FIFTH & FOURTEENTH AMENDMENTS—EQUAL PROTECTION—THE USE OF RACE-BASED PEREMPTORY CHALLENGES IN A CIVIL TRIAL TO EXCLUDE POTENTIAL JURORS DURING VOIR DIRE VIOLATES THE EQUAL PROTECTION RIGHTS OF THE CHALLENGED JURORS—*Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991).

J. Patrick McCabe

I. INTRODUCTION

Jury selection, the process of determining the composition of the petit jury,[1] is a procedure designed to produce a disinterested collection of individuals from the community so that they may fairly decide a case.[2] During voir dire,[3] the judge or the parties' attorneys question members of the venire[4] in order to determine a prospective juror's impartiality.[5] Moreover, the period of voir dire affords the parties an opportunity to remove venirepersons both "for cause"[6] and through the use of

[1] The petit jury is the "ordinary jury for the trial of a civil or criminal action." BLACK'S LAW DICTIONARY 768 (5th ed. 1979).

[2] 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 155b (19th ed. photo reprint 1979) (1832).

[3] Voir dire is defined as "[a] preliminary examination which the court may make of one presented as a . . . juror, where his competency, interest, etc., is objected to." BLACK'S LAW DICTIONARY 1412 (5th ed. 1979). *See also* Michael Fried et al., *Juror Selection: An Analysis of Voir Dire, in* THE JURY SYSTEM IN AMERICA 49, 50 (Rita J. Simon ed., 1975). The purposes of voir dire are: first, to serve as a means of gathering information about prospective jurors in order to gain a tactical advantage in the selection process; second, to enable both parties to develop lines of communication between themselves and the members of the venire who are ultimately empaneled as the petit jury; and third, to present the litigants with an occasion to sway jurors, thereby influencing the way in which they evaluate the evidence that will be presented during the course of the trial. *Id. See generally* Gordon Bermant & John Shapard, *The Voir Dire Examination, Juror Challenges, and Adversary Advocacy, in* 2 THE TRIAL PROCESS 69, 73 (Bruce D. Sales ed., 1981).

[4] "The list of jurors summoned to serve as jurors for a particular term" is known as the venire. BLACK'S LAW DICTIONARY 1395 (5th ed. 1979).

[5] *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 139-40 (1977).

[6] The party seeking to remove a prospective juror from the venire via a "for cause" challenge must convince the trial judge of that particular individual's lack of impartiality or unfitness to serve on a jury. *See* PAULA DIPERNA, JURIES ON TRIAL 92-93 (1984).

peremptory challenges.[7]

In the realm of criminal prosecutions, the use of the peremptory challenge, which "usually can be exercised for *any* reason,"[8] was somewhat limited by the 1986 Supreme Court decision in *Batson v. Kentucky*,[9] wherein the Court held that the Fourteenth Amendment's Equal Protection Clause[10] prohibits the exercise of racially-motivated peremptory strikes by state prosecutors.[11] Recently, however, in *Edmonson v. Leesville Concrete Co.*,[12] the United States Supreme Court extended the applicability of the equal protection analysis enunciated in *Batson* to the use of race-based peremptory challenges in federal civil proceedings.[13]

Thaddeus Donald Edmonson, a black construction worker, was injured while working at a federal enclave in Louisiana.[14] Thereafter, Edmonson brought a negligence action against the Leesville Concrete

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[7] In the past, peremptory challenges have been employed so that a litigant might strike a prospective juror based on the "limited knowledge" his counsel has gleaned regarding the juror's impartiality during the voir dire questioning process. Swain v. Alabama, 380 U.S. 202, 221 (1965). "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.* at 220. For a further discussion of the *Swain* decision, see *infra* notes 78-84 and accompanying text.

[8] THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 27 (2d ed. 1988) (emphasis added).

[9] 476 U.S. 79 (1986). For a further discussion of the *Batson* decision, see *infra* notes 85-100 and accompanying text.

[10] The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[11] *Batson*, 476 U.S. at 84 (citing *Swain*, 380 U.S. at 203-04).

[12] 111 S. Ct. 2077 (1991).

[13] *Id.* at 2080. Because *Edmonson* originated in a federal district court, rather than in a state court, the Supreme Court did not apply the Equal Protection Clause of the Fourteenth Amendment; instead, the Court utilized the "equal protection component of the Fifth Amendment's Due Process Clause" in rendering its decision. *Id.* (citing Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding the duty of the federal government to be equal to that of the states regarding the obligation to avoid discriminatory practices)). *See also* Washington v. Davis, 426 U.S. 229, 239 (1976) (The Fifth Amendment applies to the federal government in a fashion analogous to the limitation placed on the actions of state governments by the Fourteenth Amendment.).

[14] *Edmonson*, 111 S. Ct. at 2080. Edmonson claimed that he sustained serious injuries due to the negligent operation of a company truck owned by Leesville and operated by a Leesville employee on a construction site in Fort Polk—a federal enclave in Louisiana. *Id.*

Company ("Leesville") in the United States District Court for the Western District of Louisiana[15] and invoked his Seventh Amendment right to a jury trial.[16] During voir dire, Edmonson employed his three available peremptory challenges to remove white venirepersons from the prospective jury panel.[17] In turn, Leesville used two of its three peremptory challenges to remove two of the three panel members who were black.[18] Relying on the Supreme Court's pronouncement in *Batson*, Edmonson called upon the trial judge to demand a race-neutral articulation from Leesville for its exercised challenges.[19] Limiting its applicability to criminal proceedings, the district court judge denied Edmonson's motion, proclaiming that the *Batson* decision had no

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[15] Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1309 (5th Cir. 1988).

[16] *Id.* at 1309-10. The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

[17] *Edmonson*, 860 F.2d at 1310. *See infra* note 30 (discussing the source of the three peremptory challenge rule).

[18] *Edmonson*, 860 F.2d at 1310. Leesville employed its third peremptory challenge to remove a white jury member. *Id.*

[19] *Id.* (citing Batson v. Kentucky, 476 U.S. 79 (1986)). In *Batson*, the United States Supreme Court held that deliberate racial discrimination by the state in the selection of a jury panel violates the defendant's equal protection rights under the Fourteenth Amendment because such discrimination amounts to a denial of the protection safeguarded by a jury trial. *Batson*, 476 U.S. at 86. Moreover, the *Batson* Court mandated that upon a defendant's establishment of a prima facie case of intentional discrimination by the state in jury selection, "the burden shifts to the State to explain adequately the racial exclusion." *Id.* at 93-94 (citing Alexander v. Louisiana, 405 U.S. 625, 632 (1972)). The *Batson* Court further explained that a defendant may establish a prima facie case of racial discrimination during voir dire by: first, showing that they belong to a race apt to receive disparate treatment; and second, by introducing evidence of a pattern of strikes designed to exclude members of their race because the "'result bespeaks discrimination.'" *Id.* at 94 (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)) (quoting Hernandez v. Texas, 347 U.S. 475, 482 (1954)). Once the defendant has established a prima facie case of intentional discrimination, according to the Court, the state must then show that "'permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" *Id.* (quoting *Alexander*, 405 U.S. at 632). The *Batson* Court further stipulated that a mere statement by state officials to the effect that race did not factor into the selection process would not suffice to meet the state's burden. *Id.* For a further discussion of the *Batson* decision, see *infra* notes 85-100 and accompanying text.

relevance in the civil arena.[20] At the conclusion of the trial, the jury—composed of eleven white and one black juror—found in favor of the plaintiff, calculating his damages suffered at $90,000, but awarding him only $18,000 after finding significant contributory negligence.[21]

On appeal, a divided panel of the Fifth Circuit extended the *Batson* principle to civil proceedings and reversed the decision of the district court on the basis of the allegedly discriminatory use of peremptory challenges by Leesville.[22] The panel then remanded the case, calling for a determination on the issue of whether Edmonson had met his initial burden of establishing "a prima facie case of racial discrimination" as required under the *Batson* analysis.[23] Upon reconsideration, a fractured en banc court reinstated the decision of the trial court.[24] In vacating the panel opinion, the court declared that state action was lacking on the facts as presented in *Edmonson*.[25] Moreover, the Fifth Circuit opined that utilizing a peremptory challenge in a civil proceeding in order to strike a venireperson "neither demeans [that person] nor calls in question the fairness of the civil justice system."[26]

The United States Supreme Court granted certiorari to consider the

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[20] Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1310 (5th Cir. 1988).

[21] *Id.* The jury determined that Edmonson was 80% contributorily negligent, thereby reducing his award from $90,000 to $18,000. *Id.*

[22] *Id.* at 1314-15. The panel's opinion, authored by Judge Rubin and joined by Judge Wisdom, held that a private attorney may not use peremptory challenges to strike venirepersons on the basis of race even when representing a private litigant in a civil proceeding. *Id.* at 1314.

[23] *Id.* at 1315. Dissenting, Judge Gee posited that the two-part test for state action required under the *Batson* analysis was not satisfied by the facts in *Edmonson*. *Id.* at 1315-16 (Gee, J., dissenting) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)). Initially, Judge Gee conceded that the strikes exercised by Leesville amounted to "'the exercise of a right or privilege having its source in state authority,'" thereby satisfying the first prong of the state actor test enunciated by the Supreme Court in *Lugar*. *Id.* (quoting *Lugar*, 457 U.S. at 939). Nonetheless, the dissenting judge maintained that the second prong of the *Lugar* test, requiring the party charged with the deprivation to be one who may fairly be said to be a "state actor," was not satisfied due to the Supreme Court's decision in *Polk County v. Dodson*, wherein the Court held that a public defender was not a state actor. *Id.* at 1315-16 (Gee, J., dissenting) (citing 454 U.S. 312, 317 (1981)).

[24] Edmonson v. Leesville Concrete Co., 895 F.2d 218, 226 (5th Cir. 1990) (en banc).

[25] *Id.* at 219. Judge Gee, now writing the majority opinion of the en banc court, distinguished the instant case from the situation in *Batson*, wherein the peremptory challenges at issue were clearly the product of state action. *Id.* (citing Batson v. Kentucky, 476 U.S. 79 (1986)).

[26] *Id.*

Fifth Circuit's interpretation of the intended scope of *Batson* and to resolve a division amongst the federal courts of appeals on the issue of racially-based peremptory challenges in the civil context.[27]

II. THE ROAD TO *EDMONSON*: CURBING THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES

Two centuries ago, William Blackstone referred to peremptory strikes as "an arbitrary and capricious species of challenge."[28] Recognizing that a party may be unable to articulate a sufficient reason to remove a juror for cause, Blackstone favored the peremptory challenge as a legitimate means of ensuring that a case be tried to a jury composed of individuals whose "bare looks and gestures" have not resulted in "unaccountable prejudices" on behalf of either of the principals to a lawsuit.[29] Blackstone's faith in the utility of the peremptory challenge crossed the Atlantic, as the challenge became a fixture of the American legal system. Indeed, the peremptory challenge was integrated into the American common law by the time Congress was debating the proposed Sixth Amendment in 1789.[30] Moreover, the traditional rule providing twenty defense challenges in trials involving

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[27] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2081 (1991) (citing Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281 (7th Cir. 1990) (holding that *Batson* prohibits the use of peremptory challenges by a private litigant in a civil case on racial grounds); (Dias v. Sky Chefs, Inc., 919 F.2d 1370 (9th Cir. 1990) (holding that an employer lacked standing to raise claim based on opposing party's use of peremptory challenges to remove three males from the jury panel, with a resulting all-female jury); United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990) (The government has standing to assert constitutional rights of excluded venirepersons in a criminal case.), *reh'g en banc ordered*, 930 F.2d 695 (9th Cir. 1991); Reynolds v. Little Rock, 893 F.2d 1004 (8th Cir. 1990) (*Batson* analysis held to be applicable in a civil suit); Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989) (Once a black citizen in a civil case demonstrated membership in a recognized racial group and introduced evidence raising an inference that opposing counsel had utilized peremptory strikes to exclude members of that group from the venire, the burden to articulate a race-neutral explanation for the challenges shifts to the opposing party.)).

[28] WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 353 (D. Berkowitz & S. Thorne eds., 1978).

[29] *Id.*

[30] Douglas L. Colbert, *Challenging The Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORN. L. REV. 1, 10 (1990). The contemplated language contained in an initial draft of the Sixth Amendment included a reference to "the right of challenge and other accustomed requisites." *Id.* (citing THE GAZETTE OF THE U.S., Aug. 29, 1789, at 158).

capital crimes was recognized by Congress in 1790.[31] Seventy-five years later, with the passage of the Thirteenth Amendment,[32] the peremptory challenge privilege was expanded to allow its invocation by the prosecutor in federal criminal trials.[33]

Since its adoption, the peremptory challenge has been historically accorded great deference by the United States Supreme Court.[34] In fact, the Supreme Court has recently held that the Sixth Amendment right to an impartial jury[35] is not affected by the discriminatory use of peremptory strikes.[36] Although the traditional view has been that "[n]o reason or 'cause' need be stated for [exercising a peremptory] challenge,"[37] recent commentators have criticized the peremptory challenge system on the ground that racism and sexism may often be the underlying basis for such strikes.[38] Indeed, even Justice Marshall has

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[31] *Id.* at 10-11.

[32] The Thirteenth Amendment to the United States Constitution provides, in pertinent part, that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

[33] Colbert, *supra* note 30, at 11. Congress provided 5 prosecution and 20 defense peremptory challenges in capital and treason cases, and 2 prosecution and 10 defense challenges in noncapital felony cases. *Id.* at 11 n.38 (citing Act of Mar. 3, 1865, ch. 86, § 2(v), 13 Stat. 500).

[34] *See* Robert L. Harris, Jr., Note, *Redefining The Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1032 n.29 (1991) ("'The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused .... Any system for the empaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned.'") (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)). *See also id.* at 1032 ("'Experience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge. The Public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him.'") (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

[35] For the full text of the Sixth Amendment, see *infra* note 42.

[36] *See* Holland v. Illinois, 493 U.S. 474, 480-81 (1990) (holding that the Sixth Amendment guarantees only an impartial jury, not a petit jury that actually mirrors the proportional representation of the various identifiable groups in a particular forum). For a further consideration of the *Holland* case, see *infra* notes 62-69 and accompanying text.

[37] BLACK'S LAW DICTIONARY 209 (5th ed. 1979).

[38] *See* Jere W. Morehead, *Prohibiting Race-Based Peremptory Challenges: Should the Principle of Equal Protection Be Extended to Private Litigants?*, 65 TUL. L. REV. 833 (1991); S. Alexandria Jo, Comment, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 PAC. L.J. 1305 (1991); Clara L. Meek, Note, *The Use of Peremptory Challenges to Exclude Blacks from Petit Juries in Civil*

contended that the inherent tension between the concept of peremptory challenges and the right to be free from discrimination is so great as to justify the wholesale eradication of peremptories.[39] Although not willing to go quite that far, the United States Supreme Court has entertained a series of attacks on a variety of discriminatory methods of jury selection grounded on two separate constitutional principles: (1) the right to an impartial jury guaranteed by the Sixth Amendment,[40] and (2) the Equal Protection Clause of the Fourteenth Amendment.[41]

A. THE SIXTH AMENDMENT ATTACK ON JURY DISCRIMINATION

The United States Supreme Court first expounded upon the relationship between jury service and a criminal defendant's Sixth Amendment right to a jury trial[42] in the 1975 case of *Taylor v.*

Actions: The Case for Striking Peremptory Strikes, 4 REV. LITIG. 1751 (1985). *But see*, Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 554 (1975) (praising the peremptory challenge system because it "allows the covert expression of what we dare not say but know is true more often than not," thus avoiding the societal division that would ensue if the reasons for such strikes had to be enunciated), *quoted in* Batson v. Kentucky, 476 U.S. 121 (1986) (Burger, C.J., dissenting).

[39] *See* Batson v. Kentucky, 476 U.S. 79, 107-08 (1986) (Marshall, J., concurring). For a further discussion of *Batson*, see *infra* notes 85-100 and accompanying text.

[40] *See, e.g.,* Taylor v. Louisiana, 419 U.S. 522, 531 (1975) (holding that a male criminal defendant had standing to assert a Sixth Amendment objection to the exclusion of women from his jury despite the fact that he was not a member of the excluded class, the *Taylor* Court asserted that the fundamental Sixth Amendment guarantee that a petit jury be drawn from a representative cross section of the community is violated by the systematic exclusion of women from the jury pool). For an elaborate discussion of Sixth Amendment challenges to discriminatory jury selection, see *infra* notes 43-69 and accompanying text. For the full text of the Sixth Amendment to the United States Constitution, see *infra* note 42.

[41] *See* Strauder v. West Virginia, 100 U.S. 303 (1880) (holding that the equal protection rights of a black defendant in a criminal trial were violated by a West Virginia statute precluding blacks from jury service). For a detailed treatment of the equal protection challenges, see *infra* notes 70-111 and accompanying text.

[42] The Sixth Amendment to the United States Constitution provides in full:

> 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 the Assistance of Counsel for his

Louisiana.[43] In *Taylor,* Billy J. Taylor was convicted of aggravated kidnapping by a petit jury selected from an all male venire due to Louisiana's systematic exclusion of women from jury service.[44] Taylor challenged his conviction, alleging that the state's juror selection scheme denied him his Sixth Amendment right to an impartial jury.[45] Writing for the Court, Justice White[46] postulated that implicit in the Sixth Amendment guarantee of a trial by an impartial jury is the right to have the jury composed of members drawn from "a fair cross section of the community."[47] In reversing the petitioner's conviction, the Supreme

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defence.

U.S. CONST. amend. VI.

[43] 419 U.S. 522 (1975). For a more detailed discussion of the *Taylor* case, see Note, *Peremptory Challenges And The Meaning Of Jury Representation,* 89 YALE L.J. 1177 (1980).

[44] *Taylor,* 419 U.S. at 523. At the time Taylor was tried, the Louisiana juror selection scheme was based on section 41 of the Louisiana Constitution and article 402 of the Louisiana Code of Criminal Procedure. *Id.* (citing LA. CONST. art. VII, § 41, *repealed and replaced by* LA. CONST. art. V, § 33; LA. CODE CRIM. PROC. ANN. art. 402 (West 1991)). Although section 402 technically permitted women to be selected for jury service provided that written notice of desire to serve was filed with the clerk of the court in the parish where that woman resided, both authorities effectively disallowed women from serving as jurors. *Id.* nn.1 & 2.

[45] *Id.* at 525.

[46] Taylor v. Louisiana, 419 U.S. 522, 523 (1975). Justice White was joined by Justices Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell. *Id.* Chief Justice Burger concurred without opinion. *Id.* at 538. Justice Rehnquist dissented from the Court's holding. *Id.*

[47] *Id.* at 529. Justice White further maintained that Congress, in passing the Federal Jury Selection and Service Act of 1968, intended that all parties in the federal courts afforded a jury trial have the right to a jury drawn from "a fair cross section of the community" where the particular court in question is located. *Id.* (citing 28 U.S.C. § 1861 (West Supp. 1992)). *See* Peters v. Kiff, 407 U.S. 493, 500 (1972) (plurality opinion) (Justice Marshall, joined by Justices Douglas and Stewart, opined that the Sixth Amendment establishes a criminal defendant's right to a jury reflective of a typical cross section of the population.); Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972) (plurality opinion) ("[A] jury will come to . . . a [common sense] judgement as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate . . . on the question of a defendant's guilt."); Williams v. Florida, 399 U.S. 78, 100 (1970) (positing that the number of jurypersons should "be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community"); Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970) (observing that the exclusion of blacks from jury service "contravenes the very idea of a jury—'a body truly representative of the community' . . . . ") (quoting *Smith v. Texas,* 311 U.S. at 130);

Court noted, however, that while it is not permissible to exclude women as a class from venires, criminal defendants are not entitled to have juries which actually mirror the racial, ethnic, or gender makeup of their particular community.[48]

Four years later, the Court expanded the *Taylor* holding to invalidate constitutional and statutory provisions which provided women an elective exemption from jury service upon request.[49] In *Duren v. Missouri*,[50] Billy Duren was convicted of first-degree murder and first-degree robbery despite both pre-trial and post-conviction motions claiming that the Missouri law granting women an exemption from jury service upon request[51] violated his right to a jury selected from a fair cross section of his community.[52] Again authoring the majority opinion, Justice

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Brown v. Allen, 344 U.S. 443, 474 (1953) ("[The Court's] duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty."); Ballard v. United States, 329 U.S. 187, 195-96 (1946) (reversing a federal conviction obtained from a jury drawn from a panel which excluded women); Glasser v. United States, 315 U.S. 60, 86 (1942) (holding the purposeful exclusion of women from jury panels to be violative of the fair cross section component of the Sixth Amendment); Smith v. Texas, 311 U.S. 128, 130 (1940) ("[I]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.").

[48] Taylor v. Louisiana, 419 U.S. 522, 537-38 (1975). In dissent, Justice Rehnquist categorically rejected the majority's thesis that implicit in the Sixth Amendment right to a jury trial is the fair-cross-section requirement. *Id.* at 539. Justice Rehnquist expostulated that due process and equal protection principles do not require a jury to be drawn from a fair-cross-section of the community, rather the jury must be selected pursuant to a system that is not likely to "result in biased or partial juries." *Id.*

[49] Duren v. Missouri, 439 U.S. 357 (1979). For a further discussion of the *Duren* decision, see Joseph A. Colussi, *The Unconstitutionality Of Death Qualifying A Jury Prior To The Determination Of Guilt: The Fair-Cross-Section Requirement In Capital Cases*, 15 CREIGHTON L. REV. 595, 605 (1982).

[50] 439 U.S. at 357.

[51] Article 1, section 22(b) of the Missouri Constitution provided in pertinent part: "No citizen shall be disqualified from jury service because of sex, but the Court shall excuse any woman who requests an exemption therefrom before being sworn as a juror." MO. CONST. Art. 1. § 22(b). Moreover, the applicable state statute provided that women were to be automatically exempted from jury duty during the jury selection process if they requested such an exemption. MO. REV. STAT. § 494.031(2) (Supp. 1978).

[52] *Duren*, 439 U.S. at 360.

White[53] articulated a three-prong test which a defendant must meet in order to establish a "prima facie violation of the Sixth Amendment's fair-cross-section requirement."[54] In reversing the petitioner's conviction, the Supreme Court concluded that the Missouri exemption procedure operated as an unconstitutional means of systematically excluding women from jury service.[55]

A decade later, the case of *Teague v. Lane*[56] presented the Supreme Court with an opportunity to address the applicability of the Sixth Amendment's requirement of a "fair cross section" to petit juries.[57] In *Teague*, an all white jury convicted Frank Teague, a black male, of attempted murder after the prosecutor used all ten of his peremptory challenges to remove black venirepersons.[58] Contesting the constitutionality of his conviction, the defendant claimed that such use of peremptory challenges violated his Sixth Amendment right to a jury trial.[59] Summarily dismissing the defendant's claim, a plurality of the Court adjudicated it "not ripe for review."[60] Accordingly, the Supreme

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[53] *Duren*, 439 U.S. at 359. Justice White was joined by Chief Justice Burger as well as Justices Brennan, Stewart, Marshall, Blackmun, Powell and Stevens. *Id.* Justice Rehnquist filed a dissenting opinion. *Id.* at 370.

[54] *Id.* According to Justice White, prong one of the test requires a showing that the excluded group is sufficiently numerous and distinct so that a procedural exclusion will result in a Sixth Amendment violation. *Id.* The second prong of Justice White's test requires statistical evidence of the percentage of the community population comprised of members of the excluded group—the statistical evidence will be used to approximate the required venire representation of the group for fair cross section analysis. *Id.* at 364-65. The third requirement is that the defendant show that the alleged under-representation is due to the group being systematically excluded from the jury selection process." *Id.* at 366.

[55] *Id.* at 367. Again in dissent, Justice Rehnquist chastised the majority, accusing the Court of developing a hybrid doctrine due to its willingness to employ Sixth Amendment fair-cross-section analysis in order to achieve its objective of safeguarding the equal protection rights of women rather than out of any concern with the criminal defendant's right to be tried by an impartial jury. *Id.* at 370-71 n.*

[56] 489 U.S. 288 (1989) (plurality opinion). For a more detailed discussion of *Teague*, see Robert J. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1040 (1991).

[57] *Teague*, 489 U.S. at 292.

[58] *Id.* at 292-93.

[59] *Id.* at 293.

[60] *Id.* at 292. Justice O'Connor, writing for the Court, maintained that Teague could not assert the rule of *Batson v. Kentucky* due to the fact that recent precedent barred retroactive application of the *Batson* rule to cases on collateral review, and Teague's conviction became final two and one half years before the rule announced in *Batson* was

Court denied the defendant's request to have his conviction reversed.[61]

Most Recently, the United States Supreme Court chose the case of *Holland v. Illinois*[62] as a vehicle to expound upon the applicability of the Sixth Amendment to the selection process of the petit jury in criminal prosecutions.[63] In *Holland*, the Supreme Court was presented with a white defendant's claim that the prosecutor's use of peremptory challenges to exclude all of the black venirepersons from the jury panel deprived him of his Sixth Amendment right to a fair cross section.[64] While conceding that the petitioner had standing to assert a Sixth

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announced. *Id.* at 295 (citing Allen v. Hardy, 478 U.S. 255 (1986) (holding that equal protection analysis of alleged racial discrimination in jury selection as articulated in Batson v. Kentucky, 476 U.S. 79 (1986), would not be applied retroactively to cases on collateral review if those cases concerned convictions finalized prior to the Court's decision in *Batson*; the *Allen* Court defined "finalized convictions" as those occurring in a case decided prior to the decision in *Batson*, where the availability of appeal had been exhausted and the time for petition for certiorari had already elapsed)). Moreover, the Court declined to apply the *Batson* rule retroactively to those cases, including *Teague*, which had been on direct review at the time the Court refused to grant certiorari to McCray v. New York, 461 U.S. 961 (1983) (cert. denied) (holding that the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case") (quoting United States v. Carver, 260 U.S. 482, 490 (1923)).

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, further postulated that Teague's fair cross section claim was not ripe for review because a decision in his favor would be a new rule which the Court had previously declared ineligible for retroactive application to cases on collateral review. *Teague*, 489 U.S. at 299-316. Moreover, Justice O'Connor's plurality opinion adopted Justice Harlan's view in *Mackey v. United States* that new rules of criminal procedure—i.e., an extension of the rule announced in *Taylor* from jury venires to petit juries—should not be applied to cases on collateral review. *Teague*, 489 U.S. at 301 (citing 401 U.S. 667 (1971)).

In *Mackey*, Justice Harlan suggested that a new rule of criminal procedure should be applied retroactively only in cases where: (1) the rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or (2) if the rule requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Mackey*, 401 U.S. at 692-93 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[61] Teague v. Lane, 489 U.S. 288, 317 (1989) (plurality opinion).

[62] 493 U.S. 474 (1990). For an in depth analysis of the *Holland* decision, see Alice Biederbender, Note, Holland v. Illinois: *A Sixth Amendment Attack on the Use of Discriminatory Peremptory Challenges*, 40 CATH. U. L. REV. 651 (1991).

[63] *Holland*, 493 U.S. at 478.

[64] *Id.* at 477-78. Daniel Holland was convicted in Circuit Court of Cook County, Illinois, with aggravated kidnapping, rape, deviate sexual assault, and armed robbery. *Id.* at 476.

Amendment claim,[65] Justice Scalia, writing for a sharply divided Court,[66] declined to reverse Holland's conviction.[67] The majority posited that the Sixth Amendment fair cross section requirement is meant to focus only on the selection of *venire members,* thereby rendering the requirement inapplicable to the selection of the *petit jury.*[68] Justice Scalia further averred that because Holland presented a Sixth Amendment claim, and not a claim grounded in the Fourteenth Amendment's Equal Protection Clause, the issue of state-sanctioned discrimination against either the defendant or the excluded jurors was not properly before the Court.[69]

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[65] *Id.* at 476-77. Acknowledging that Holland would lack standing to assert an equal protection claim under a *Batson* analysis due to the lack of common race between Holland and the excluded venire members, the Court nonetheless stressed:

> We have never suggested, however, that such a requirement of correlation between the group identification of the defendant and the group identification of excluded venire members is necessary for Sixth Amendment standing. To the contrary, our cases hold that the Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs.

Id. at 477 (citing Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975)).

[66] Writing for a 5 to 4 Court, Justice Scalia was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy. *Id.* at 475. Justice Marshall authored a dissent in which he was joined by Justices Brennan and Blackmun. *Id.* at 490. Justice Stevens authored a separate dissent. *Id.* at 504.

[67] *Id.* at 478. The Court refused to accept the petitioner's contention that the Sixth Amendment prohibits the prosecution from utilizing peremptory challenges to remove venirepersons belonging to identifiable groups for tactical reasons. *Id.*

[68] *Id.* at 480-81 (emphasis added). Justice Scalia bolstered the Court's position by positing that the Sixth Amendment demands an impartial jury; an end furthered by the selection of a venire composed of a fair cross section of the community. *Id.* Moreover, the Justice maintained that the fair cross section requirement is not designed to achieve a representative petit jury because a representative petit jury does not necessarily equate to an *impartial* petit jury, and it is only the latter which is constitutionally required. *Id.* (emphasis added).

[69] *Id.* at 487-88. Justice Scalia proffered that the Sixth Amendment posture of the case foreclosed any opportunity for the Court to examine the issue of discriminatory use of peremptory challenges, as the Sixth Amendment is concerned solely with the impartiality of the jury ultimately empaneled. *Id.*

B. The Equal Protection Attack on Discrimination in the Jury System

Eleven years after the adoption of the Fourteenth Amendment in 1868,[70] the Supreme Court first applied the Equal Protection Clause to the area of jury selection in *Strauder v. West Virginia*.[71] In *Strauder*, Taylor Strauder, a black man convicted of murder, challenged the constitutionality of a West Virginia statute that limited jury participation to white males.[72] Invoking the Equal Protection Clause of the Fourteenth Amendment,[73] Justice Strong, writing for the Court,[74] held that the statutory exclusion of Blacks from the defendant's trial was unconstitutional in that the Fourteenth Amendment was designed to provide relief from such overt discrimination based on race.[75] Reversing the defendant's conviction, the Court further stressed that implicit in relief from discrimination is the existence of "rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property."[76] Significantly, once established, this constitutional principle was steadily applied by the

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[70] In pertinent part, the Fourteenth Amendment to the United States Constitution provides:

> 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 due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[71] 100 U.S. 303 (1879).

[72] *Id.* at 305. At trial, no blacks were empaneled on the jury pursuant to a West Virginia statute which read in relevant part: "All *white male persons* who are twenty one years of age and who are citizens of this State shall be liable to serve as jurors . . . as herein provided." *Id.* at 305 (quoting 1872-1873 W. Va. Acts 102) (emphasis added).

[73] For the pertinent text of the Equal Protection Clause of the Fourteenth Amendment, see *supra* note 70.

[74] Justice Strong authored the majority opinion for a 7 to 2 Court. *Strauder*, 100 U.S. at 304. Justices Clifford and Field dissented from the Court's opinion. *Id.* at 312 (Clifford, J., dissenting).

[75] *Id.* at 310.

[76] *Id.*

Court in ensuing cases.[77]

Eighty-five years later in *Swain v. Alabama*,[78] the Supreme Court was faced with an appeal by a black man who was convicted of rape by an all-white jury in Talladega County, Alabama.[79] Despite recognizing a criminal defendant's equal protection right to be free from a state's intentional refusal to permit Blacks to serve as jurors, the *Swain* Court demanded a showing by the defendant that the prosecution had employed peremptory challenges in a systematically discriminatory manner over a *series* of cases before a constitutional violation would lie.[80] Writing for the majority, Justice White[81] refused to apply the equal protection analysis proffered by the Court in *Strauder* to the prosecutor's exercise of peremptory challenges because to do so "would entail a radical change in the nature and operation of the challenge."[82] Upholding the defendant's conviction, Justice White further posited that applying the equal protection analysis to the state's use of peremptory

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[77] *See, e.g.*, *Ex parte* Virginia, 100 U.S. 339, 343 (1880) (relying on equal protection grounds to uphold a statute under which a state court judge was convicted for the federal crime of prohibiting Blacks from sitting on jury venires or petit juries); Neal v. Delaware, 103 U.S. 370, 397 (1880) (holding a state's purposeful exclusion of Blacks from either grand or petit jury service violates black defendant's equal protection rights); Martin v. Texas, 200 U.S. 316, 320-21 (1906) (a defendant has an equal protection right not to have those who share his or her race barred from jury service on the basis of race); Norris v. Alabama, 294 U.S. 587, 599 (1935) (the Equal Protection Clause guarantees a criminal defendant that a state, through its legislature, courts, or executive branch of government cannot purposely exclude Blacks from grand or petit jury service); Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946) (prospective jurors shall be designated without organized and purposeful expulsion of distinct "economic, social, religious, racial, political, and geographical groups of the community"); Cassell v. Texas, 339 U.S. 282, 287 (1950) (plurality opinion) ("An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race.").

[78] 380 U.S. 202 (1965). For an in depth discussion of the *Swain* decision, see F.R.D., Comment, Swain v. Alabama: *A Constitutional Blueprint For The Perpetuation Of The All-White Jury*, 52 VA. L. REV. 1157 (1966).

[79] *Swain*, 380 U.S. at 203-05. Statistics indicated that while there had been Blacks included on jury venires in Talladega County, they had been entirely excluded from serving on petit juries during the 15 years preceding 1965. *Id.* at 205.

[80] *Id.* at 223-24. In an effort to protect the peremptory challenge as a trial tool, the *Swain* Court insulated the prosecutor's use of peremptory challenges in any given case by granting a presumption that "the removal of Negroes from a particular jury . . . [is the result of] the prosecutor . . . acting on acceptable considerations related to the case he is trying . . . ." *Id.* at 223.

[81] *Id.* at 203.

[82] *Id.* at 221-22.

challenges would destroy the peremptory nature of the tool, which would in turn foster the inappropriate result of subjecting the prosecutor's motives to inspection for plausibility and ingenuousness.[83]

In the years following *Swain*, the Supreme Court reverted to applying the principle first announced in *Strauder*—that the Equal Protection Clause prohibits a state actor from discriminatorily excluding people from jury venires on the basis of race.[84] Indeed, it was not until the

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[83] *Id.* at 222. In a telling dissent, Justice Goldberg argued that the majority had seriously undermined the rule first articulated by the *Strauder* Court regarding racial discrimination in jury selection as violative of the Equal Protection Clause. *Id.* at 231 (Goldberg, J., dissenting). The dissent emphasized that Alabama did not even deny banning Blacks from jury service; rather, the state sought to vindicate this practice by arguing that any discrimination was the result of the deeply rooted system of peremptory challenges in this country. *Id.* at 233 (Goldberg, J., dissenting). Justice Goldberg then severely chastised the majority for:

> recognizing that no Negro has ever served on any petit jury in Talladega County, that the method of venire selection was inadequate, that the prosecutor in this case used the peremptory challenge system to exclude all Negroes as a class, and that the systematic misuse by the State of a peremptory challenge system to exclude all Negroes from all juries is prohibited by the Fourteenth Amendment, [and then upholding Swain's conviction because he had failed to nullify the unlikely prospect that] the total exclusion of Negroes from jury service in all other cases was produced solely by the action of defense attorneys.

Id. at 233-34 (Goldberg, J., dissenting).

[84] *See, e.g.*, Turner v. Fouche, 396 U.S. 346, 359-61 (1970) (exclusion of 171 Blacks out of 178 total citizens disqualified from grand jury service for lack of "intelligence" or "uprightness" constitutes a prima facie case of racial discrimination which the state has the burden to overcome); Alexander v. Louisiana, 405 U.S. 625, 632 (1972) (shifting the burden to the state to adequately explain the racial exclusion in the selection of a grand jury upon a showing of a prima facie case of invidious discrimination by the defendant); Washington v. Davis, 426 U.S. 229, 239-42 (1976) (A black defendant may make out a prima facie case of unconstitutional racial discrimination in venire selection by introducing evidence of the totality of the germane circumstances; such evidence will in turn give rise to an inference of discriminatory purpose); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-68 (1977) (holding a consistent pattern of official racial discrimination not to be a prerequisite for finding that the Equal Protection Clause has been offended); Castaneda v. Partida, 430 U.S. 482, 495-96 (1977) (statistical evidence indicating the Mexican-American population within a county to be 79.1% and yet over an eleven year period only 39% of persons summoned for grand jury service were Mexican-Americans held to be sufficient to constitute a prima facie case of discrimination which would shift the burden of producing race neutral explanation for disparity to state).

high Court decided the seminal case of *Batson v. Kentucky*,[85] that it recognized the logical inconsistency between the holdings in *Strauder* and its progeny and *Swain*'s accommodation of a prosecutor's use of the peremptory challenge.[86] *Batson* involved a black man convicted by an all-white jury in Kentucky state court of second-degree burglary and receipt of stolen goods.[87] During jury selection, the prosecutor had used his peremptory challenges to remove all of the Blacks from the jury venire.[88] On appeal to the United States Supreme Court, the defendant argued that the prosecutor's conduct violated his right under the "fair cross section of the community" component of the Sixth Amendment guarantee to an impartial jury.[89] Conversely, the respondent, the State of Kentucky, asserted that the defendant was actually claiming a denial of equal protection, thus urging a reconsideration of *Swain*.[90] Adopting the state's characterization of the issue presented, the *Batson* Court declined comment on the defendant's Sixth Amendment claim.[91] Announcing the opinion of the Court,[92] Justice Powell postulated that the same equal protection principles that govern instances of discrimination in the selection of the jury venire are to be applied to the prosecutor's use of peremptory strikes to remove individuals from the

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[85] 476 U.S. 79 (1986). For a sustained analysis of the *Batson* decision, see John J. Hoeffner, Note, *Defendant's Discriminatory Use Of The Peremptory Challenge After* Batson v. Kentucky, 62 ST. JOHN'S L. REV. 46-53 (1987).

[86] *Batson*, 476 U.S. at 87-96. *See generally* 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, 164 (1989) (noting that the *Swain* ruling eviscerated prior court rulings concerning the Equal Protection Clause and jury service; *Swain* guaranteed minorities only the right to reach the jury venire free of government bias before the prosecutor was able to remove them for reasons of bigotry and prejudice if he or she so desired).

[87] *Batson*, 476 U.S. at 82.

[88] *Id.* at 82-83.

[89] *Id.* at 84 n.4. *See supra* note 47 and accompanying text (discussing the derivation of the "fair cross section" component of the Sixth Amendment).

[90] *Batson*, 476 U.S. at 84 n.4. It seems clear that the defendant asserted his claim under the Sixth Amendment's fair cross section requirement in an effort to avoid forcing the Court to expressly reconsider the Swain decision. In contradistinction, the State of Kentucky argued that Batson was asserting an equal protection claim which, to be successful, would require the Court to expressly overrule *Swain*. *Id.* at 84 n.4.

[91] *Id.* at 84.

[92] Justice Powell's majority opinion was joined by Justices Brennan, White, Marshall, Blackmun, Stevens, and O'Connor. *Id.* at 81. Chief Justice Burger dissented from the Court's holding. *Id.* at 112. Justice Rehnquist filed a separate dissenting opinion. *Id.* at 134.

petit jury.[93]

Furthermore, Justice Powell explicitly overruled the portion of the *Swain* decision that saddled defendants with "a crippling burden of proof" and resulted in the "prosecutor's peremptory challenges [becoming] largely immune from constitutional scrutiny."[94] Emphasizing that the Court had previously, in post-*Swain* cases, delineated the applicable standards for establishing a prima facie case of discrimination in venire selection, the *Batson* Court extended this reasoning to the selection of the petit jury.[95] As a result, the Court reversed Batson's conviction and remanded the case for consideration of whether there was sufficient evidence of a discriminatory purpose in the prosecutor's use of peremptory challenges.[96]

Maintaining that criminal defendants may employ evidence relating to prosecutorial peremptory strikes occurring at their own trials in order to make out a prima facie showing of willful bigotry in the assembly of the petit jury, the majority in *Batson* developed a three-prong test that a defendant must satisfy in order to validate such a showing.[97] As an initial matter, criminal defendants "must show that [they are] member[s] of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant[s'] race."[98] Second, "defendant[s are] entitled to rely on the

[93] *Id.* at 89.

[94] *Id.* at 92-93. The *Swain* Court had granted prosecutors exercising peremptory challenges a presumption that the challenges were employed for the purpose of achieving a "fair and impartial jury." *See* Swain v. Alabama, 380 U.S. 202, 222 (1965). In order to rebut this presumption, according to the *Swain* Court, the defendant was required to offer evidence sufficient to establish a prima facie case of systematic discrimination through the prosecutor's use of peremptory challenges; however, the defendant was precluded from introducing evidence of prosecutorial discrimination occurring in his own case because it was insulated from examination by the presumption. *Swain*, 380 U.S. at 223-24. Instead, the defendant was required to demonstrate a pattern of discrimination by the prosecutor in cases previous to his own. *See id.* Furthermore, under *Swain*, the defendant who offered evidence indicating that no black venireperson had ever served on a petit jury in the forum in question was held to have failed to meet his or her burden of production unless this showing was coupled with evidence that demonstrated that the prosecutor alone was responsible for challenging those black people who had been on venires in the forum in the past. *Id.* at 224-25.

[95] Batson v. Kentucky, 476 U.S. 79, 96 (1986) (citing Castaneda v. Partida, 430 U.S. 482, 494-95 (1977); Washington v. Davis, 426 U.S. 229, 241-42 (1976); Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972)).

[96] *Id.* at 100.

[97] *See id.* at 96-97.

[98] *Id.* at 96 (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[99] The final prong of the test requires that defendants demonstrate "that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venire[persons] from the petit jury on account of their race."[100]

Five years later, the Supreme Court refined the *Batson* standard in *Powers v. Ohio.*[101] The *Powers* case involved a white defendant convicted of murder, aggravated murder, and attempted murder in Franklin County, Ohio.[102] On appeal, the defendant, invoking the Sixth Amendment's fair cross section provision as well as the Equal Protection Clause of the Fourteenth Amendment, objected to the prosecutor's use of peremptory challenges to remove seven Blacks from the venire.[103]

Reversing the defendant's conviction, Justice Kennedy delivered the opinion of the Court,[104] declaring that racial identity between the protesting defendant and the stricken member of the venire is not a requirement for an equal protection challenge under the rule articulated

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[99] *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

[100] *Id.* Justice Powell explained that "[t]his combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination." *Id.*

[101] 111 S. Ct. 1364 (1991). For an in depth analysis of the *Powers* case, see Patrick A. Tuite, *Supreme Court Takes* Batson *Principles One Step Further*, 137 CHI. DAILEY L.B. 3 (1991).

[102] *Powers*, 111 S. Ct. at 1366.

[103] *Id.* During voir dire, each time the Franklin County prosecutor employed his peremptory strikes to eliminate a black juror, Powers objected on the basis that the Supreme Court's holding in *Batson* required a race-neutral explanation before the trial judge dismissed the juror. *Id.* The trial judge overruled each of Powers' objections. *Id.* On appeal, Powers maintained that the lack of a common race between himself and the excluded jurors was immaterial to the issue of his standing to object to the prosecutor's peremptory challenges. *Id.* Nonetheless, the Ohio Court of Appeals affirmed Powers' conviction and the Supreme Court of Ohio refused to hear the case, holding that it lacked a considerable constitutional issue. *Id.* at 1366-67.

[104] *Id.* at 1366. Justice Kennedy delivered the opinion of the Court in which Justices White, Marshall, Blackmun, Stevens, O'Connor and Souter joined. *Id.* at 1365. Justice Scalia filed a dissenting opinion which was joined by Chief Justice Rehnquist. *Id.* at 1374.

in *Batson*.[105] The majority rebuffed as inimical to prevailing equal protection precepts the argument that peremptory challenges based on race are valid because whites as well as members of other racial groups are subject to like treatment.[106]

Next, emphasizing that a litigant is generally foreclosed from asserting the legal rights of others, the *Powers* Court explained why a criminal defendant has third party standing to raise a claim grounded in the rights of an excluded venireperson.[107] In light of the defendant's keen interest in avoiding the harms of a prosecutor's use of discriminatory peremptory challenges at trial, coupled with the

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[105] *Id.* at 1368 (citing Batson v. Kentucky, 476 U.S. 79, 86 (1986)). Justice Kennedy observed that *Batson* comprehended that a state's employment of peremptory challenges in a discriminatory manner harms the excluded juror as well as the general public. *Id.* (citing Batson, 476 U.S. at 87). The Court announced that the discriminatory implementation of prosecutorial peremptory strikes harms those excluded by denying them a profound occasion to take part in civic life. *Id.* (citing *Batson*, 476 U.S. at 87). In addition, the majority recognized that discrimination in jury selection has been unlawful under federal law for 117 years. *Id.* at 1369 (citing 18 U.S.C. § 243 (West 1969)). Indeed, according to the federal law,

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

18 U.S.C. § 243 (West 1969).

[106] Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991) (citing Plessy v. Ferguson, 163 U.S. 537 (1896)). *Plessy* espoused the theory, explicitly rejected by the Court in Loving v. Virginia, 388 U.S. 1, 87 (1967), that racial classification are constitutionally valid so long as equally applied to all races. *Plessy*, 163 U.S. at 543. *See also* Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (reversing the infamous "separate but equal" doctrine first articulated in *Plessy*).

[107] *Powers*, 111 S. Ct. at 1370 (citing United States Dept. of Labor v. Triplett, 494 U.S. 715, 720 (1990) (holding that enforcement of a restriction against a party to a lawsuit resulting in a third party being prohibited from entering into a relationship, otherwise unencumbered, gives rise to the injured third party having standing to challenge the restriction); Singleton v. Wulff, 428 U.S. 106, 117 (1976) (holding that a physician had third party standing to challenge a state statute prohibiting abortions which are not medically necessary, as defined by the purposes for which Medicaid benefits are distributed).

See also E. Vaughn Dunnigan, *Discrimination by The Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 366 (1988) (arguing that prosecutors should be granted third party standing to assert the equal protection rights of jurors peremptorily challenged by defense counsel).

remoteness of the possibility that an excluded juror would bother to pursue the matter of his or her removal further, Justice Kennedy found that the requisite elements of third party standing were satisfied on the facts of *Powers*.[108] Thus, the *Powers* Court held that a criminal defendant may properly assert the equal protection claims of venirepersons excluded by the prosecutor's discriminatory use of peremptory challenges.[109] In conclusion, the majority pronounced that to deny a criminal defendant third party standing to propound such a claim would be "to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service."[110]

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[108] *Powers*, 111 S. Ct. at 1370-73. Justice Kennedy first posited that the discriminatory use of peremptory challenges by the prosecutor causes the criminal defendant cognizable harm, thus conferring a "sufficiently concrete interest" in the resolution of the conflict upon the defendant. *Id.* at 1370 (quoting Singleton v. Wulff, 428 U.S. 106, 112 (1976)). Second, the Justice noted that the relationship between the defendant and the removed venire member is such that the defendant is likely to be as equally proficient as the excluded venireperson with regard to protecting the latter's rights. *Id.* at 1372. The Court then bolstered its position by maintaining that the defendant, because he or she has so much riding on the outcome of the trial, is clearly motivated to assert the common interest shared with the excluded venireperson, a court proceeding free from racial discrimination. *Id.* Finally, the majority declared that third party standing is properly extended to criminal defendants due to the unlikelihood that excluded jurors will be sufficiently motivated "to assert their own rights." *Id.* at 1372 (citing *Singleton*, 428 U.S. at 115-16).

[109] *Id.* at 1373.

[110] *Id.* Dissenting, Justice Scalia declared that the majority's holding contradicted Supreme Court precedent in the areas of Equal Protection and third party standing. *Id.* at 1374. Justice Scalia further maintained that it is the criminal *defendant's* equal protection rights that are violated when venirepersons of the *defendant's* race are excluded from the jury, not the excluded venirepersons rights. *Id.* at 1375. Moreover, Justice Scalia opined that the defendant lacks standing to object to the exclusion because the defendant suffers no injury in fact. *Id.* at 1379.

Most recently, the Supreme Court has decided the case of Georgia v. McCollum, 112 S. Ct. 2348 (1992). In *McCollum*, a criminal indictment was handed down against two white men, charging them with beating Jerry and Myra Collins, a black couple. *Id.* at 2351. Before jury selection began, defense counsel made it known that it would be employing peremptory strikes in a discriminatory manner, arguing that the defendant's case would best be served by excluding Blacks from the jury. *Id.* The state prosecutor countered by citing the fact that 43% of the county's population was comprised of black citizens and a statistically representative jury panel would include 18 black jurors out of the 42 total venirepersons. *Id.* With its 20 peremptory challenges, the state explained that the defense would be able to accomplish its goal and remove all black citizens from the jury. *Id.* The trial judge denied the state's motion requesting that the defense state a racially neutral explanation for its peremptory challenges. *Id.* at 2352. The Georgia Supreme Court affirmed the trial court's ruling. *Id.* Writing for a majority consisting of Justices White, Stevens, Kennedy, and Souter, Justice Blackmun declared that the

It was amidst this expanding interpretation of the Equal Protection Clause in the criminal vignette that the Supreme Court decided *Edmonson v. Leesville Concrete Co.*[111]

III. RESTRICTING RACE-BASED CHALLENGES IN THE CIVIL CONTEXT: *EDMONSON v. LEESVILLE CONCRETE CO.*

Justice Kennedy, writing for a six Justice majority,[112] held that the use of race-based peremptory challenges in a civil trial to exclude potential jurors during voir dire violates the equal protection rights of the challenged jurors.[113] The Court began by reviewing the applicability of the equal protection analysis of voir dire proceedings in the criminal context, focusing specifically on the use of race-based peremptory challenges by government officials.[114] The majority noted that a criminal defendant may object to a prosecutor's race-based

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state had third-party standing to assert the Equal Protection rights of venirepersons who have been struck by the defense counsel in a criminal trial. *Id.* at 2357. Chief Justice Rehnquist filed a concurring opinion in which he noted that, although wrongly decided, *Edmonson* controlled the disposition of the state action question presented by *McCollum*. *Id.* at 2359 (Rehnquist, CJ., concurring). Justice Thomas, concurring in the judgment, wrote separately to register his disappointment with the Court's continued willingness to use the Constitution to regulate peremptory challenges. *Id.* (Thomas, J., concurring). In a scant dissent, Justice Scalia criticized the Court's expansion of *Edmonson*—in his view, a *wrongly* decided case. *Id.* at 2364-65 (Scalia, J., dissenting). Also dissenting, Justice O'Connor opined that the majority's holding in *McCollum* was a "perverse" result premised on the Court's "remarkable conclusion" that a criminal defendant being *prosecuted by the state* acts on behalf of the state when exercising peremptory challenges. *Id.* at 2361 (O'Connor, J., dissenting).

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

[112] *Id.* at 2080. Justice Kennedy was joined by Justices White, Blackmun, Marshall, Stevens and Souter. *Id.* at 2080. Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined. *Id.* at 2089. Justice Scalia filed a separate dissent. *Id.* at 2095.

[113] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2080 (1991).

[114] *Id.* at 2081 (citing Powers v. Ohio, 111 S. Ct. 1364 (1991) (a criminal defendant may invoke the Equal Protection Clause to object to race-based exclusions of jurors through peremptory challenges regardless of whether or not the defendant and the excluded jurors are of the same race); Batson v. Kentucky, 476 U.S. 79 (1986) (a state's deliberate racial discrimination in selection of a jury panel is violative of the defendant's equal protection rights under the Fourteenth Amendment because the discrimination amounts to a denial of the protection safeguarded by a jury trial); Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970) (holding that there is no jurisdictional or procedural bar to an attack on systematic jury discrimination by way of a civil suit)).

exclusion of potential jurors without regard to the defendant's race.[115] In reaching the conclusion that peremptory challenges based on race implicated equal protection concerns in the civil context, as well as in the criminal sphere, Justice Kennedy emphasized that "discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial."[116] Moreover, the Court explained that, although *Edmonson* presented a case of first impression in the civil context, prior Court decisions in the criminal setting have not suggested "that race discrimination is permissible in civil proceedings."[117]

After recognizing that the use of race-based peremptory challenges by a government actor violates the equal protection rights of the excluded venireperson, Justice Kennedy then invoked well established rules of third party standing to hold that a party to a lawsuit may assert the excluded juror's equal protection claim.[118] Relying on the Court's recent decision in *Powers v. Ohio*,[119] which granted a *criminal* defendant third party standing to assert the equal protection claims of excluded venirepersons,[120] the *Edmonson* Court concluded that a private litigant in a civil trial must be afforded the same right.[121]

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[115] *Id.* (citing *Powers*, 111 S. Ct. at 1370). Indeed in *Powers*, the Supreme Court concluded that a prosecutor's racially motivated peremptory challenges violate the equal protection rights of those excluded from jury service. *Powers*, 111 S. Ct. at 1370. The *Powers* Court further held that a criminal defendant has third-party standing to raise the equal protection rights of the excluded venireperson. *Id.* at 1370-73.

[116] *Edmonson*, 111 S. Ct. at 2082 (citing Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946) (the systematic exclusion of daily wage earners from jury lists violates the American tradition—applicable to both civil and criminal jury trials—of an impartial jury drawn from a cross-section of the community)).

[117] *Id.* (citing *Thiel*, 328 U.S. at 220-21).

[118] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2087-88 (1991). Noting that generally a litigant is restricted to asserting their own rights, the Court nonetheless emphasized the existence of exceptions to this rule. *Id.* at 2087 (citing Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991)). Justice Kennedy then reaffirmed the notion that: (1) a litigant is empowered to assert a claim on behalf of a third party upon a showing that a concrete, redressable injury has been suffered by said litigant; (2) a close relationship exists between the litigant and the third party; and (3) the third party is hindered from protecting his or her own interest. *Id.*

[119] 111 S. Ct. at 1364. For a further discussion of *Powers*, see *supra* notes 101-110 and accompanying text.

[120] Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991).

[121] *Edmonson*, 111 S. Ct. at 2087-88 (citation omitted). Justice Kennedy averred that the civil litigant stands in a position analogous to that of the criminal defendant for purposes of asserting the equal protection rights of excluded venirepersons, and

Justice Kennedy then bolstered the Court's logical extension of *Powers* by emphasizing the attendant difficulties and resulting unlikelihood of an excluded juror bringing suit on their own behalf, stating: "'[t]he barriers to a suit by an excluded juror are daunting.'"[122]

Next addressing the issue of state action, the *Edmonson* Court acknowledged that Constitutional protection in the areas of individual liberty and equal protection generally apply only to government action.[123] Moreover, the majority maintained that racial discrimination is violative of the Constitution only in situations where the discriminatory conduct is attributable to some action taken by the state.[124] Accordingly, Justice Kennedy posited that the legality of the exclusion at issue in *Edmonson* necessarily turned on the question of whether a private litigant in a civil case can fairly be said to act with governmental authority when exercising peremptory challenges, thus becoming subject to Constitutional constraints.[125]

Justice Kennedy began his analysis of the state action issue by quickly dismissing any contention that peremptory challenges do not have their genesis in state authority.[126] Moreover, explaining that peremptory challenges exist only because the government provides for them through statute or judge made law,[127] the Court determined the source of the

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therefore must be given the same rights. *Id.* at 2087.

[122] *Id.* at 2087 (quoting *Powers*, 111 S. Ct. at 1373).

[123] *Edmonson*, 111 S. Ct. at 2082 (citing National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (holding that a state university's action in disciplining one of its basketball coaches according to N.C.A.A. rules did not constitute state action because the N.C.A.A. lacked the power to discipline the coach directly and the state university had not delegated its disciplinary power to the association).

[124] *Id.* at 2082 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) (holding that a Pennsylvania liquor board regulation requiring that licensees adhere to its bylaws placed sanctions behind discriminatory practices of licensees sufficient to constitute state action)).

[125] *Id.* at 2082-83. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 941-42 (1982) (In considering the question of state action under a due process challenge to a state's procedural scheme enabling private parties to obtain prejudgment attachments, the Court announced the applicable analytical paradigm for determining state actor status: first, "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority," and second, "whether the private party charged with the deprivation could be described in all fairness as a state actor.").

[126] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2082-83 (1991) (citation omitted).

[127] *Id.* (citing Batson v. Kentucky, 476 U.S. 79, 98-99 (1986) (there is no constitutional obligation to allow peremptory challenges); Ross v. Oklahoma, 487 U.S. 81, 88 (1988) (peremptory challenges are not a constitutional right, but rather only a method employed

alleged discriminatory act at issue in *Edmonson* to be state authority.[128] Significantly, the Court further noted that without the assistance of Congress—through its development of the system of peremptory challenges—Leesville would have been foreclosed from engaging in the alleged discriminatory acts at issue.[129]

The *Edmonson* Court then proceeded to address the second requirement of state action; namely, whether the statutory scheme enabling a private litigant to employ peremptory challenges resulted in the assumption of state actor status by the private litigant.[130] The Court reaffirmed its position that the applicable analytical paradigm necessary to determine whether a particular action may be deemed governmental in nature consists of three prongs.[131] First, the Court must analyze the "extent to which the actor" relies on government assistance and benefits in engaging in the challenged conduct.[132] Second, the Court must determine whether the act performed can be characterized as a traditional government function.[133] Third, the Court

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to achieve an impartial jury); Stilson v. United States, 250 U.S. 583, 586 (1919) (there is nothing in the Constitution requiring the granting of peremptory challenges to criminal defendants; trial by an impartial jury is the constitutional guarantee and the system of peremptory challenges is merely a means of safeguarding that right)).

[128] *Edmonson*, 111 S. Ct. at 2083. The challenges at issue in *Edmonson* were exercised pursuant to a federal statute which provides in pertinent part: "In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges and permit them to be exercised separately or jointly." *Id.* (quoting 28 U.S.C. § 1870 (West Supp. 1992)).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* (citing Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478 (1988) (holding that private use of state-sanctioned procedures fails to satisfy the standard for state action necessary to implicate the Due Process Clause of the Fourteenth Amendment absent the overt, significant assistance of state officials)); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (finding state action under equal protection analysis in the case of a private restaurant operated in a building leased from a state agency; factors weighing in favor of such a finding included the fact that the restaurant was operated in a building erected by the agency in the performance of a governmental function, and that the restaurant was an integral part of the state's operational design for the building)).

[133] *Id.* (citing Terry v. Adams, 345 U.S. 461 (1953) (ascribing state actor status to a private political association with regard to the holding of a private primary election; evidence clearly demonstrated collusion between county electoral officials and the association resulting in the avoidance of state law regulating primary elections and the *de facto* disenfranchisement of black voters with regard to county elections); Marsh v.

must inquire whether the resulting injury is exacerbated in a unique way by the exercise of governmental authority.[134]

Applying the aforementioned principles to the facts of *Edmonson*, the majority concluded that Leesville's use of peremptory challenges occurred pursuant to a course of state action.[135] Moreover, Justice Kennedy posited that the system of peremptory challenges could not function absent the obvious and substantial aid of the government, stressing that "peremptory challenges have no utility outside the jury system, a system which the government alone administers."[136] The Court further recognized that trial judges are vested with significant authority over the process of voir dire in the federal system.[137] Significantly, Justice Kennedy proclaimed that the "party who exercises

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Alabama, 326 U.S. 501 (1946) (company-owned town deemed to be state actor for first amendment purposes because the town, while privately owned, was indistinguishable from any other municipality); San Francisco Arts and Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987) (United States Olympic Committee held not to be a government actor in its capacity as coordinator of amateur sports in America because such coordination has not traditionally been a function of the federal government)).

[134] *Id.* (citing Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that judicial enforcement of racially-discriminatory private restrictive covenants constitutes state action, thereby implicating the Equal Protection Clause)).

[135] *Id.* at 2084 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (citing Sniadach v. Family Finance Corp, 395 U.S. 337, 338-39 (1969) (finding state action where private party utilizes a state developed remedy in conjunction with the manifest and meaningful assistance of state officials))).

[136] *Id.*

[137] *Id.* (citing Fed. R. Civ. P. 47(a)). Justice Kennedy explained that trial judges at the federal level are responsible for defining the parameters regarding the range of data which may be discovered about the individual members of the jury pool, thereby affecting both peremptories and also challenges for cause. *Id.* The Justice further noted trial judges preside over the process of voir dire and inform prospective jurors that they have been excused when a lawyer exercises a peremptory challenge. *Id.* Accordingly, Justice Kennedy concluded that peremptories are performed pursuant to a course of state action due the undeniably active involvement of trial judges. *Id.*

Rule 47(a) of the Federal Rules of Civil Procedure provides:

> The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

FED. R. CIV. P. 47(a).

a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the 'final and practical denial' of the excluded individual's opportunity to serve on the petit jury."[138]

Justice Kennedy then addressed the final requirement of state action; specifically, the issue of peremptory challenges in the context of their relationship to a traditional function of the government.[139] The majority summarily rejected any challenge to the notion that a traditional function of the government is invoked by the exercise of peremptories.[140] In dismissing the respondent's reliance on *Polk County v. Dodson*,[141] Justice Kennedy opined that in the civil litigation context, unless the government is involved as a party to the suit, an adversarial relationship as between the government and a private litigant is lacking.[142] Accordingly, due to the fact that the private litigant and the government work in tandem respecting jury selection, the Court explained that a private entity may fairly be deemed a state actor with respect to the narrow scope of using peremptory challenges during voir dire.[143] Justice Kennedy further noted that the resulting harm done to potential jurors wrongfully excluded by a private litigant ultimately occurs due to the government's delegation of its authority in conjunction with the actual assistance of the trial judge in the peremptory challenge

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[138] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2085 (1991) (quoting Virginia v. Rives, 100 U.S. 313, 322 (1880)).

[139] *Id.*

[140] *Id.*

[141] 454 U.S. 312 (1981) (holding public defenders not to be state actors in their general representation of criminal defendants due to the adversarial nature of their relationship with the state). For a detailed analysis of the *Polk County* decision see Jay Michael Barber, Note, Polk County v. Dodson: *The Supreme Court Formulates A New Test*, 34 Mercer L.R. 1147-1171 (1983). Justice Kennedy emphasized, however, that the *Polk County* Court had opined that in some instances a public defender may fairly be deemed a state actor with respect to the performance of specific official duties. *Edmonson*, 111 S. Ct. at 2086 (citing *Polk County*, 454 U.S. at 325).

[142] *Edmonson*, 111 S. Ct. at 2086.

[143] *Id.* ("The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race."). Justice Kennedy proceeded to analogize the facts presented in *Edmonson* to those of the case of a private physician contracting to attend to the medical needs of inmates in a state prison: "the functions of the [p]hysicians employment . . . [c]ontrol whether his actions can fairly be attributed to the state." *Id.* (quoting West v. Atkins, 487 U.S. 42, 55-56 (1988)).

process.[144]

The *Edmonson* majority analogized the present case to the factual situation presented in *West v. Atkins*,[145] wherein the Supreme Court found a private physician under contract to attend to the medical needs of state prisoners to be a state actor within the scope of his employment functions.[146] Noting the absence of a contractual relationship in *Edmonson*, Justice Kennedy nonetheless found the delegation of governmental authority to a physician in *West* and an attorney in *Edmonson* sufficiently analogous to attribute the actions of both to the state.[147]

Lastly, the *Edmonson* Court recognized that the harm done by discrimination is amplified when the government allows it to occur within a courthouse.[148] Justice Kennedy posited that racial bias within the courthouse draws into question the integrity of the entire judicial system, as well as the impartiality of the proceedings therein.[149]

Holding that the use of race-based peremptory challenges by a private litigant in a civil case violates the equal protection rights of the challenged jurors, the Supreme Court reversed the decision of the court of appeals.[150]

B. JUSTICE O'CONNOR'S CALL TO RECOGNIZE PRIVATE ACTION

In a scathing dissent, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia,[151] criticized the majority's willingness to

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[144] *Id.* at 2087.

[145] 487 U.S. 42 (1988).

[146] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2086 (1991) (citing *West v. Atkins*, 487 U.S. at 55-56).

[147] *Id.* at 2086-87.

[148] *Edmonson*, 111 S. Ct. at 2087.

[149] *Id.* (citing Rose v. Mitchell, 443 U.S. 545, 556 (1979) (racial discrimination in the selection of a grand jury is a valid ground for setting aside an otherwise proper conviction); Smith v. Texas, 311 U.S. 128, 130 (1940) (holding that racial discrimination in the selection of grand jury members violates not only the Constitution, but also the fundamental values upon which American society is based)).

[150] *Id.* at 2080. Furthermore, the Court remanded the case for a determination of whether a prima facie case of racial discrimination had been presented by the facts in *Edmonson*. *Id.* at 2088-89.

[151] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2089 (1991) (O'Connor, J., dissenting).

attribute state action status to a matter more appropriately characterized as one of private choice.[152] The dissent recognized the desirability of removing racial discrimination from the courtroom, but insisted that extra-constitutional means are the more appropriate vehicle for accomplishing this laudable goal.[153]

Initially, Justice O'Connor noted the accuracy of the majority's definition of "peremptory challenge,"[154] but averred that the Court's characterization of peremptories as constituting state action was misplaced.[155] The dissent found especially troubling the Court's willingness to find state action absent a showing that the government had coerced or otherwise significantly encouraged the use of a peremptory challenge by a private party.[156]

Addressing the challenged conduct, Justice O'Connor began by asserting that the "significantly encourage" prong of the test for state action is not satisfied in *Edmonson* due to the trial judge's impartiality.[157] The dissenting Justice posited that a jurist's role with respect to peremptory challenges is one of acquiescence to the will of the litigant.[158] The dissent further found the "coercion" prong of the test

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[152] *Id.*

[153] *Id.*

[154] *Id.* Like the majority, the dissenting Justice explained that peremptory challenges enable litigants to strike a set number of otherwise qualified venirepersons from service on a petit jury. *Id.*

[155] *Id.* The dissent maintained that peremptory challenges were developed to be used by private litigants in furtherance of that party's best interest. *Id.* Therefore, the Justice concluded that "[t]he peremptory is, by design, an enclave of private action in a government-managed proceeding." *Id.* at 2090 (O'Connor, J., dissenting).

[156] *Id.* (citing Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (holding that the decisions of nursing homes to discharge Medicaid patients do not involve state action because governmental compliance in the initiatives of a private actor fails to meet the standard required to hold the government responsible for those initiatives under the Fourteenth Amendment)). Justice O'Connor maintained that the government should incur responsibility for the actions of non-governmental parties only in circumstances where the government has exerted coercion or supplied greater than minimal encouragement in order to influence the choice in question. *Id.* (citing *Blum*, 457 U.S. at 1004).

[157] *Id.*

[158] *Id.* Justice O'Connor further indicated that there are in fact jurisdictions in which voir dire and jury selection take place in the absence of any court personnel when such an arrangement is agreed to by the parties. *Id.* (citing Haith v. United States, 231 F. Supp. 495 (E.D. Penn. 1964) (holding that neither due process nor the federal rules of criminal procedure requires the presence of the trial judge during voir dire in a criminal proceeding); State v. Eberhardt, 282 N.E.2d 62 (Ohio 1972) (The absence of trial judge during jury selection in a criminal case pursuant to the consent of all counsel and the

was not satisfied in *Edmonson*.[159] Justice O'Connor expostulated that enforcement of peremptory challenges does not compel discrimination, since the decision to discriminate is solely a matter of private choice.[160] Moreover, the Justice was of the opinion that judicial acquiescence falls short of transforming what is essentially a private decision into state action.[161]

The dissent next declared that the majority had erred in concluding that peremptory challenges constitute a function traditionally performed by the government.[162] Although initially conceding that the establishment of juror qualifications was a traditional government function, Justice O'Connor went on to distinguish the *private* use of peremptory strikes.[163] Because such strikes are not aimed at selecting a qualified jury, but rather are geared toward eliminating otherwise qualified jurors as a matter of courtesy to the private party exercising the challenge, the dissenting Justice concluded that no traditional governmental function is implicated.[164] Moreover, the dissent

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defendant did not violate the Due Process Clause. It is not the absence of the trial judge during voir dire that violates due process, rather it is the occurrence of a prejudicial incident during such absence that constitutes error)).

[159] *Id.* at 2090-91 (O'Connor, J., dissenting). Justice O'Connor distinguished *Edmonson* from Shelley v. Kraemer, 334 U.S. 1, 13-14 (1948), wherein the Court found the "coercion" prong satisfied when the power of the state was invoked by private litigants in order to enforce racially restrictive covenants against sellers of realty who did not wish to discriminate. The dissenting Justice drew the line of distinction between the factual situations presented by *Edmonson* and *Shelley* on the grounds that the private litigant in *Edmonson* had not invoked the court's power to enforce a facially discriminatory act, but rather a challenge which is exercised without a reason stated. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2090-91 (1991) (O'Connor, J., dissenting). Justice O'Connor posited that, in contradistinction to the situation in *Shelley*, a judge who, without inquiring as to the litigant's motive, merely informs a venireperson that they have been excused has neither significantly encouraged discrimination nor employed coercion to effectuate discrimination. *Id.* at 2091 (O'Connor, J., dissenting).

[160] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2091 (O'Connor, J., dissenting) (citing Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 819 (1989) (citing *Blum*, 457 U.S. at 1004-05)). *See also supra* note 156.

[161] *Edmonson*, 111 S. Ct. at 2091 (O'Connor, J., dissenting). *See also supra* note 155.

[162] *Edmonson*, 111 S. Ct. at 2092 (O'Connor, J., dissenting).

[163] *Id.*

[164] *Id.* The dissent maintained that the practice of peremptory challenges predates the founding of the United States. *Id.* Accordingly, Justice O'Connor stated that the "tradition" is not one attributable to the government, but rather to private choice. *Id.*

proffered that the majority had misstated the law when citing *Terry v. Adams*[165] and *Marsh v. Alabama*[166] for the proposition that state actor status is fairly applied to anyone performing a duty traditionally performed by the government.[167] Justice O'Connor maintained that the public-function doctrine demands that the private actor not only perform a function traditionally performed by the government, but also that such function has been *exclusively* performed by the government.[168]

The dissent further found the majority's reliance on *West v. Atkins*[169] to be misplaced, explaining that the doctor in West was hired by the state in order to fulfill the state's constitutional obligation to provide its prisoners medical care, not merely to perform an important job.[170] Justice O'Connor concluded that *West* is inapposite to the area of peremptory challenges exercised by private litigants.[171] Moreover, the dissent proffered that the use of a peremptory challenge by a private litigant not only fails to rise to the level of an important government function, but also fails to qualify as a function of the government at all.[172]

Justice O'Connor then declared that the Court's decision in *Polk*

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at 2093 (O'Connor, J., dissenting).

[165] 345 U.S. 461 (1953) (holding that private control over primary election that controlled outcome of county general election rendered private action attributable to the state).

[166] 326 U.S. 501 (1946) (holding a privately owned town to be the functional equivalent of a municipality and, therefore, a state actor for First Amendment analysis).

[167] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2093 (1991) (O'Connor, J., dissenting). Justice O'Connor opined that the majority had neglected to consider the exclusivity component of the public function doctrine when analyzing peremptory challenges in *Edmonson*. *Id.*

[168] *Id.* at 2092 (O'Connor, J., dissenting) (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157-60 (1978) (a warehouseman's proposed sale of goods that had been entrusted to him for storage pursuant to the New York Uniform Commercial Code held not to be state action because, while the code permitted the warehouseman's decision to sell the goods, it in no way compelled the decision)).

[169] 487 U.S. 42 (1988) (private physician hired by the state to treat prison inmates held to be a state actor with respect to his treatment of the patients).

[170] *Edmonson*, 111 S. Ct. at 2093 (O'Connor, J., dissenting). Justice O'Connor accused the majority of extrapolating a rule from this case whereby one who performs an important function inside the government is thereby a state actor, regardless of their lack of status as a government employee. *Id.*

[171] *Id.*

[172] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2093-94 (1991) (O'Connor, J., dissenting).

County v. Dodson[173] was controlling.[174] Recognizing the analogous relationship between the government and the attorneys in both *Edmonson* and *Polk County*,[175] the dissent sought to indict the majority's logic as specious by proffering that "a lawyer, when representing a private client, cannot at the same time represent the government."[176] In the dissent's view, the Court's willingness to find state action in *Edmonson* turns the state action doctrine "upside down".[177]

Lastly, the dissent criticized the majority's conclusion that the exercise of a peremptory challenge is state action simply because it occurs in a court of law.[178] Drawing on the rationale behind the Court's decision in *Polk County*, Justice O'Connor asserted that the actions of a lawyer, even if motivated solely by racial prejudice, cannot be imputed to the government simply because such actions occur in a courtroom.[179] Although recognizing that racial discrimination is irrational and evil, the dissent felt constitutionally bound to deny relief on the ground that the Fifth Amendment's Due Process Clause does not prohibit racial discrimination by *private* individuals, regardless of the location of that private discrimination.[180]

C. JUSTICE SCALIA EXPLORES EDMONSON'S RAMIFICATIONS

Justice Scalia, agreeing with Justice O'Connor in principle, wrote

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[173] 454 U.S. 312 (1981).

[174] Edmonson, 111 S. Ct. at 2094 (O'Connor, J., dissenting). The *Polk County* Court held that a public defender, although employed by the state, does not become a state actor for the purpose of constitutional analysis due to the adversarial relationship which results between the public defender and the government vis a vis the criminal trial process. *Polk County*, 454 U.S. at 318-19.

[175] *Edmonson*, 111 S. Ct. at 2094 (O'Connor, J., dissenting) (both *Edmonson* and *Polk County* involved situations in which attorneys advanced the interests of clients who had no obvious connection with the state).

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

[177] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2094 (1991) (O'Connor, J., dissenting).

[178] *Id.* at 2095 (O'Connor, J., dissenting); *see supra* notes 155-64.

[179] *Edmonson*, 111 S. Ct. at 2094 (O'Connor, J., dissenting).

[180] *Id.*

separately in order to focus on the consequences of the Court's decision.[181] Justice Scalia stressed that, at least in the criminal context, the Court's decision represented a net loss for minority litigants.[182] According to the Justice, because the majority's rationale in *Edmonson* must logically be applied to criminal prosecutions, a minority criminal defendant will no longer be able to exercise peremptory challenges to prevent an all-white jury.[183] Conceding that the negative results for minority litigants are not as pronounced in the civil context, Justice Scalia nonetheless concluded that *Edmonson* does not represent an absolute gain for minorities.[184] To this, Justice Scalia noted that although peremptory challenges are not universally employed as a device to prevent racially diverse juries, they are a means of assuring racial diversity on a jury panel.[185]

IV. CONCLUSION

In *Edmonson v. Leesville Concrete Co.*, the United States Supreme Court extended the prohibition against the use of race-based peremptory challenges first announced in the criminal context in *Batson* to the civil sphere. The Court's decision is clearly laudable from a policy perspective and, at first glance, would appear to be logically consistent with the long line of cases in which the Court has labored to rid the jury selection process of the taint of racism. A thorough examination of the majority's opinion, however, reveals that a blurring of the line between private and state action was necessary, if not inevitable, for the Court to achieve its desired policy goal.

The Court's willingness to stretch in order to find state action in a *private* litigant's use of the peremptory challenge, while implicating the

[181] *Id.* at 2095 (Scalia, J., dissenting). Justice Scalia opined that the Court's decision would ultimately do a disservice to minority defendants in criminal prosecutions. *Id.* Justice Scalia noted that the Court's holding in *Batson*, prohibiting the prosecution from using race-based peremptory strikes must, after *Edmonson*, be applied to prohibit minority criminal defendants from using peremptory challenges in order to avoid an all-white jury. *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

Constitutional protection afforded by the Equal Protection Clause,[186] has far reaching consequences as to the future viability of the peremptory challenge as a trial tool. Furthermore, the residue of the majority's result-oriented opinion leaves courts and practitioners alike pondering just where the line lies demarcating tangential government involvement with otherwise private conduct. In other words, exactly what type and how much government involvement is sufficient to transform such conduct into state action?[187]

Although Justice Kennedy accurately identified the source of peremptory challenges in state authority,[188] thereby satisfying the first requirement for state action, the Court's analysis of the second requirement for state action seems flawed. The second prong of the state action test announced in *Lugar v. Edmondson Oil Co.*,[189] requires performance by some person who can be "fairly" depicted as a state actor.[190] Justice Kennedy found that the private litigant may satisfy this requirement when exercising a peremptory challenge because the judge advises the jurors that they have been excused.[191] To entertain the notion that this *de minimis*, perfunctory action by the judge is "government sponsored assistance" of the degree necessary for a finding of state action undoubtedly ignores the Court's decision in *Blum v. Yaretsky*.[192] The *Blum* Court explicitly found state action lacking when the government merely complied with the initiatives of a private actor, absent coercive conduct or at the least, greater than minimal encouragement directed towards the private actor on the government's part.[193] It is obvious that the trial judge is not in a position to coerce or even encourage a private litigant's use of peremptory strikes due to

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[186] U.S. CONST. amend. V. *See supra* note 13 (discussing how the Fourteenth Amendment's Equal Protection Clause was held applicable to the federal government through the due process component of the Fifth Amendment).

[187] *See* Bruce Fein, *A Court of Mediocrities*, 77 A.B.A. J. 74, 78 (Oct. 1991) (discussing the *Edmonson* case and criticizing Justice Kennedy's opinion for its lack of clarity regarding what is and is not to be considered state action).

[188] *See* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2082-83 (1991).

[189] 457 U.S. 922, 939-42 (1982) (holding that in order for state action to be found, a two part test must be satisfied: (1) the harm must be the result of the private litigant exercising some liberty or entitlement created by the state; and (2) the participant incriminated must be a person who may "fairly" be characterized as a state actor).

[190] *See id.* at 937.

[191] *Edmonson*, 111 S. Ct. at 2085.

[192] 457 U.S. 991 (1982).

[193] *Id.* at 1004.

the fact that by their very nature peremptory challenges are employed without a reason stated to the judge, and exercised "without being subject to the court's control."[194]

Moreover, it is illogical to deem a private litigant a state actor for the limited purpose of exercising peremptory challenges when established precedent requires a showing of "the overt, significant assistance of state officials" before any such status is conferred.[195] Although one could argue, as Justice Kennedy did, that the entire jury selection process—including the peremptory challenge system—could not exist without government participation, thereby making it "fair" to deem the private litigant a state actor for the purpose of exercising peremptory challenges,[196] this reasoning ignores the fact that the private litigant has no other recourse but to rely on the methods of jury selection which the government has promulgated.

Logically extending the fallacious reasoning articulated by the majority in *Edmonson*, all civil litigants must be deemed state actors regarding not just the use of peremptory challenges, but all actions which take place during the course of a trial due to the fact that, without the significant assistance of the government, the American judicial system could not function. Indeed it would seem that drivers of motor vehicles would be deemed state actors for the limited purpose of driving a car merely because they drive with the significant assistance of the government, which has promulgated the statutory scheme which allows those qualified to be issued licenses. The state action test articulated by Justice Kennedy is arguably satisfied in such a hypothetical. The driving privilege certainly has its source in state authority, as the privilege exists only because the government provides for it through statutory law.[197] Drivers are further assisted in exercising their state sponsored privilege by the system of roads and highways built for this purpose; clearly the availability of such roads encourages citizens to drive. The act of driving would seem to fail the second prong of the state actor test employed by Justice Kennedy,[198] since it is hard to characterize it as "a traditional

[194] Swain v. Alabama, 380 U.S. 202, 220 (1965).

[195] Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478, 486 (1988). *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (finding state action on evidence indicating *collusion* between county electoral officials and a private political association regarding the holding of private primary elections which resulted in the *de facto* disenfranchisement of black voters in county elections).

[196] *See* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2084 (1991).

[197] *See, e.g.*, N.J. STAT. ANN. § 39:3-10 (West 1990 & Supp. 1992).

[198] *See Edmonson*, 111 S. Ct. at 2083.

government function." But, is it not equally difficult to, as the *Edmonson* Court readily does, characterize as a traditional government function the striking of a prospective juror by a private litigant in order to tactically advance one's chance of winning a civil case? Finally, assuming the driver of the car injures another on a federal highway, the injury sustained is exacerbated by the exercise of governmental authority. The harm done by our hypothetical driver ultimately occurs due to the governmental delegation to private individuals of the right to operate a motor vehicle pursuant to statutory licensing procedures in conjunction with the governmental development of the federal highway system.

A preposterous example? Perhaps, but the fact remains that the Court's decision in *Edmonson* fails to articulate a principled means for distinguishing the above example from the case of a private litigant exercising a peremptory challenge pursuant to a statutory scheme that allows each party to a lawsuit three challenges to use "without a reason stated."[199]

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[199] According to federal law, "[i]n civil cases, each party shall be entitled to three peremptory challenges." 28 U.S.C. § 1870 (West 1966 & Supp. 1992).