the Fourteenth Amendment.[89] The panel found that "[t]he government is intimately involved in the process by which a litigant challenges a prospective juror."[90] The court emphasized that it is the judge, a government official, who excuses the prospective juror.[91] The panel remanded the case to the trial court for the determination on whether Edmonson had established a *prima facie* case of discrimination as mandated under *Batson*.[92]

The full court then held a rehearing en banc. A divided panel affirmed the district court's judgment.[93] The court held that private litigants did not become state actors by exercising their peremptory challenges, and therefore, the Fourteenth Amendment was not applicable.[94] Edmonson appealed again, and the U.S. Supreme Court granted certiorari.[95]

The Decision of the Supreme Court

1. The Majority Opinion

The Supreme Court held that *Batson* applies to private citizens in civil cases, and therefore, peremptory challenges may not be used in civil cases to exclude jurors on the basis of race.[96] The Court applied the two-part test from *Lugar v. Edmonson Oil Company*[97] and determined that the plaintiff had satisfied the requirements. The Court gave the first part of the *Lugar* test[98] only cursory attention: "[P]eremptory challenges have no significance outside a court of law ... [They] are 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 ...."[99]

The majority of the Court's opinion focused on the second part of the *Lugar* test.[100] The Court employed three different theories to make this determination: "the

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[88] Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1315 (5th Cir. 1988).
[89] *Id.*
[90] *Id.* at 1312
[91] *Id.*
[92] *Id.* at 1315.
[93] Edmonson v. Leesville Concrete Co., 895 F. 2d 218, 226 (5th Cir. 1990) (en banc).
[94] *Id.*
[95] 111 S. Ct. 41 (1990).
[96] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2080 (1991).
[97] 457 U.S. at 937.
[98] Whether the claimed constitutional deprivation resulted from the exercise of a right of privilege having its source in state authority. *Id.*
[99] 111 S. Ct. at 2083.
[100] Whether the private party charged with the deprivation could be described as a state actor. 457 U.S. at 941-42.

extent to which the actor relies on governmental assistance and benefits. . .; whether the actor is performing a traditional government function. . .; whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[101]

Noting again that peremptory challenges have no utility outside the jury system, the Court found that exercise of the peremptory challenge requires the overt significant assistance of the court.[102] The Court also found that Leesville performed a traditional state function in exercising its peremptory challenges.[103] The peremptory challenge is used in jury selection. The jury system "performs the critical government functions of guarding the right of litigants and insuring continued acceptance of the laws by all of the people."[104] The Court specifically distinguished *Polk County v. Dodson*.[105] Although there is an employment relationship between the government and a public defender, the relationship is adversarial in nature. This adversarial relationship does not exist between the government and a private litigant.[106] The Court found it significant that the government and private litigants work toward the same goal during the jury selection.[107]

Finally, the Court emphasized that the injury caused by discrimination is made worse because the government permits it to happen.[108] "Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there .... To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin."[109]

In addition to holding that a juror's equal protection rights could be violated through a private litigant's use of the peremptory challenge, the Court also found that a private civil litigant has standing to raise the equal protection claim on behalf of the juror.[110] The Court found the analysis in *Powers* applied to civil trials as well.[111]

The Supreme Court reversed the case, and remanded for a determination of whether Edmonson can establish a *prima facie* case of racial discrimination.

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[101] 111 S. Ct. at 2083 (citations omitted).

[102] The Court determined that it is the judge, unarguably a state actor, whose enforcement of the peremptory challenge gives it effect. *Id.* at 2084.

[103] *Id.* at 2085.

[104] *Id.*, quoting Powers v. Ohio, 111 S. Ct. 1364, 1369 (1991).

[105] 454 U.S. 312 (1981).

[106] 111 S. Ct. at 2086.

[107] *Id.*

[108] *Id.* at 2087.

[109] *Id.*

[110] *Id.*

[111] *Id.* It is curious that the court found it necessary to make this determination. Edmonson himself was black, and could have raised his own equal protection claim. In *Powers*, the Court held a white litigant has standing to raise an equal protection claim on behalf of an excluded black juror. The implication of this application of *Powers* will be discussed later.

2. The Dissenting Opinions

In a dissenting opinion joined by Justice Scalia and Chief Justice Rehnquist, Justice O'Connor took issue with several parts of the majority's decision. First, Justice O'Connor disagreed with the Court's determination that a private litigant acts with the overt, significant participation of the government. While the Court referred to government involvement in the jury selection process,[112] Justice O'Connor pointed out that the court would do these things whether there was a peremptory challenge or not.[113] Justice O'Connor admitted that the judge who excuses a challenged juror is a state actor. However, Justice O'Connor believed that this type of government participation is insufficient to qualify as state action.[114] Justice O'Connor believed this case was more comparable to *Jackson v. Metropolitan Edison Co.*.[115]

Justice O'Connor also disagreed with the Court's holding that the exercise of the peremptory challenge is a traditional government function. Justice O'Connor found it significant that "[p]eremptory challenges are exercised by a party, not in selection of jurors, but in rejection."[116] In addition, when tracing the history of the peremptory challenge, Justice O'Connor pointed out that it is "older than the Republic,"[117] thus demonstrating that it has never been the exclusive function of the government to select juries.[118]

In a separate dissenting opinion, Justice Scalia addressed the problematic implications of this decision. Justice Scalia's concerns were two-fold. First, he was wary that this case logically extends to criminal defendants.[119] Justice Scalia also believed that the case will lead to more litigation because every time an equal protection claim is raised, another trial will be required to determine whether there is a *prima facie* showing of discrimination.[120]

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[112] *Id.* at 2084.

[113] 111 S. Ct. 2077, 2090 (1991)(O'Connor, J., dissenting).

[114] *Id.*

[115] *Id.* at 2091. In *Jackson*, 419 U.S. 345 (1974), the plaintiff claimed that he was denied due process when his electric company cut off service pursuant to a procedure approved of by the state utility commission. *Id.* at 348. The Court denied this claim, holding that state approval of the plan did not rise to the level of state encouragement. *Id.* at 358.

[116] 111 S. Ct. at 2092 (1991) (O'Connor, J., dissenting) (quoting *Lincoln, Abbott's Civil Jury Trials* 92 (3d ed. 1912), quoting O'Neil v Lake Superior Iron Co., 67 Mich. 560, 35 N.W. 162 (1887)).

[117] 111 S. Ct. at 2093.

[118] *Id.*

[119] *Id.* at 2095 (Scalia, J., dissenting). Justice Scalia's fears were realized a year later when, in Georgia v. McCollum, 60 U.S.L.W. 4574 (1992), the Court applied *Edmonson* to find that a criminal defendant does not have the right to exercise his peremptory challenges in a racially discriminatory manner. For a discussion of *McCollum*, see Addendum.

[120] *Id.* at 2096.

ANALYSIS

Expanding the State Action Doctrine

The Supreme Court has set out on a noble mission: to eradicate discrimination from the judicial process. However, the Court must work within the bounds of the United States Constitution and precedential decisions. In deciding *Edmonson*, the Court stretched these boundaries, and on occasion, came very near to crossing them.

The Court's holding that private litigants in a civil case become state actors when they exercise peremptory challenges, rested on the application of three state action theories: the extent of government participation; the traditional government function doctrine; and the unique injury caused by government endorsement of discrimination.[121]

1. The Extent of Government Participation

The Court found that the peremptory challenge is exercised only with "the overt, significant participation of the government."[122] The involvement of the government in the entire jury selection is, indeed, significant.[123] However, as Justice O'Connor wrote in dissent, these activities would occur whether or not there was a peremptory challenge.[124] Surely the Court did not mean to imply that state action results simply from the summoning of a jury. If this were so, then every jury trial would trigger state action.

The Court found that state action results because the trial judge himself excuses the challenged venireperson from the panel.[125] The Court claimed that when the judge discharges a juror who has been challenged for discriminatory reasons, the government "in a significant way has involved itself with invidious discrimination."[126] This is not really a significant involvement on the part of the government. The Court cites *Burton v. Wilmington Parking Authority* [127] for the proposition that the government "has not only made itself a party to the [biased act], but has elected to place its power, property, and prestige behind the [alleged discrimination]."[128] However, the Court reached a different conclusion in *Jackson v. Metropolitan*

[121] *Id.* at 2083.
[122] *Id.* at 2084.
[123] The Court lists this involvement: establishing qualification for jury service, determining which jurors will be summoned, payment of the per diem, jury qualification forms, etc. Much of this activity is mandated by statute. *Id.*
[124] *Id.* at 2090 (O'Connor, J., dissenting).
[125] *Id.* at 2084.
[126] *Id.* at 2085.
[127] 365 U.S. 715 (1961).
[128] *Id.* at 725. The Court also cites Shelly v. Kraemer, 334 U.S. 1 (1948). In *Shelley*, the State was found to have "exercised coercive force" to enforce discriminatory restrictive covenants between private property owners.

Edison Co.[129] In that case, Jackson's electrical services were terminated pursuant to a procedure approved by the state utility commission. The Supreme Court held that Jackson could not raise a due process claim because the State did not encourage the termination.[130] Similarly, the trial judge does not encourage a litigant's discriminatory use of the peremptory challenge, nor does the Court use coercive force to enforce discrimination. The judge simply instructs the juror that he or she has been excused. *Jackson* is more applicable to the situation in *Edmonson* - especially considering the Court's reluctance in previous cases to interpret *Burton* in a broad manner.

2. The Traditional Government Function Doctrine

The Court did not rely solely on the government's overt, significant participation to find state action. The Court also applied the public function theory in finding that the peremptory challenge is used "in selecting an entity that is a quintessential government body."[131]

The Court may define the government function involved in this case either broadly or narrowly. The majority used the broad function of selecting jurors. However, the dissent used the narrow function of exercising peremptory challenges. Defining this function is critical. The jury selection process, as a whole, may fairly be considered a government function. Nonetheless, the exercise of peremptory challenges is not necessarily a traditional government function. The peremptory challenge is used to exclude potential jurors - not select them.[132] In addition, the peremptory challenge has its roots in ancient history,[133] thus demonstrating that the peremptory challenge is not a traditional government function.

Even if the exercise of peremptory challenges could be considered a traditional government function, it does not meet the exclusive government function test stated in *Flagg Brothers v. Brooks.*[134] The practice of peremptory challenges precedes the Republic,[135] and therefore cannot be considered an exclusive function of the government.

3. The Unique Injury Caused by Governmental Endorsement of Discrimination

As discussed above, the first two theories put forth by the Supreme Court are insufficient for a finding of state action. If there is any justification for the Court's

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[129] 419 U.S. 345 (1974).
[130] *Id.* at 357.
[131] 111 S. Ct. at 2085.
[132] *Id.* at 2092 (O'Connor, J. dissenting).
[133] *See* Swain v. Alabama, 380 U.S. 202, 218 (1965).
[134] *See* 436 U.S. at 159-60.
[135] 111 S. Ct. at 2093.

decision, it is the third factor cited by the Court. Governmental endorsement of the discriminatory use of the peremptory challenge poses a special problem. Public faith in the fairness of the judicial system is essential. Permitting discrimination in this forum tends to undermine faith in the system.[136] Even in dissent, Justice Scalia recognized the value of this decision. "Although today's decision neither follows the law nor produces desirable concrete results, it certainly has great symbolic value. To overhaul the doctrine of state action in this fashion - what a magnificent demonstration of this institution's uncompromising hostility to race-based judgments, even by private actors!"[137]

The Application of Edmonson to Criminal Defendants[138]

The *Edmonson* Court did not expressly address whether criminal defense attorneys are also restricted in their use of peremptory challenges. This particular issue raises difficult questions, and the Court was correct to refrain from addressing this issue.[139] Among the questions raised by this issue are whether *Batson* is consistent with the Fifth Amendment right of a criminal defendant to remain silent, and the Sixth Amendment right to effectiveness of counsel.[140] There are different factors that are unique to criminal trials and were not present in this case. These include (1) the different burdens of proof for civil and criminal trials, (2) the different roles of the defense counsel and the prosecutor in a criminal trial; and (3) the different punishment involved in a criminal trial.[141]

The Court's decision sent a conflicting message about how it will resolve this issue in the future.[142] As *Batson* held, the Court's rationale of harm to the judicial system, resulting from racial discrimination in the courtroom, applies with equal force to a criminal proceeding. Another factor indicating that the Court intends for *Batson* to apply to criminal defendants is the Court's reference to *Powers v. Ohio.*[143] Under *Powers* the equal protection claim raised in *Edmonson* was that of the juror, not Edmonson. If the equal protection claim belongs to the juror, as *Powers* and *Edmonson* held, then the *Batson* rule could apply equally to both sides of a criminal case. However, if the State's discrimination violates the rights of the defendant, then *Batson* should not apply to a State's challenge of the defendant's peremptory strikes.[144] The constitutional right to equal protection of the laws is a right belonging

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[136] Batson v. Kentucky, 476 U.S. 79, 87 (1986).
[137] 111 S. Ct. at 2096 (Scalia, J., dissenting).
[138] This Note was written before the Court decided this issue in Georgia v. McCollum, 60 U.S.L.W. 4574 (1992). For a discussion of *McCollum*, see Addendum.
[139] *See* Brief Amicus Curiae of the American Civil Liberties Union in support of the Petitioner, Edmonson v. Leesville Concrete Co., 111 S. Ct. 2076 (1991) (No. 89-7743).
[140] *Id.*
[141] *Id.* at 19.
[142] The Court has agreed to resolve this issue next term in Georgia v. McCollum, 112 S. Ct. 931 (1991).
[143] 111 S. Ct. at 2088. *Powers* held that a white criminal defendant has standing to raise an excluded black juror's constitutional claim.
[144] *See supra* note 73 at 590, "Compare Batson, 476 U.S. at 85-87 (suggesting that a defendant's right to

to the individual. There is no such right belonging to the state.

The policy reasons behind the *Edmonson* Court's decision, and the Court's reference to *Powers* indicate that a criminal defendant will not be permitted to use peremptory challenges to discriminate on his own behalf. However, the manner in which the Court distinguished *Polk County v. Dodson,*[145] leads to a different conclusion. The *Edmonson* Court distinguished *Polk County* on the grounds that the public defender is not a state actor because his private function is as an adversary to the government.[146] Similarly, a criminal defense attorney acts as an adversary to the government. Therefore, "[t]he Court must concede that *Polk County* stands for the proposition that a criminal defense attorney is not a state actor when using peremptory strikes."[147]

The Court's decision is internally inconsistent. It will be interesting to see how the Court resolves this issue in the future.

The Tip of the Iceberg

Aside from the application to criminal defendants problem, the *Edmonson* decision gives rise to several other questions. The case only addresses peremptory challenges based on race. It seems that the Court's interest in eliminating discrimination from the judicial process would logically extend to challenges on the basis of gender, national origin, age, handicap, economic background, etc.[148] This is at odds with the rationale behind the peremptory challenge - to allow parties to strike venirepersons for any reason, or no reason at all.

If a *Batson/Edmonson* challenge is made, a separate trial will be required to determine whether the complainant can make a *prima facie* showing of discrimination. Not only will this add to the docket of an already overloaded court, but it creates a prime opportunity for a party to delay the trial.

Another disturbing result may follow if the court does find a *prima facie* showing of discrimination. It seems reasonable to conclude that the striking party, if shown to have used to peremptory challenge in a discriminatory manner, could be subject to Civil Rights litigation. Certainly parties are going to be hesitant to employ the peremptory challenge if a Civil Rights charge could result.

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equal protection is violated if members of his race have been purposefully excluded from the jury) with *Id.* at 87, 97-98 (finding that racial discrimination in jury selection 'unconstitutionally discriminates against the excluded juror')."

[145] 454 U.S. 312 (1981) (The Court held that a public defender is not a state actor).

[146] 111 S. Ct. at 2086.

[147] *Id.* at 2094 (O'Connor, J. dissenting).

[148] *See, e.g.*, Dias v. Sky Chefs, 919 F.2d 1370 (9th Cir. 1990). The plaintiff in a sexual harassment suit, used peremptory challenges to strike three men from the venire - leaving an all female jury. *Id.* at 1377. The Supreme Court granted certiorari, and remanded the case to the court of appeals for further consideration in light of *Edmonson*. 111 S. Ct. 2791 (1991).

CONCLUSION

In *Edmonson v. Leesville Concrete Company*, [149] the Supreme Court held that a private civil litigant may not use the peremptory challenge to exclude blacks from the venire. In doing so, the Court stretched the bounds of the state action doctrine. Left unanswered is the issue of whether *Batson* applies to criminal defendants.

The Court should be commended for its effort to eradicate discrimination from the judicial process. However, by expanding the state action doctrine in this way, the Court has created more problems than it resolved. The peremptory challenge is supposed to be a means in which a party can exclude jurors for any reason, or no reason at all. It evolved as a method of ensuring that the jury will be fair and impartial. A party is no longer free to exercise his peremptory challenges in any way he chooses. Inability to articulate a reason for striking a juror will result in at least one additional trial, and maybe more. The death knell has sounded for peremptory challenges.

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[149] 111 S. Ct. 2077.