Boston College Law Review

Volume 33
Issue 5 *Number 5*

Article 4

9-1-1992

Extending Batson v. Kentucky to the Criminal Defendant's Use of the Peremptory Challenge: The Demise of the Challenge without Cause

Sharon Leigh Nelles

Follow this and additional works at: http://lawdigitalcommons.bc.edu/bclr

Part of the Criminal Law Commons

Recommended Citation

Sharon Leigh Nelles, *Extending Batson v. Kentucky to the Criminal Defendant's Use of the Peremptory Challenge: The Demise of the Challenge without Cause*, 33 B.C.L. Rev. 1081 (1992), http://lawdigitalcommons.bc.edu/bclr/vol33/iss5/4

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.

EXTENDING *BATSON V. KENTUCKY* TO THE CRIMINAL DEFENDANT'S USE OF PEREMPTORY CHALLENGES: THE DEMISE OF THE CHALLENGE WITHOUT CAUSE

> [*I*]*n criminal cases, or at least in capital ones, there is,* in favorem vitae, *allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a* peremptory *challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.*[1]
>
> —William Blackstone

The peremptory challenge is a procedural device allowing each party in a civil or criminal proceeding to remove a certain number of prospective jurors without explanation and regardless of the jurors' qualifications for service.[2] Historically, the peremptory challenge was used to ensure that criminal defendants, confronting the loss of liberty, and perhaps life, had every opportunity to be tried before a jury with which they felt comfortable.[3] As the above epigraph indicates, such legal theorists as Blackstone have recognized the peremptory's ability to provide the assurance of fairness to criminal defendants facing serious charges.[4]

The Fifth and Fourteenth Amendments to the United States Constitution state that no person shall be deprived of life, liberty or property without due process of law.[5] The United States Supreme Court has long acknowledged the peremptory challenge as one of the most effective means of ensuring fair trials.[6] For this reason, courts have traditionally left the privilege of peremptory challenges free from judicial control.[7] When courts have imposed restrictions, these restrictions have been minimal.[8] The Supreme Court, recog-

---

[1] 4 WILLIAM BLACKSTONE, COMMENTARIES *353.

[2] *See* Robert M. O'Connell, Note, *The Elimination of Racism from Jury Selection: Challenging the Peremptory Challenge*, 32 B.C. L. REV. 433, 436 (1991).

[3] *See* Lewis v. United States, 146 U.S. 370, 376 (1892) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *353).

[4] 4 WILLIAM BLACKSTONE, COMMENTARIES *353.

[5] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

[6] Swain v. Alabama, 380 U.S. 202, 219 (1965); Hayes v. Missouri, 120 U.S. 68, 70 (1887).

[7] *Swain*, 380 U.S. at 220 (citing Lewis v. United States, 146 U.S. 370, 378 (1892); State v. Thompson, 206 P.2d 1037, 1039 (1949)).

[8] *See Swain*, 380 U.S. at 223–24 (challenges on racial basis prohibited only when exercised systematically).

nizing that the peremptory challenge is one of the most important rights afforded to the accused, has condemned as unjust any system of empaneling a jury that restricts the defendant's use of peremptory challenges.[9]

The Supreme Court has also, however, condemned any jury empanelment system that permits racially discriminatory selection procedures.[10] In 1880, the Supreme Court held in *Strauder v. West Virginia* that the State violates an African-American defendant's equal protection rights by trying the defendant before a jury from which members of the defendant's race have been excluded.[11] Over a century later, in the 1986 decision of *Batson v. Kentucky*, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from using peremptory challenges to keep racial minorities from serving as jurors.[12] The *Batson* Court declined to comment on the scope of the decision.[13] As a result, the Court's ruling created a tension between equal protection limits placed on discriminatory challenges and the criminal defendant's right to use peremptory strikes.[14]

---

[9] Pointer v. United States, 151 U.S. 396, 408–09 (1894).

[10] *See* Batson v. Kentucky, 476 U.S. 79, 79 (1986).

[11] 100 U.S. 303, 309–10 (1880).

[12] *Batson*, 476 U.S. at 89 (1986).

[13] *Id.* at 89 n.12. In addition to criminal defendants, *Batson* left open the status of the discriminatory use of peremptory challenges by civil litigants and the viability of Sixth Amendment challenges. The Supreme Court held in Holland v. Illinois, 493 U.S. 474 (1990), that the Sixth Amendment was inapplicable to peremptory challenges. *Id.* at 478. See *infra* notes 155–73 and accompanying text for a discussion of the *Holland* decision. After *Batson*, a number of federal courts considered the application of the *Batson* rule to civil litigants. These cases include Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1314 (5th Cir. 1988), *rev'd en banc*, 895 F.2d 218, 219 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2077, 2080 (1991); Wilson v. Cross, 845 F.2d 163, 164–65 (8th Cir. 1988); Maloney v. Washington, 690 F. Supp. 687, 689 (N.D. Ill. 1988), *order vacated sub nom.* Maloney v. Plunkett, 854 F.2d 152, 153 (7th Cir. 1988); Clark v. City of Bridgeport, 645 F. Supp. 890, 895 (D. Conn. 1986); Esposito v. Buonome, 642 F. Supp. 760, 761 (D. Conn. 1985). For a further discussion of these cases, see O'Connell, *supra* note 2, at 446–51. For a discussion and listing of state cases see Timothy Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 TEX. TECH. L. REV. 921 (1988).

A number of state courts have interpreted their constitutions to find a right to a fair trial for the state, and as such have applied the *Batson* rule, if not reasoning, to defense counsel. *See* 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, 823–24, 842 n.95 (1989). See *infra* notes 356–403 and accompanying text for a complete discussion of state treatment of defendant strikes.

[14] *See Batson*, 476 U.S. at 125–26 (Burger, C.J., dissenting)(if prosecutor strikes can be limited, defendant strikes can be limited). For purposes of this note, the terms peremptory challenge and peremptory strike will be used interchangeably.

In response, lower courts differed in their application and interpretation of the decision.[15] Many courts applied *Batson* only in limited circumstances.[16] Generally, the *Batson* doctrine was applied when the defendant was a member of a cognizable racial group and could show that the prosecutor was excluding other members of the same racial group from the jury by means of peremptory challenges.[17]

Although many lower courts read *Batson* narrowly, during 1991 the Supreme Court actively broadened the *Batson* rule prohibiting racially discriminatory challenges.[18] First, in *Powers v. Ohio,* the Court ruled that criminal defendants may object to race-based peremptory exclusions whether or not the defendant is the same race as the removed juror.[19] Then, in *Edmonson v. Leesville Concrete Co.,* the Court extended standing to assert a *Batson* claim to civil litigants.[20] As a result of the expansion of *Batson,* only the criminal defendant retained power to use the peremptory strike as originally conceived.[21] These two United States Supreme Court decisions, however, placed the viability of the criminal defendant's discriminatory use of peremptory challenges in doubt.[22]

On November 4, 1991, the Court certified *Georgia v. McCollum* for review.[23] *McCollum* presented an opportunity for the Justices to

---

[15] O'Connell, *supra* note 2, at 434 n.11.

[16] *See supra* note 137.

[17] Powers v. Ohio, 111 S. Ct. 1364, 1375 (1991). This narrow interpretation is justified in light of Justice White's characterization of *Batson* as a remedy for a specific ill:

> I agree that . . . *Swain* should be overruled. I do so because *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries. This should have warned prosecutors that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause.
>
> It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs.

Batson, 476 U.S. at 101 (White, J., concurring) (footnote omitted). This limited application may also have been in deference to the importance and historical acceptance of the peremptory challenge to criminal defendants. See *infra* notes 35–48, 68–76 and accompanying text for a discussion of the history of peremptory challenges.

[18] *See* Georgia v. McCollum, 405 S.E.2d 688, 689 (Ga. 1991), *rev'd and remanded,* 112 S. Ct. 2348 (1992).

[19] 111 S. Ct. at 1373–74.

[20] 111 S. Ct. 2077, 2080 (1991).

[21] Georgia v. McCollum, 112 S. Ct. 2348, 2352 (1992).

[22] *See Edmonson,* 111 S. Ct. at 2095 (Scalia, J., dissenting).

[23] 112 S. Ct. 370 (1991).

address the viability of the criminal defendant's right to exclude potential jurors without cause in the wake of their recent decisions.[24] At the time *McCollum* was certified, ample reason already existed to believe that the Court was willing to extend *Batson* to the criminal defendant's use of peremptory challenges.[25]

Since *Batson* was decided, commentators have argued that a criminal defendant's use of discriminatory challenges to strike potential jurors cannot offend the Equal Protection Clause of the Fourteenth Amendment for two reasons: first, the criminal defendant is not a state actor,[26] and second, the State does not have standing to challenge the exclusion.[27] This note analyzes how the Court's decisions in *Powers* and *Edmonson* created precedent circumventing these noted obstacles. This note also discusses how the Court's 1991 decisions went beyond the ostensible issues of each case and critically examines how the Court laid the necessary foundation for declaring the use of the peremptory strike by the defense unconstitutional.

Section I of this note examines the history and purpose of the peremptory challenge as a criminal defendant's device and examines the cases, leading to and including *Batson,* that limited the use of racially discriminatory jury selection practices.[28] Section II scrutinizes the *Powers* decision and its holding that criminal defendants have standing to object to discriminatory juror strikes regardless of whether the defendant and juror share a racial identity.[29] Section III considers the *Edmonson* decision and its holding that civil litigants are state actors, subject to Fourteenth Amendment constraints when they employ peremptory strikes.[30] Section IV focuses on the lower courts' treatment of the criminal defendant's use of peremptory challenges and presents the *McCollum* decision and its holding.[31]

---

[24] *See McCollum,* 405 S.E.2d at 689.

[25] *Edmonson,* 111 S. Ct. at 2095 (Scalia, J., dissenting).

[26] *See* Goldwasser, *supra* note 13, at 811–20; Harry Zirlin, Note, *Unrestricted Use of Peremptory Challenges by Criminal Defendants and Their Counsel: The Other Side of the One Color Jury,* 34 N.Y.L. SCH. L. REV. 227, 238–43 (1989). Zirlin also asserts that the criminal defense strikes are constitutional as the state has no Sixth Amendment right to an impartial jury. *Id.* at 243–47. *Holland v. Illinois* renders the Sixth Amendment inapplicable to peremptory strikes. *See infra* notes 155–73 and accompanying text.

[27] *See* 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, 198 (1989); Goldwasser, *supra* note 13, at 820 & n.74.

[28] *See infra* notes 35–154 and accompanying text.

[29] *See infra* notes 155–250 and accompanying text.

[30] *See infra* notes 251–354 and accompanying text.

[31] *See infra* notes 355–532 and accompanying text.

Finally, Section V analyzes how the Supreme Court, by means of its recent decisions, laid the groundwork for the determination that the State may challenge, on Fourteenth Amendment equal protection grounds, peremptory strikes asserted by the criminal defendant.[32] This section also discusses how *Powers* provided a solution to the prosecution's lack of standing and how the Court's reasoning in *Edmonson* created a means for the State to argue that the criminal defendant is a state actor.[33] Finally, this section criticizes the Supreme Court's resolution of the tension between defendants' rights and race-neutral jury selection proceedings at the expense of a traditional criminal defendant's safeguard.[34]

I. The Role of the Peremptory Challenge in American Jury Trials

The American justice system purposely favors the accused in order to ensure a fair trial and to assure the criminal defendant that the sides will be evenly balanced.[35] The United States Supreme Court has held a criminal defendant's right to a jury trial fundamental to the American scheme of justice.[36] The Sixth Amendment requires that the defendant's jury be impartial.[37] Defendants have traditionally employed peremptory challenges as means to secure this impartial jury.[38]

Because of the peremptory challenge's historic importance, observers have doubted the Supreme Court's willingness to limit the use of peremptory strikes.[39] In the 1986 case of *Batson v. Kentucky*, however, the Supreme Court held that a prosecutor's use of racially motivated strikes violates a defendant's equal protection rights.[40]

---

[32] *See infra* notes 533–96 and accompanying text.

[33] *See infra* notes 550–86 and accompanying text.

[34] *See infra* notes 588–96 and accompanying text.

[35] DAVID FELLMAN, THE DEFENDANT'S RIGHTS TODAY 3 (1976). According to Fellman:

> [O]ur law is generally described as a defendant's law, in contrast with other legal systems which emphasize the necessities of the prosecution and give priority to the interests of society in the apprehension and conviction of criminals. We, too, are concerned with the suppression of crime, but we are equally concerned with the necessities of justice and respect for man's dignity.

Id. (footnote omitted).

[36] Duncan v. Louisiana, 391 U.S. 145, 149 (1968); *see also* FELLMAN, *supra* note 35, at 162.

[37] U.S. CONST. amend. VI.

[38] *See* FELLMAN, *supra* note 35, at 187.

[39] *See* Eric L. Chase, *Peremptory Challenges*, *in* 8 THE GUIDE TO AMERICAN LAW 175, 177 (1984); *The Supreme Court—Leading Cases*, 104 HARV. L. REV. 129, 173 (1990).

[40] 476 U.S. 79, 89 (1986).

Batson, the Court's initial restriction on racially motivated peremptory challenges, only reached that exercise that infringed upon the defendant's rights.[41]

A. *The Peremptory Challenge as a Traditional Defendant Right*

The framers of the United States Constitution were careful to include trial by jury as a fundamental right afforded to the criminal defendant.[42] The inclusion of this right reflects the jury trial's important role in protecting the accused from government oppression.[43] In 1968, the Supreme Court held that the right to a jury trial in serious criminal cases is a constitutional right that a state cannot abridge.[44] Thus, the Supreme Court has held that trial by jury is a fundamental right, essential to the American system of justice, and guaranteed by the Due Process Clause of the Fourteenth Amendment.[45]

The Supreme Court has also held that the right to a fair trial includes a right to impartial jurors.[46] The Court has noted that it is

---

[41] *Id.* at 89 n.12.

[42] *See* FELLMAN, *supra* note 35, at 161.

Article III of the United States Constitution secures the right to trial by jury for criminal defendants. The Fifth and Sixth Amendments underscore the jury trial's importance to the American system of justice by requiring a grand jury indictment for capital cases and by requiring that juries be impartial. Article III, § 2 states:

> The trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trials shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .

The Sixth Amendment requires:

> 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 . . . .

[43] Duncan v. Louisiana, 391 U.S. 145, 155 (1968) (quoting Singer v. United States, 380 U.S. 24, 31 (1965)).

[44] *Id.* at 149, 154. Because the *Duncan* Court considered the Sixth Amendment right to trial by jury a fundamental principle of liberty and justice, it was incorporated by the Fourteenth Amendment and protected against state action. *Id.* at 149–50. The Court noted, however, that a state could accept waivers of jury trials and refuse to provide jury trials for petty offenses. *Id.* at 158.

[45] *Id.* at 149.

[46] Irvin v. Dowd, 366 U.S. 717, 722 (1961).

"obviously fundamental to fairness that a 'jury' means an 'impartial jury.'"[47] The peremptory challenge is a traditional means for securing an impartial jury.[48]

The peremptory challenge takes place during the final moments of jury selection.[49] A jury is selected in the following manner: (1) a venire is summoned; (2) challenges to the venire are considered; (3) individual venire members are subject to voir dire examination; (4) jurors are challenged for cause; and (5) jurors are peremptorily challenged.[50] The venire, or jury panel, is the group of citizens chosen for jury service, generally in a random manner, from a list of qualified jurors.[51] If the defendant believes that the state improperly drew the entire venire, or believes the venire cannot be fair because of exposure to pre-trial publicity, the defendant can request that the panel be discharged.[52]

Once a venire is accepted, individual jurors are randomly selected to undergo voir dire, a face-to-face questioning usually conducted by the judge, for the purpose of determining if the juror is able to hear the case without prejudice.[53] During voir dire, counsel may bar a prospective juror from serving as a member of the jury through two mechanisms: the challenge for cause and the peremptory challenge.[54]

Challenges for cause are made when attorneys believe they can show that a prospective juror is biased against the client.[55] Although challenges for cause are unlimited, they are subject to significant judicial control.[56] Counsel must convince the judge that a prospective juror is biased before the juror is removed.[57] For cause challenges may also be subject to statutory control.[58] For example, state rules may require that the judge examine a prospective juror before

---

[47] *Duncan*, 391 U.S. at 181–82 (Harlan, J., dissenting) (citing Irvin v. Dowd, 366 U.S. 717, 722 (1961)).

[48] Swain v. Alabama, 380 U.S. 202, 219 (1965).

[49] *See* Rita J. Simon & Prentice Marshall, *The Jury System*, *in* THE RIGHTS OF THE ACCUSED IN LAW AND ACTION 211, 217 (Stuart S. Nagel ed., 1972).

[50] *Id.* at 215–17.

[51] *Id.* at 215; *see also* 28 U.S.C. § 1864a (1986).

[52] Simon & Marshall, *supra* note 49, at 215.

[53] *Id.* at 216.

[54] JON M. VAN DYKE, JURY SELECTION PROCEDURES 139–40 (1977); Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 339–40 (1982).

[55] Saltzburg & Powers, *supra* note 54, at 340.

[56] *Id.*; *see also* VAN DYKE, *supra* note 54, at 143.

[57] VAN DYKE, *supra* note 54, at 140.

[58] *See* Saltzburg & Powers, *supra* note 54, at 340.

counsel is allowed to ask questions.[59] Moreover, the Supreme Court has noted that any effort to discover hidden racial prejudices could alienate certain prospective jurors.[60]

These limitations on voir dire questioning create barriers inhibiting the discovery of subtle biases and attitudes that obscure impartiality.[61] A party may have difficulty obtaining adequate proof to support the for cause challenge, especially when an attorney or client is acting upon a hunch that the prospective juror holds subconscious prejudices.[62] As a result, commentators have criticized the for cause challenge as being an ineffective procedure for removing all but the most blatantly biased venirepersons.[63]

In contrast, the peremptory challenge is, by definition, a challenge that requires no explanation.[64] It allows a party to strike a juror from the venire for any reason whatsoever.[65] By tradition, the use of peremptory strikes is only limited by those court rules and statutes authorizing the number of peremptories available to both sides.[66] The peremptory challenge is, therefore, a tool that allows the parties in a trial to have a measure of control in composing the jury.[67]

Historically, commentators have viewed the peremptory challenge as a criminal defendant's device.[68] Blackstone, for example, considered the strike the means by which a defendant could remove from the jury a person who harbored bad feelings toward the accused.[69] He noted two additional purposes for the peremptory challenge: to allow the removal of jurors whom the accused intui-

---

[59] *Id.* at 339 n.13. Such an examination may put counsel in an awkward position, especially if the judge refuses to ask questions designed to elicit bias. *See* VAN DYKE, *supra* note 54, at 145. Most states also have statutes that establish "cause" for the for cause challenge. *Id.* at 143; *see, e.g.*, ALA. CODE § 12-16-150 (1986); GA. CODE ANN. § 15-12-164 (Michie 1990).

[60] Swain v. Alabama, 380 U.S. 202, 220 (1965) ("'[T]he bare questioning [a juror's] indifference may sometime provoke a resentment.'" (quoting Lewis v. United States, 146 U.S. 370, 376 (1892))).

[61] Saltzburg & Powers, *supra* note 54, at 340.

[62] *Id.* at 340. Although for cause challenges are unlimited in number, few are made and even fewer accepted. Simon & Marshall, *supra* note 49, at 216.

[63] *See* Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 243–44 (1968); *see also* Simon & Marshall, *supra* note 49, at 216.

[64] Saltzburg & Powers, *supra* note 54, at 340.

[65] VAN DYKE, *supra* note 54, at 145.

[66] O'Connell, *supra* note 2, at 436. Rule 24(b) of the Federal Rules of Criminal Procedure authorizes 20 peremptory strikes for each side in a capital trial, 10 peremptory strikes for the defendant and six for the government involved in a felony offense trial, and three for each side involved in a misdemeanor offense trial. FED. R. CRIM. P. 24(b).

[67] *See* Saltzburg & Powers, *supra* note 54, at 341.

[68] *See, e.g.*, *id.*; VAN DYKE, *supra* note 54, at 147.

[69] 4 WILLIAM BLACKSTONE, COMMENTARIES *353.

tively disliked, so that the defendant would have "a good opinion of his jury, the want of which might totally disconcert him," and to allow removal of those prospective jurors the defendant may have alienated during voir dire.[70]

Colonial America adopted England's grant of peremptory challenges for criminal defendants.[71] When the United States first authorized use of the peremptory challenge in the late 1700s, the authorizing statute did not include prosecutors.[72] Congress initially allotted the defendant thirty-five peremptories in trials for treason, and twenty in capital felony trials.[73] Federal prosecutors were not statutorily authorized to use peremptory strikes until 1865: five where the defendant was entitled to twenty, and two where the defendant received ten.[74] Similarly, most state prosecutors did not receive the right to employ peremptories until the mid-nineteenth century.[75] Today, although every state now authorizes some kind of peremptory juror exclusion for civil as well as criminal trials, the states generally allot significantly more challenges for criminal cases.[76]

---

[70] *See id.*

[71] VAN DYKE, *supra* note 54, at 147, 148.

[72] VAN DYKE, *supra* note 54, at 147 (citing Act of March 1, 1790, ch. 9, § 30, 1 Stat. 119 (1790) (codified at 28 U.S.C. § 424 (1988) (challenges)); *see also* Swain v. Alabama, 380 U.S. 202, 214 & n.13 (1965). In *Swain*, Justice White noted that a common law right to use peremptory challenges was presumed to exist for federal prosecutors, perhaps originating in the English common law right to "stand jurors aside." *Swain*, 380 U.S. at 214; *see also* VAN DYKE, *supra* note 54, at 148 (explanation of the doctrine of "standing jurors aside"). This prosecution practice was not well accepted by the states, however, and prosecutorial peremptory strikes were limited. VAN DYKE, *supra* note 54, at 148–49.

[73] *See Swain*, 380 U.S. at 214 (citing § 30, 1 Stat. 119 (1790)). The statute states:

> that if any person or persons be indicted of treason against the United States, and shall stand mute or refuse to plead, or shall challenge peremptorily above the number of thirty-five of the jury; or if any person or persons be indicted of any other of the offenses herein before set forth, for which the punishment is declared to be death, if he or they shall also stand mute or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury; the court, in any of the cases aforesaid, shall notwithstanding proceed to the trial of the person or persons so standing mute or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly.

§ 30, 1 Stat. 119 (1790).

[74] *Swain*, 380 U.S. at 214–15 (citing Act of March 3, 1865, ch. 86, § 2, 13 Stat. 500 (1865)).

[75] VAN DYKE, *supra* note 54, at 148–49. In fact, neither New York nor Virginia authorized prosecutorial use of peremptory challenges until the late nineteenth century. *Id.*

[76] *See Swain*, 380 U.S. at 217; *see also, e.g.*, CAL. CIV. PROC. CODE § 231 (West Supp. 1991) (20 challenges per party in capital cases, 10 challenges in other felony cases, six challenges in civil cases).

Historically, criminal defendants were allotted more challenges than the prosecution. *See*

B. *Batson v. Kentucky*: *The Fourteenth Amendment Protects Criminal Defendants from Prosecutors' Race-Based Strikes*

Although the peremptory challenge is an important safeguard of defendant rights,[77] courts have recognized that parties may use challenges as a means to achieve less noble ends.[78] In the 1880 case of *Strauder v. West Virginia*, the Supreme Court held that the systematic exclusion of African-Americans from the jury pool that supplies the venire violates the equal protection rights of African-American defendants.[79] In *Strauder*, the defendant, an ex-slave, objected to a West Virginia statute that expressly prohibited African-Americans from being called for jury service.[80] The Court reasoned that because the statute secured a white man's right to a jury selected from members of his race, and denied that same right to African-American men, African-Americans were denied equal protection of the laws.[81] Thus, the Court established that the Fourteenth Amendment requires race-neutral jury service selection procedures.[82] As one commentator noted, after *Strauder*, prosecutors desiring all-white juries employed discriminatory peremptory strikes as an alternative to segregated jury lists.[83] This commentator suggested that prosecutors desired to exclude African-Americans from jury service ex-

---

VAN DYKE, *supra* note 54, at 149. There has recently been movement, however, toward equalizing the number of peremptory challenges granted each side in a criminal trial, as recommended by the National Conference of Commissioners on Uniform State Laws. *See* N.C. GEN. STAT. § 15A-1217 (off. cmt. 1988). For examples of this trend in non-capital felony cases, see CAL. CIV. PROC. CODE § 231 (West Supp. 1991) (state and defendant allotted 10 peremptory challenges); COLO. REV. STAT. § 16-10-104 (1986) (state and defendant allotted five peremptory challenges); D.C. CODE ANN. § 23-105 (1989) (state and defendant allotted 10 peremptory challenges); HAW. REV. STAT. § 635-30 (1985) (state and defendant allotted three peremptory challenges); IDAHO CODE § 19-2016 (1987) (state and defendant allotted six peremptory challenges); KAN. STAT. ANN. § 22-3412 (1988) (state allotted same number of peremptory challenges as all defendants); MISS. CODE ANN. § 99-17-3 (1972) (state and defendant allotted six peremptory challenges); MO. REV. STAT. § 494.480 (Supp. 1992) (same).

But see, e.g., ARK. CODE ANN. § 16-33-305 (Michie 1987) (state entitled to six peremptory challenges, defendant entitled to eight); N.J. REV. STAT. § 2A:78-7 (Supp. 1991) (state entitled to 12 peremptory challenges, defendant to 20); S.C. CODE ANN. § 14-7-1110 (Law. Co-op. Supp. 1990) (state entitled to no more than five peremptory challenges, defendant to no more than 10).

[77] See *supra* notes 68–76 and accompanying text for a discussion of the historical purpose of peremptory challenges.

[78] Batson v. Kentucky, 476 U.S. 79, 99 (1986); *see also Swain*, 380 U.S. at 235–36 (Goldberg, J., dissenting).

[79] 100 U.S. 303, 310 (1880).

[80] *Id.* at 304, 309.

[81] *Id.* at 308.

[82] *See id.* at 310–11.

[83] *Swain*, 380 U.S. at 234–36 (Goldberg, J., dissenting); Zirlin, *supra* note 26, at 230.

cept in those cases where both the crime victim and the accused were African-American.[84]

This abuse of the peremptory system avoided serious judicial inquiry until the 1965 case of *Swain v. Alabama.*[85] In *Swain,* the United States Supreme Court held that a prosecutor's use of peremptory challenges to eliminate African-American jurors from the jury venire in any particular trial does not violate the Equal Protection Clause of the Fourteenth Amendment.[86] The Court reasoned that a defendant is denied equal protection of the laws only when prosecutors systematically use peremptory challenges to keep African-Americans from participating in the jury system.[87] The Court also noted that careful scrutiny would pervert the peremptory system's historical purpose.[88]

In *Swain,* Robert Swain, an African-American, was charged and convicted of rape and sentenced to death.[89] At Swain's trial, the prosecutor used peremptory challenges to remove six of the eight African-American members of the venire.[90] The other two African-Americans were exempted.[91] Swain, invoking *Strauder v. West Virginia,* motioned the court to quash the indictment, strike the venire and discharge the petit jury.[92] To support his claim, Swain offered evidence that although African-American males accounted for twenty-six percent of the eligible juror population, African-Americans represented only ten to fifteen percent of grand and petit jury venires.[93] Moreover, Swain asserted that no African-American had served on a petit jury in approximately fifteen years.[94] The trial court dismissed Swain's motion, and the Alabama Supreme Court later affirmed his conviction.[95] The United States Supreme Court granted certiorari.[96]

The Supreme Court, in an opinion authored by Justice White, affirmed the Alabama Supreme Court decision.[97] The Court noted

---

[84] *See Swain,* 380 U.S. at 236 (Goldberg, J., dissenting); Zirlin, *supra* note 26, at 230.
[85] *See* Batson v. Kentucky, 476 U.S. 79, 91 (1986); Zirlin, *supra* note 26, at 230.
[86] 380 U.S. 202, 221 (1965).
[87] *Id.* at 223–24.
[88] *Id.* at 222.
[89] *Id.* at 203–04.
[90] *Id.* at 205.
[91] *Id.*
[92] *Id.* at 203.
[93] *Id.* at 205.
[94] *Id.*
[95] *Id.* at 203.
[96] *Id.*
[97] *Id.* at 203, 228.

that a state violates the Equal Protection Clause when it purposely excludes African-Americans from juries.[98] The Court also noted, however, that defendants could not prove purposeful discrimination merely by showing that African-Americans were underrepresented on their particular jury.[99] The Court noted that "[i]n light of the purposes of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial," it could not subject the peremptory challenge to the traditional standards of equal protection without turning the peremptory challenge into a challenge for cause.[100]

The Court asserted that the defendant must prove a pervasive pattern of discriminatory strikes in order to prove an equal protection violation.[101] In this case, although no African-American had served on any petit jury in a decade and a half, the Court refused to find a pervasive pattern.[102] The Court was unwilling to accept the *Swain* defendant's proof because the record was unclear as to which side had struck the prospective jurors.[103]

Furthermore, the Court stated that a prosecutor is presumed to have employed strikes to secure an impartial jury.[104] The Court explained that, traditionally, parties have relied on peremptory challenges to secure a fair jury.[105] The Court noted that while the challenge for cause only allows for removal of jurors "on a narrowly specified, provable and legally cognizable basis of partiality," the peremptory challenge allows removal of jurors that a party suspects, but cannot prove, are partial.[106] As a result, the Court continued, parties must draw upon their limited knowledge of the juror, including group affiliation, to determine if a juror may be partial and thereby undermine the fairness of the trial.[107] Thus, the Court established that a defendant would need to prove that African-Americans were consistently and systematically denied a place on

[98] *Id.* at 203–04.

[99] *Id.* at 208–09.

[100] *Id.* at 221–22.

[101] *Id.* at 223.

[102] *Id.* at 205, 224.

[103] *Id.* at 226.

[104] *Id.* at 222.

[105] *Id.* at 211–12. The Court presented a lengthy discussion of the history and purpose of the peremptory challenge. *Id.* at 212–19.

[106] *Id.* at 220.

[107] *Id.* at 221. The Court noted that "the question that a prosecutor . . . must decide is not whether a juror of a particular race or nationality is in fact partial but whether one from a different group is less likely to be." *Id.*

the jury solely on account of race to raise a successful equal protection challenge.[108]

As one commentator noted, the *Swain* holding placed an "unjustifiable and virtually insuperable burden upon injured defendants."[109] Consequently, courts and commentators strongly criticized the decision as offering little recourse to injured defendants.[110] In addition, a significant number of state courts rejected the *Swain* decision by utilizing their state constitutions' version of the Sixth Amendment.[111] The Second and Sixth Circuits similarly circumvented the *Swain* decision.[112] Following these decisions, defendants brought cases in other states and other circuits in the hope of obtaining a similarly hostile response to *Swain*.[113] One of these cases, *Batson v. Kentucky,* rose to the Supreme Court.[114]

In *Batson,* the United States Supreme Court held that the Equal Protection Clause prohibits the State's use of discriminatory strikes

---

[108] *See id.* at 223–24.

[109] Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury,* 52 VA. L. REV. 1157, 1163 (1966). See Saltzburg & Powers, *supra* note 54, at 345 n.42, for a list of cases where defendants failed to meet the *Swain* test.

[110] *See* People v. Wheeler, 583 P.2d 748, 767–68 (Cal. 1978); Commonwealth v. Soares, 387 N.E.2d 499, 510 n.11 (Mass.), *cert. denied,* 444 U.S. 881 (1979); Sherri L. Johnson, *Black Innocence and the White Jury,* 83 MICH. L. REV. 1611, 1658, 1659 & n.242 (1985); Kuhn, *supra* note 63, at 289–96 (1968); Gary L. Geeslin, Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race,* 39 MISS. L.J. 157, 162 (1967); Comment, *supra* note 109, at 1159. Despite criticism of the *Swain* decision, the use of peremptory challenges was considered so intertwined with the concept of a fair trial that substantive change was unexpected. *See* Eric L. Chase, *Peremptory Challenges, in* 8 THE GUIDE TO AMERICAN LAW 175, 177 (1984). As Eric Chase noted, "the practice [of peremptory challenges] is deeply rooted in the Anglo-American concept of a 'fair trial.' Reform of the peremptory challenge will probably be limited to procedural change. . . . The substance . . . seems secure. . . ." *Id.*

[111] See Zirlin, *supra* note 26, at 231–36, for a more complete discussion. The following courts employed their state's version of the Sixth Amendment to prohibit discriminatory strikes: People v. Wheeler, 583 P.2d 748, 767–68 (Cal. 1978); Riley v. State, 496 A.2d 997, 1012 (Del. 1985), *cert. denied,* 478 U.S. 1022 (1986); State v. Neil, 457 So. 2d 481, 485–86 (Fla. 1984); Commonwealth v. Soares, 387 N.E.2d 499, 514–15 (Mass.), *cert. denied,* 444 U.S. 881, (1979). *But see* State v. Crespin, 612 P.2d 716, 718 (N.M. Ct. App. 1980) (Swain v. Alabama controls where only one minority juror is peremptorily struck).

[112] *See* Booker v. Jabe, 775 F.2d 762, 772 (6th Cir. 1985), *vacated and remanded sub nom.* Michigan v. Booker, 478 U.S. 1001, *reinstated sub nom.* Booker v. Jabe, 801 F.2d 871, 872 (6th Cir. 1986), *cert. denied,* 479 U.S. 1046 (1987); McCray v. Abrams, 750 F.2d 1113, 1118 (2d Cir. 1984), *vacated and remanded,* 478 U.S. 1001 (1986). These courts used the Sixth Amendment right to a fair cross section to circumvent *Swain* by reasoning that *Swain* was decided before the Sixth Amendment was applied to the states. *See* Zirlin, *supra* note 26, at 233.

[113] Zirlin, *supra* note 26, at 233. Zirlin notes that twenty-nine states considered the issue before *Batson v. Kentucky* was decided. *Id.*; *see also* Gilliard v. Mississippi, 476 U.S. 867, 871 n.3 (1982) (Marshall, J., dissenting from denial of certiorari) (list of cases); United States v. Leslie, 783 F.2d 541, 551 n.16 (5th Cir. 1986) (cases decided after *Gilliard*).

[114] Zirlin, *supra* note 26, at 234.

in any individual trial.[115] The Court reasoned that the Equal Protection Clause guarantees the defendant that the State will not strike members of the defendant's race on account of race or on the assumption that members of the racial group in question are not qualified for jury service.[116] Batson, an African-American man, had been indicted on charges of burglary and receipt of stolen goods.[117] At trial, the prosecutor used four peremptory strikes to remove all prospective African-American jurors from the venire.[118] In response, Batson requested that the jury be discharged.[119] Batson asserted that the prosecutor's challenges violated both his Sixth Amendment right to a jury drawn from a cross section of the community and his Fourteenth Amendment equal protection rights.[120] The trial court, denying Batson's motion, asserted that parties can "strike anybody they want to."[121] Batson appealed to the Supreme Court of Kentucky.[122] The Supreme Court of Kentucky, relying on *Swain,* affirmed the trial court decision and held that a defendant must show systematic exclusion in order to assert denial of a jury drawn from a fair cross section.[123]

Batson rose to the United States Supreme Court, and the Court, in an opinion authored by Justice Powell, reexamined *Swain*'s interpretation of the applicability of the Equal Protection Clause to the use of peremptory challenges.[124] The Court held that the Equal Protection Clause prohibits a prosecutor's use of race-based peremptory challenges.[125] Moreover, the Court held that a defendant does not have to prove systematic exclusion in order to object to prosecution strikes.[126]

The *Batson* Court reasoned that the Equal Protection Clause governs peremptory challenges because the Fourteenth Amend-

[115] *Batson,* 476 U.S. at 97–98.

[116] *Id.* at 85–86.

[117] *Id.* at 82.

[118] *Id.* at 83.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 83. Batson, conceding that *Swain v. Alabama* foreclosed an equal protection argument in any individual case, instead focused on the Sixth Amendment fair cross section argument that had been successful in *People v. Wheeler* and *Commonwealth v. Soares. Id.* at 83. Batson also raised an equal protection violation under the *Swain* "pattern" of discrimination test. *Id.* at 83–84.

[123] *Id.* at 84.

[124] 476 U.S. at 84 n.4. The Court never considered Batson's Sixth Amendment challenge. *Id.*

[125] *Id.* at 89.

[126] *See id.* at 87–88.

ment protects individuals during all phases of the trial process.[127] When prosecutors use peremptory strikes in a discriminatory manner, the Court continued, equal protection problems arise.[128] According to the Court, when members of a defendant's race are barred from jury service as a group, the defendant's ability to receive a fair trial is diminished.[129] In addition, the Court noted that discriminatory strikes violate *Strauder v. West Virginia*'s specific prohibition against barring persons from jury service solely on account of race.[130]

The *Batson* Court emphasized that the *Swain* pervasive pattern analysis was unsuccessful in upholding defendants' equal protection rights.[131] Because defendants were unable to satisfy the burden of proof needed to establish a pervasive pattern of discrimination, peremptory strikes became immune from constitutional scrutiny.[132] The Court therefore adopted an individual trial analysis, declaring the *Swain* standard an inadequate evidentiary formulation of a prima facie case of discrimination under the Equal Protection Clause.[133]

The *Batson* Court's decision was specifically addressed to defendants who are members of a cognizable group and who object to the exclusion of prospective jurors of shared group identity.[134] Only in this situation, implied the Court, does the defendant have standing to raise the equal protection claim.[135] The *Batson* Court also noted general disfavor toward the use of discriminatory strikes in any proceeding.[136] The Court explained that discriminatory strikes harm not only the defendant but also the excluded juror and the community at large.[137]

---

[127] *Id.* at 88–89.

[128] *See id.* at 85–90.

[129] *See id.* at 86–87.

[130] *Id.* at 85–86 (citing Strauder v. West Virginia, 100 U.S. 303, 305 (1880)).

[131] *Id.* at 92–93.

[132] *Id.*

[133] *Id.* at 93–94.

[134] *Id.* at 94.

[135] *Id.* at 94, 96. In his concurrence, Justice White noted his approval of the narrow holding. *Id.* at 101. He suggested it was an appropriate response to *Swain*, because despite *Swain*, there remained a widespread practice of prosecutors using peremptories to strike African-American venirepersons when the defendant was also African-American. *Id.*

[136] *See id.* at 87.

[137] *Id. Batson* has been interpreted as holding only that discriminatory strikes deny equal protection to defendants who share a racial identity with the excluded juror. *See* Powers v. Ohio, 111 S. Ct. 1364, 1376 (1991) (Scalia, J., dissenting). Nevertheless, *Batson* has also been read as asserting, in dicta, that peremptory strikes also violate the equal protection rights of

The *Batson* Court asserted that its decision created a manageable means for the defendant to make a prima facie showing of discriminatory behavior that violated the Fourteenth Amendment.[138] Following *Batson,* a defendant member of a cognizable group who questions the prosecutor's motive for excluding racially similar prospective jurors must only show the court that the prosecutor used peremptory challenges to strike the members of the same group from jury service at the trial in question.[139] This showing suffices to create an inference of impermissible exclusion.[140] The defendant is, therefore, not required to offer proof of broader state activities indicating systematic exclusion for purposes of securing segregated juries.[141] Once the defendant has made a showing of unlawful discrimination, the prosecutor must then provide race-neutral explanations for the strikes.[142]

The Court expressly declined to consider whether the *Batson* reasoning applied to a criminal defendant's use of peremptory strikes.[143] Justice Marshall, in his concurrence, noted the potential tension between protecting the role of the peremptory as a safeguard of fair jury trials and freeing the courtroom from racial

---

the excluded juror. *See, e.g.*, O'Connell, *supra* note 2, at 444 ("The *Batson* Court further stated that the practice also denied the equal rights of the prospective jurors, because it implied that they, because of their race, were either unqualified to serve as jurors in general, or were unable to decide impartially a case involving a member of their own race.").

[138] *Batson*, 476 U.S. at 92–93.

[139] *Id.* at 96.

[140] *Id.*

[141] *Id.* at 92–93, 100 n.25.

[142] *Id.* at 96–97.

[143] *Id.* at 89 n.12. In his dissent, Chief Justice Burger asserted that it would be unfair not to apply the *Batson* rule to the defense as well as to the prosecution. *Id.* at 126 (Burger, C.J., dissenting). Justice Burger asserted that the criminal justice system requires freedom from bias against the prosecution as well as the defendant. *Id.* (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)). *But see* Goldwasser, *supra* note 13, at 823–25 (courts are mistaken in reading *Hayes* as supporting rights for the prosecution). Some of the pre-*Batson* courts that limited the use of peremptories shared Justice Burger's opinion and used the Sixth Amendment or their state equivalent to limit the use of peremptory challenges by the defense as well as the prosecution. *See* Booker v. Jabe, 775 F.2d 762, 772 (6th Cir. 1985), *vacated and remanded sub nom.* Michigan v. Booker, 478 U.S. 1001, *reinstated sub nom.* Booker v. Jabe, 801 F.2d 871, 872 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987); McCray v. Abrams, 750 F.2d 1113, 1118 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986); People v. Wheeler, 583 P.2d 748, 768 (Cal. 1978); State v. Neil, 457 So. 2d 481, 485–86 (Fla. 1984); Commonwealth v. Soares, 387 N.E.2d 499, 514–15 (Mass.), *cert. denied*, 444 U.S. 881 (1979). *But see* United States v. Leslie, 783 F.2d 541, 564–65 (5th Cir. 1986) (declining to consider reasons other than Fourteenth Amendment for limiting strikes in part to avoid inhibiting defense use of peremptory strikes); United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984) (same); United States v. Newman, 549 F.2d 240, 250 n.8 (2d Cir. 1977) (same).

bias.[144] Commentators have disagreed about whether the Court should strive to protect the criminal defendant's right to shape the jury or to eliminate all forms of discrimination in the courtroom.[145] Commentators on both sides, however, have agreed that obstacles exist that prevent the application of the *Batson* reasoning to the defendant's use of peremptory challenges.[146] These commentators have noted that in order to apply the *Batson* reasoning to criminal defendants, the prosecution must have standing to object to the defendant's use of challenges[147] and the defendant must be considered a state actor.[148]

II. Standing

The *Batson* Court prohibited the State's use of discriminatory strikes in order to secure the equal protection rights of criminal defendants.[149] The State, on the other hand, has no such equal protection rights and consequently no standing to assert a violation of equal protection rights claim.[150] In order for the State to establish an equal protection claim, therefore, the State would have to assert the rights of a third party—the excluded juror.[151]

A number of states interpreted their constitutions' equivalent to the Sixth Amendment to allow defendants to object to discriminatory strikes.[152] In *Holland v. Illinois*, the United States Supreme

---

[144] *Batson*, 476 U.S. at 107–08 (Marshall, J., concurring). Marshall made his position clear:

> Much ink has been spilled regarding the historic importance of defendants' peremptory challenges. . . . But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.

Id. at 108 (Marshall, J., concurring) (footnotes omitted).

[145] *Compare* Goldwasser, *supra* note 13, at 811 (differences between prosecution and defense are so significant that *Batson* should not be extended) *with* Alschuler, *supra* note 27, at 197 (courts should not hesitate to hold that discrimination by defense attorneys violates equal protection) *and* E. Vaughn Dunnigan, Note, *Discrimination by the Defense: Peremptory Challenges after* Batson v. Kentucky, 88 Colum. L. Rev. 355, 355 (1988) (same).

[146] *See* Alschuler, *supra* note 27, at 198; Goldwasser, *supra* note 13, at 811.

[147] Alschuler, *supra* note 27, at 198; Goldwasser, *supra* note 13, at 820 n.74.

[148] *See* Alschuler, *supra* note 27, at 197; Goldwasser, *supra* note 13, at 811–12.

[149] *See Batson*, 476 U.S. at 97–98.

[150] Goldwasser, *supra* note 13, at 820 n.74.

[151] *Id.*

[152] *See infra* notes 360–74 and accompanying text.

Court rejected this approach.[153] Instead, in *Powers v. Ohio,* the Court determined that discriminatory strikes violate the equal protection rights of the excluded juror and that a defendant has third-party standing to assert the juror's claim.[154]

A. Holland v. Illinois: *Dismissing the Sixth Amendment Approach*[155]

The Supreme Court has employed the fair cross section requirement of the Sixth Amendment to limit discrimination in jury selection proceedings.[156] The Sixth Amendment specifically ensures the right of the accused to be tried by an impartial jury.[157] At least one Justice argued that the Court could use the Sixth Amendment to achieve a *Batson*-like result in cases where the defendant and the excluded juror do not share a racial identity because the amendment has no requirement of shared group identity.[158] The Court, however, determined that the Sixth Amendment plays no role in regulating the discriminatory use of peremptory strikes.[159]

In the 1990 case of *Holland v. Illinois,* the United States Supreme Court held that the Sixth Amendment does not prohibit the prosecution from engaging in race-based juror challenges.[160] Defendant Holland asserted that the use of peremptory strikes denied him his constitutionally guaranteed trial by a fair cross section of the community.[161] Although the Court recognized that Holland had standing to assert the challenge, the Court held that the fair cross section requirement does not apply to the actual composition of the petit jury.[162]

---

[153] 493 U.S. 474, 478 (1990).

[154] 111 S. Ct. 1364, 1366 (1991).

[155] See *supra* note 42 for the text of the Sixth Amendment.

[156] *See, e.g.,* Duren v. Missouri, 439 U.S. 357, 360 (1979) (fair cross section requirement applies to venire selection); Taylor v. Louisiana, 419 U.S. 522, 533 (1975) (fair cross section requirement applies to jury pool selection).

[157] U.S. CONST. amend. VI.

[158] Teaque v. Lane, 489 U.S. 288, 341–42 (1989) (plurality opinion). According to Justice Brennan, the only significant difference in outcome between applying the Sixth Amendment instead of the Fourteenth Amendment is that the Sixth Amendment "would bar the prosecution from excluding venirepersons from the petit jury on account of their membership in some cognizable group, whereas the Equal Protection Clause might not provide a basis of relief unless the defendant belonged to the group whose members were improperly excluded." *Id.*

[159] Holland v. Illinois, 493 U.S. 474, 478 (1990).

[160] *Id.*

[161] *Id.* at 476.

[162] *Id.* at 477–78.

In *Holland*, the Court reaffirmed that the State cannot manipulate the venire, reasoning that the defendant is entitled to a jury pool drawn from the entire community.[163] The Court noted that the Sixth Amendment ensures that each party begins the jury selection process without special advantage.[164] The initial representative nature of the venire, asserted the Court, may be changed by either State or defense challenges.[165] According to the Court, the purpose of the peremptory strike is to remove persons believed partial to the other side.[166] Thus, the Court held, the Sixth Amendment requirement of a representative cross section reaches only the pool from which the venire is drawn and not to any particular challenge.[167]

The *Holland* Court intimated that the propriety of prosecutorial use of racially motivated strikes, regardless of the race of the defendant, is essentially a Fourteenth Amendment issue.[168] Justice Kennedy, in a concurring opinion, noted that the prosecutor's race-based challenges may have violated the *Batson* rule, but not the Sixth Amendment.[169] As a result, commentators expressed their belief that the Court's decision in *Holland* suggested that the motivations underlying *Batson* had diminished.[170]

According to one commentator, "the Court's lofty rhetoric appears to have made the peremptory challenge sacrosanct as the means of assuring a fair trial. . . ."[171] This same commentator asserted that "[b]y straying from its previous path of demanding non-discriminatory jury selection, the Court halted its progress toward an end to racial discrimination in jury selection."[172] The Court, however, had only begun its reconsideration of the use of peremptory challenges.[173]

---

[163] *See id.* at 480.

[164] *Id.* at 481.

[165] *Id.* at 480.

[166] *Id.* at 483.

[167] *See id.* at 477–78.

[168] *Id.* at 487 & n.3.

[169] *Id.* at 488 (Kennedy, J., concurring).

[170] Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1034 (1991); *The Supreme Court—Leading Cases*, 104 HARV. L. REV. 129, 173 (1990). *But see* Steven W. Fisher, *Racial Discrimination in Jury Selection: A* 'Batson' *Update*, N.Y. L.J., July 17, 1990, at A1 (suggesting the Court would move to limit the use of discriminatory strikes).

[171] Harris, *supra* note 170, at 1032.

[172] *Id.* at 1034.

[173] During 1991 the Court considered three major peremptory challenge cases, and certified a fourth: Powers v. Ohio, 111 S. Ct. 1364 (1991); Edmonson v. Leesville, 111 S. Ct.

B. Powers v. Ohio: *Establishing Standing Regardless of Race Under the Fourteenth Amendment*

In the 1991 case of *Powers v. Ohio,* the United States Supreme Court held that under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors by peremptory strike, even if the defendant and the excluded jurors do not share a racial identity.[174] In reaching this conclusion, the Court determined that the prospective juror has a constitutional right not to be excluded from a jury on account of race and that a criminal defendant has standing to raise the equal protection claims of excluded jurors.[175] The *Powers* decision reaffirmed the Court's interest in prohibiting racially motivated peremptory strikes.[176]

In *Powers,* Larry Joe Powers, a white man, was charged with two counts of aggravated murder and one count of attempted aggravated murder, to which he pleaded not guilty.[177] During the jury selection process, the prosecutor peremptorily challenged an African-American panelist.[178] Citing the *Batson* decision, Powers motioned the court to require the prosecution to put forth a race-neutral basis for its peremptory challenge.[179] The court denied Powers's motion and the juror was excused.[180] The State continued to use peremptory challenges to strike African-American venirepersons.[181] After each strike, Powers renewed his objection and was overruled.[182] Powers was convicted on all counts and sentenced to fifty-three years to life in prison.[183]

2077 (1991); Hernandez v. New York, 111 S. Ct. 1859 (1991); Georgia v. McCollum, 112 S. Ct. 370 (1991).

[174] *Powers,* 111 S. Ct. at 1373.

[175] *Id.* at 1370, 1373.

[176] *See id.* at 1366.

[177] *Id.* Defendant Powers had gone to the home of Gary Goldman after spending the evening in a bar with Goldman and another man, Thomas Kikas. State v. Powers, No. 87AP-526, 1988 WL 134822, at *1 (Ohio Ct. App. Dec. 13, 1988). At Mr. Goldman's home, Powers placed a gun on a bar stool in the Goldman basement, left the room, and returned to shoot and kill Goldman and Kikas, and to attempt to shoot Charlotte Goldman, Goldman's wife. *Id.* at *1, *3. The trial testimony suggested that Powers was acting as a hit man for Brad Wellman, who was aware that Goldman was having an affair with Wellman's wife. *Id.* at *3.

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

[179] *Id.* The record does not indicate why Powers objected to the strikes. *Id.*

[180] *Id.* The Court's refusal to request race-neutral explanations was one of eight assignments of error raised on appeal. 1988 WL 134822, at *1.

[181] *Powers,* 111 S. Ct. at 1366. The State exercised a total of 10 challenges and removed seven black panelists. *Id.* The record provides no indication that race was a factor in the commission of Powers' crimes. *Id.* The victims were white, as was Powers. *Powers,* 1988 WL 134822, at *5.

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

[183] *Id.*

Powers appealed to the Ohio Court of Appeals, claiming that the prosecutor's use of discriminatory strikes violated the Sixth and Fourteenth Amendments.[184] The Ohio Court of Appeals rejected Powers's assignment of error, holding that the defendant failed to satisfy the first test of *Batson*—a showing that the prosecutor used peremptory strikes to remove members of the defendant's race from the venire.[185] After the Supreme Court of Ohio dismissed Powers's appeal, the United States Supreme Court granted certiorari.[186]

---

[184] *Powers*, 1988 WL 134822, at *1. Powers relied on *Batson* to support his argument that the prosecution's actions violated his rights under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at *5. Powers, relying on Peters v. Kiff, 407 U.S. 493, 501 (1972), also argued that the strikes violated the Fourteenth Amendment's Due Process Clause. *See id.* at *5, *6.

In *Peters*, a 1972 case, the United States Supreme Court, in a plurality opinion, held that a state is prohibited by the Due Process Clause of the Fourteenth Amendment from subjecting a defendant to trial by a jury that had been selected in a discriminatory manner. 407 U.S. at 505. In upholding Peters's due process claim, the Court reasoned that excluding any identifiable class of citizens from jury service has the potential to impact every defendant's trial in a subtle but pervasive manner. *Id.* at 503. Thus, the *Peters* Court established that any defendant, regardless of race or group affiliation, has standing to attack the State's illegal exclusion of blacks from jury service by means of discriminatory selection procedures. *Id.* at 504. Three dissenting Justices rejected the idea that non-minority defendants could be denied due process. *Id.* at 511 (Burger, C.J., dissenting).

To support his Sixth Amendment argument, Powers relied on the 1974 case of Taylor v. Louisiana, 419 U.S. 522 (1975). *Powers*, 1988 WL 134822, at *7. In *Taylor*, the United States Supreme Court held that a male defendant has standing to object to the State's use of discriminatory statutory jury selection schemes to exclude women from his jury as violative of the Sixth Amendment. 419 U.S. at 526. The defendant was not a member of the excluded class, but argued that Louisiana's requirement, that women who wished to serve on a jury notify a state official in writing of their desire, violated his right to a jury drawn from a venire constituting a fair cross section of the community. *Id.* The Court reasoned that a jury selection scheme, such as Louisiana's, which resulted in the systematic exclusion of women (who represented 53% of the Louisiana citizenry) from jury service resulted in the lack of a fair cross section from which to draw a jury. *Id.* at 531. The Court also established that Taylor had the ability to present his claim even though he was not a member of the excluded class. *Id.* at 526. The Court did not consider Powers's Sixth Amendment claim. *Powers*, 111 S. Ct. at 1367.

In addition to his claims based on the United States Constitution, Powers asserted claims based on Article I, Sections Ten and Sixteen of the Ohio Constitution. *Powers*, 1988 WL 134822, at *1. Powers did not raise the claims under the state constitution in his appeal to the Supreme Court. *See id.* at 1367.

[185] 1988 WL 134822, at *9. The court noted that even if the reasoning in *Kiff* and *Taylor* supported Powers's Fourteenth Amendment claim, this shared racial identity requirement would prohibit an expansion of the *Batson* rule to help Powers. *Id.* at *5.

[186] *Powers*, 111 S. Ct. at 1367. After the trial conviction was affirmed by the Ohio Court of Appeals, Powers appealed to the Supreme Court of Ohio. *Id.* at 1366–67. That court dismissed the appeal for lack of a valid constitutional question. *Id.* Powers petitioned to the United States Supreme Court for review on Fourteenth Amendment equal protection and Sixth Amendment fair cross section grounds. *Id.* at 1367. The Court decided *Holland v. Illinois*, holding the Sixth Amendment does not limit peremptory challenges, while Powers's

In an opinion by Justice Kennedy, the United States Supreme Court reversed and remanded the appellate court decision.[187] The Court determined that Powers's race was irrelevant to his right to object to the prosecution's peremptory challenges.[188] The Court held that race-based peremptory strikes violate the challenged juror's equal protection rights and that the defendant in a criminal case can raise the claim for the excluded juror.[189] In reaching this conclusion, the Court considered two threshold issues: first, whether discriminatory strikes deprive the excluded juror of equal protection of the law, and second, whether a criminal defendant has standing to object for the excluded juror.[190]

The *Powers* Court began its analysis by considering the effect of the discriminatory challenge on the excused juror.[191] The Court stated that although *Batson* examined the harm caused to the defendant when members of the defendant's race were excluded from jury service, the purpose of *Batson* was not merely to protect the defendant.[192] *Batson*, according to the *Powers* Court, recognized that the discriminatory strike harmed the excluded juror and the community and "was designed to serve multiple ends."[193]

The *Powers* Court then discussed the harm caused to the excluded juror who is removed from the venire by a discriminatory strike.[194] The Court identified three reasons why the opportunity to serve on a jury is important to ordinary citizens.[195] First, according to the Court, a main reason for sustaining a jury system is to provide an opportunity for ordinary citizens to participate in the criminal justice system.[196] Second, the Court noted that participation in jury service helps ensure that laws remain democratic, because citizens are instrumental in guarding individual rights and also because citizens who assist in applying the laws are better able to accept the laws.[197] Finally, jury service allows people to experience

petition was pending. *Id.* The Court then granted Powers's petition for certiorari solely on the equal protection grounds. *Id.*

[187] *Id.*

[188] *See id.*

[189] *Id.* at 1370, 1373.

[190] *See id.* at 1368.

[191] *Id.* at 1368.

[192] *Id.* (quoting Allen v. Hardy, 478 U.S. 255, 259 (1986)).

[193] *Powers*, 111 S. Ct. at 1368 (quoting Allen v. Hardy, 478 U.S. 225, 259 (1986)); *see also* Batson v. Kentucky, 476 U.S. 79, 87 (1986).

[194] *Powers*, 111 S. Ct. at 1368.

[195] *Id.* at 1368–69.

[196] *Id.* at 1368.

[197] *Id.* at 1369 (citing Green v. United States, 356 U.S. 165, 215 (1958) (Black, J. dissenting)).

the workings of government and, as a result, to perhaps better respect the law.[198]

The Court concluded that the Equal Protection Clause protects a citizen's right to participate in the jury system from being disposed of for racially motivated reasons.[199] The Court reasoned that racial discrimination in jury selection proceedings thus violates the Equal Protection Clause of the Fourteenth Amendment.[200] As support for its conclusion, the Court cited the strong statutory policy against discrimination in the jury selection process of the Civil Rights Act of 1875.[201] The Court further noted that although a state may provide statutory qualifications for citizens to serve as jurors, the state may exclude no person solely on account of race.[202] Finally, the Court pointed out that in a due process challenge to racial discrimination in the formation of grand and petit juries, it had permitted a white defendant to challenge racial discrimination against African-American jurors in the selection of grand and petit juries.[203] The Court suggested that in that case six Justices determined that the defendant's race had no relevance to standing because of their belief that racial discrimination cannot be allowed in the courtroom.[204]

The *Powers* Court next considered whether a white criminal defendant could challenge the racially motivated strike in any par-

---

[198] *Id.* at 1369 (quoting Duncan v. Louisiana, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting)).

[199] *Id.* at 1370.

[200] *Id.* at 1369–70.

[201] *Id.* at 1369. The Civil Rights Act of 1875 is codified at 18 U.S.C. § 243 (1988), which states:

> 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 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 (1988).

[202] *Id.* at 1369 (citing Batson v. Kentucky, 476 U.S. 79, 84 (1986); Carter v. Jury Comm'n of Green County, 396 U.S. 320, 332 (1970); Swain v. Alabama, 380 U.S. 202, 203–04 (1965); Thiel v. Southern Pacific Co., 328 U.S. 217, 220–21 (1946); Neal v. Delaware, 103 U.S. 370, 386 (1881); Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).

[203] *Powers*, 111 S. Ct. at 1369 (citing Peters v. Kiff, 407 U.S. 493, 507 (1972)); *see also* Peters v. Kiff, 407 U.S. at 506–07 (White, J., concurring in the judgment). The Ohio appellate court considered the *Peters* decision, which had no majority, "somewhat confused" and not helpful in determining whether a white defendant could object to discriminatory strikes of black prospective jurors. State v. Powers, No. 87AP-526, 1988 WL 134822, at *7 (Ohio Ct. App. Dec. 13, 1988).

[204] *Powers*, 111 S. Ct. at 1369.

ticular jury trial.[205] The Court observed that litigants generally must assert only their own interests, rather than claims to relief based upon an injury to a third party.[206] The Court also noted, however, that litigants are allowed to bring an action based on the rights of a third party when three criteria are satisfied.[207]

The Court reviewed the three-part test that litigants must satisfy to bring an action on behalf of a third party.[208] First, the litigant must suffer an "injury-in-fact," such that the litigant has a "sufficient concrete interest" in the outcome of the controversy.[209] Second, the litigant must be closely related to the party whose rights the litigant wishes to assert.[210] Finally, obstacles must prevent the third party from asserting his or her own claim.[211] The Court has allowed criminal defendants to challenge their convictions by raising the rights of third parties when all three criteria are met.[212] The Court determined that defendants such as Powers satisfied all three criteria.[213]

The *Powers* Court asserted that when a prosecutor behaves in a racially discriminatory manner at the defendant's trial, the defendant suffers an "injury-in-fact" creating sufficient interest in the outcome to satisfy the first test.[214] As support for its conclusion, the Court asserted that the harm occurs because the discriminatory use of strikes "'casts doubt on the integrity of the judicial process.'"[215] The Court stated that the purpose of the jury system is to make

---

[205] *Id.* at 1370.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*; *see* Singleton v. Wulff, 428 U.S. 106, 112–13 (1976) (doctor suffered "injury-in-fact" from statute that limited medicaid payments provided to indigent women seeking abortions).

[210] *Powers*, 111 S. Ct. at 1370; *see also Singleton*, 428 U.S. at 115 (doctor had a "sufficiently close relationship" with patient seeking abortion).

[211] *Id.* at 1370–71; *see also Singleton*, 428 U.S. at 117 (women seeking abortion faced "hindrance" because privacy may be desired and pregnancy may come to term).

[212] *Id.* at 1371. The Court cites several cases supporting this proposition. *Id.*; *see also, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 445–46 (1972) (birth control advocate allowed to assert rights of unmarried couples); Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (doctor and birth control advocate allowed to assert rights of married couple).

[213] *Powers*, 111 S. Ct. at 1373.

[214] *Id.* at 1372. The Court stated that a criminal defendant suffers a cognizable injury when the prosecutor employs discriminatory strikes, and, therefore, has a concrete interest in objecting to discriminatory challenges. *Id.* at 1371 (citing Allen v. Hardy, 478 U.S. 255, 259 (1986)). The Court asserted that the discriminatory strikes cause the defendant's injury by undermining the integrity of the judicial process, not by dismissing jurors who might have favored the defendant. *Id.* (citing Rose v. Mitchell, 443 U.S. 545, 556 (1979)).

[215] *Id.* at 1371 (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)).

certain that both the defendant and the community believe a fair trial is performed in accordance with the law.[216] Thus, the jury guards against wrongful use of power by the state.[217] When a prosecutor, acting for the state, wrongfully and discriminatorily excludes jurors, the perception of a check on the state's power is diminished because a constitutional violation is committed in open court.[218]

The *Powers* Court next asserted that the relationship between the defendant and the excluded juror is as close, and perhaps closer, than others recognized as satisfying the second criteria for establishing third-party standing.[219] The Court observed that the party and the juror establish a relationship during voir dire.[220]

The Court also noted that, like the defendant, the excluded juror has an interest in keeping racial discrimination from the courtroom, because the rejected juror may suffer humiliation and loss of confidence in the system.[221] Finally, the Court suggested that the defendant would adequately represent the rights of the excluded juror because proof of discrimination in the jury selection may lead to a reversal of the conviction.[222] Thus, the Court concluded the defendant would be an effective advocate for the excluded juror.[223]

Finally, the *Powers* Court reasoned that the third criteria, whether a third party lacks adequate ability to assert his or her own rights, is satisfied because a dismissed juror has little incentive to vindicate the violated right.[224] According to the Court, excluded jurors have a difficult time collecting proof of the discrimination.[225] The Court noted that jurors are far more likely to just leave the courtroom than engage in the arduous tasks needed to vindicate their rights.[226] The Court therefore concluded that a defendant in a criminal case can raise the equal protection claims of jurors excluded by the prosecution because of their race.[227]

---

[216] *Id.* at 1372.

[217] *Id.* at 1371.

[218] *Id.*

[219] *Powers*, 111 S. Ct. at 1372. The Court noted, as an example, that a beer vendor was found to have a "satisfactory relationship" to assert the equal protection claims of customers prohibited from purchasing alcohol. *Id.*

[220] *Id.* Justice Kennedy's choice of the word party and not criminal defendant arguably indicates the Court's awareness of how the ruling will be applied in future cases. *See id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Powers*, 111 S. Ct. at 1373.

[225] *Id.*

[226] *Id.*

[227] *Id.* In so concluding, the Court noted that it was declining "to reverse a course of

In a dissenting opinion, Justice Scalia contended that the majority opinion was a direct departure from existing precedent, which required a shared racial identity between the defendant and the excluded juror for a race-based peremptory strike to violate the Fourteenth Amendment.[228] Justice Scalia argued that, traditionally, defendants have been limited to raising equal protection claims based on violations of their own rights, and that even with third-party standing, jurors do not suffer any injury for defendants to assert.[229] He first noted that in every case where the Court invalidated a criminal conviction on equal protection grounds, the Court based its decision on an injury to the defendant caused by exclusion of jurors with shared racial identity.[230]

Justice Scalia asserted that the majority's decision rested on an inaccurate interpretation of prior opinions.[231] He characterized the majority discussion of third-party standing as merely a pretext designed to portray the issue before the court as one of first impression.[232] In framing his argument, Justice Scalia noted that the decisions barring racially discriminatory jury selection practices were responses to state statutes that kept African-American citizens from serving as jurors and thus prevented African-American defendants from receiving equal protection of the law.[233] According to Justice Scalia, it was historically unthinkable that white defendants could assert that a statute that barred African-Americans from jury service violated the white defendants' equal protection rights.[234] Justice

---

decisions of long standing directed against racial discrimination in the administration of justice." *Id.* (quoting Cassell v. Texas, 339 U.S. 282, 290 (1950) (Frankfurter, J., concurring in the judgment)). The Court stated:

> To bar petitioner's claim because his race differs from that of the excluded juror's would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service. . . .
>
> The emphasis in *Batson* on racial identity between the defendant and the excused prospective juror is not inconsistent with our holding today that race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges.

Id.

[228] *See id.* at 1374–75 (Scalia, J., dissenting); *see also, e.g.*, Castaneda v. Partida, 430 U.S. 482, 494 (1977) (Mexican-American must establish membership in cognizable group in order to claim denial of equal protection by exclusion of Mexican-Americans from grand jury); Alexander v. Louisiana, 405 U.S. 625, 633 (1972) (black male is not denied equal protection by exclusion of women from jury lists).

[229] *See id.* at 1377 (Scalia, J., dissenting).

[230] *See id.* at 1374–75 (Scalia, J., dissenting) (citing relevant cases).

[231] *Id.* at 1377 (Scalia, J., dissenting).

[232] *Id.*

[233] *Id.* at 1374 (Scalia, J., dissenting).

[234] *Id.*

Scalia noted that more than a century of cases upholding defendants' equal protection challenges emphasized the shared racial identity between the defendant and the stricken juror.[235]

Moreover, according to Justice Scalia, the majority's lengthy discussion of third-party standing was as unfaithful to precedent as it was to history.[236] On this point, Justice Scalia argued that the Court had previously considered but rejected using third-party standing to extend the Equal Protection Clause to a racially dissimilar defendant.[237] He concluded that the Equal Protection Clause guarantees only that the State is not allowed to strike members of the defendant's race solely because of the shared racial identity.[238]

Likewise, Justice Scalia asserted that because excluded jurors suffer no cognizable equal protection injury, there is no claim for a defendant to raise on a juror's behalf.[239] According to Justice Scalia, the excluded juror's lack of first-party standing complicates the defendant's lack of third-party standing.[240] Contrary to the majority's reasoning, Justice Scalia asserted that there is no dishonor in being stricken from a jury.[241] Justice Scalia reasoned that the peremptory strike implies nothing more than the possibility of sympathy toward the defendant.[242] There is no loss of benefit resulting from removal, concluded Justice Scalia, because no special benefit inheres to jurors who serve in a trial where the defendant shares their racial background.[243] Therefore, Justice Scalia reasoned, a stricken juror suffers no equal protection injury for the defendant to protect.[244]

Justice Scalia concluded with a warning.[245] He cautioned that holding that the Equal Protection Clause protects individual jurors

---

[235] *See id.* at 1374–75 (Scalia, J., dissenting).

[236] *Id.* at 1377 (Scalia, J., dissenting).

[237] *Id.*

[238] *Id.* at 1376 (Scalia, J., dissenting). Justice Scalia noted that the first requirement necessary to raise a *Batson* challenge is for the defendant to show that he is a member of a cognizable racial group and that the excluded jurors are of the same group. *Id.* (citing *Batson*, 476 U.S. 79, 96 (1986)). The Justice found it self-evident that a white defendant could not satisfy this first requirement. *Id.* The Ohio Court of Appeals dismissed Powers's claim of error for this very reason. State v. Powers, No. 87AP-526, 1988 WL 134822, at *9 (Ohio Ct. App. Dec. 13, 1988).

[239] *Powers*, 111 S. Ct. at 1379 (Scalia, J., dissenting).

[240] *Id.* at 1377.

[241] *See Powers*, 111 S. Ct. at 1378 (Scalia, J., dissenting).

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *See id.*

from discriminatory strikes would end the use of peremptory challenges in the historical sense.[246] According to Justice Scalia, the majority opinion in *Powers* was thus not only unwise, but also an unsupported extension of the purpose and rationale of *Batson*.[247]

One commentator described the restricted context of standing as a "substantial hurdle" in extending the *Batson* rule to defendants' use of peremptory challenges.[248] In *Powers*, however, the Court created a juror's right that a third-party defendant could assert.[249] According to this same commentator, the creation of such a right would lead to a reciprocal right for prosecutors to object to a defendant's use of discriminatory strikes.[250]

III. State Action

The *Batson* holding relies on the Equal Protection Clause of the Fourteenth Amendment to prohibit a prosecutor's use of race-based strikes.[251] A number of Supreme Court decisions interpret the Equal Protection Clause as available to regulate only state action.[252] Because the Fourteenth Amendment does not extend to private conduct, the behavior of private citizens, no matter how discriminatory, is not subject to constitutional limitations.[253] Therefore, unless a defendant's use of race-based peremptories is considered state action, the *Batson* equal protection prohibition is not controlling.[254]

A. Polk County v. Dodson: *The Public Defender is Not a State Actor*

In the 1981 case of *Polk County v. Dodson*, the United States Supreme Court held that the actions of a public defender, when

[246] *Id.*

[247] *Id.* at 1381–82 (Scalia, J., dissenting).

[248] Alschuler, *supra* note 27, at 188, 198–99. Justice Kennedy, writing for the Court in *Powers*, cited to Alschuler's article. 111 S. Ct. at 1372.

[249] *Powers*, 111 S. Ct. at 1374.

[250] Alschuler, *supra* note 27, at 198–99.

[251] Batson v. Kentucky, 476 U.S. 79, 89 (1986).

[252] *See* National Collegiate Athletic Assoc. v. Tarkanian, 488 U.S. 179, 191 (1988); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974); Gilmore v. City of Montgomery, 417 U.S. 556, 573 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715, 720 (1961); *see also* Goldwasser, *supra* note 13, at 811–13.

[253] *Jackson*, 419 U.S. at 349.

[254] Goldwasser, *supra* note 13, at 812–13. Professor Goldwasser points out that in *Swain v. Alabama* the Supreme Court actually addressed whether the defendant's use of peremptories constitutes state action. *Id.* at 813. See *supra* notes 84–107 and accompanying text for a complete discussion of *Swain*. In *Swain*, the Court stated that "the ordinary exercise of challenges by defense counsel does not, of course, imply purposeful discrimination by state officials." *Id.* at 227.

performing the traditional functions of counsel for indigent clients in criminal proceedings, are not performed "under color of state law."[255] *Polk County* involved an indigent defendant, Richard Russell Dodson, who brought an ineffective assistance of counsel action against his public defender, Martha Shepard, pursuant to 42 U.S.C. § 1983, which provides for civil actions against the state for deprivation of rights.[256] Shepard was assigned to represent Dodson in an appeal from a robbery conviction.[257] After reviewing the case, however, she moved for permission to withdraw, claiming that the appeal was frivolous.[258] The trial court granted her motion and dismissed Dodson's appeal.[259]

In order to meet the jurisdictional requirement for a section 1983 suit, Dodson had to show that Shepard was a state actor.[260] The district court, finding that the actions of Shepard in question were not performed under color of state law, dismissed Dodson's complaint.[261] The court asserted that a public defender owes a primary duty to the client and therefore cannot be characterized as an agent of the state.[262] The Court of Appeals for the Eighth Circuit reversed the district court's finding.[263] The appellate court acknowledged that a public defender's first duty is to the client, but determined the defender's status as a county employee was dispositive of the state-actor question.[264] The court noted that the public defender is not selected by the client but instead has clients assigned by the state.[265]

The Supreme Court granted certiorari to resolve a division among the circuits and held that a public defender is not a state actor when performing the traditional functions of defense counsel.[266] The Court explained that in order for a person's actions to

---

[255] 454 U.S. 312, 325 (1981). Generally, "under color of state law" and "state action" are considered alternative ways of expressing the same legal principle. *See* Cobb v. Georgia Power Co., 757 F.2d 1248, 1250 (11th Cir. 1985); Briley v. California, 564 F.2d 849, 855 (9th Cir. 1977); Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873, 877–78 (5th Cir.) (*en banc*), *cert. denied*, 423 U.S. 1000 (1975).

[256] 42 U.S.C.A. § 1983 (1988); *Polk County*, 454 U.S. at 315.

[257] *Polk County*, 454 U.S. at 314.

[258] *Id.*

[259] *Id.* at 315.

[260] *Id.*

[261] Dodson v. Polk County, 483 F. Supp. 347, 350 (S.D. Iowa 1979).

[262] *Id.* at 349.

[263] 628 F.2d 1104, 1106 (8th Cir. 1980).

[264] *Id.*

[265] *See id.*

[266] 454 U.S. 312, 317 (1981).

be characterized as under color of state law, the person must be using the power granted by the government to perform in a manner only available to someone with state authority.[267] Representation of a client, the Court noted, is not a function specific to the state; the relationship between a public defender and an indigent defendant is virtually identical to any other attorney-client relationship, apart from the method of payment.[268]

In reaching its conclusion, the Court described the defense lawyer as an adversary of the state.[269] The Court noted that the American legal system is dependent upon this adversarial relationship to assist in finding the truth and promoting fairness in the judicial system.[270] Therefore, the Court concluded, the defender is serving the interests of the public, not the interests of the state, by acting as an adversary.[271]

The Court did suggest that a public defender may be a state actor in other situations.[272] The Court noted that a public defender had been found a state actor when engaging in hiring and firing personnel.[273] The Court reasserted, therefore, that a public defender could be considered a state actor when performing other administrative, or perhaps even investigative, functions.[274]

B. Edmonson v. Leesville: *Finding State Action in the Civil Litigants' Challenges*

As a result of *Powers*, the *Batson* rule still applied only to prosecutors, but now any defendant could object to a prosecutor's race-based strikes.[275] The *Batson* Court held that defendants who shared a racial identity with the excluded jurors could claim a violation of their equal protection rights.[276] The *Powers* Court held that any other defendant could challenge a prosecutor's strikes on behalf of the struck jurors.[277] To extend the *Batson* equal protection limita-

---

[267] *Id.* at 317–18 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
[268] *Id.* at 318.
[269] *Id.*
[270] *Id.*
[271] *Id.* at 318–19.
[272] *Id.* at 324–25.
[273] *Polk County*, 454 U.S. at 325 (citing Branti v. Finkel, 445 U.S. 507, 511 (1980)).
[274] *Polk County*, 454 U.S. at 325.
[275] *See* Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991).
[276] *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986).
[277] 111 S. Ct. at 1366.

tions to a party other than a prosecutor, however, would require holding that the party was a state actor.[278]

Following the *Batson* decision, the federal circuits split regarding the application of the *Batson* rule in a civil suit.[279] The circuits disagreed about whether a civil litigant's discriminatory use of a peremptory strike violated the Equal Protection Clause of the Fourteenth Amendment.[280] In particular, the circuits could not agree as to whether a private litigant's use of a peremptory strike could be characterized as state action.[281]

In the 1991 case of *Edmonson v. Leesville Concrete Co.*, the Supreme Court resolved this confusion regarding the scope of the *Batson* decision.[282] The *Edmonson* Court held that a private litigant may not use racially motivated peremptory challenges to exclude otherwise qualified jurors because such discriminatory strikes violate the equal protection rights of the excluded juror.[283] The Court reasoned that a private civil litigant's use of a peremptory strike can be characterized as state action.[284] Moreover, the Court held that the parties have standing to assert the rights of the excluded juror.[285]

The plaintiff in *Edmonson*, Thaddeus Donald Edmonson, who was injured while working for Leesville Concrete Company, brought a negligence suit in the United States District Court for the Western District of Louisiana.[286] Edmonson, an African-American construction worker, alleged that he was injured when a Leesville employee

---

[278] Alschuler, *supra* note 27, at 197.

[279] *Compare* Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281, 1282 (7th Cir. 1990) (private civil litigant may not use peremptory challenges to exclude prospective jurors on basis of race) *and* Fludd v. Dykes, 863 F.2d 822, 823 (11th Cir. 1989) (same) *with* Edmonson v. Leesville Concrete Co., 895 F.2d 218, 218–19 (5th Cir. 1990) (private civil litigants are not accountable for their use of peremptory challenges).

[280] *See Dunham*, 919 F.2d at 1282.

[281] *See Dunham*, 919 F.2d at 1287; *Fludd*, 863 F.2d at 829; *Edmonson*, 895 F.2d at 219. The circuits in favor of extending *Batson* to civil trials emphasized the courts' extensive role in jury selection proceedings in order to find sufficient state action to trigger constitutional safeguards. *See Dunham*, 919 F.2d at 1286–87; *Fludd*, 863 F.2d at 828. The circuit in favor of giving the *Batson* rule a narrow application emphasized the courts' limited role in a party's decision to use a peremptory challenge in order to hold that there was insufficient state action to merit constitutional protection. *See Edmonson*, 895 F.2d at 221–22.

[282] 111 S. Ct. 2077, 2080 (1991).

[283] *Id.*

[284] *Id.* at 2082–87.

[285] *Id.* at 2087. The Court also held that a civil litigant's prima facie case of the discriminatory use of peremptory challenges is the same as the prima facie case articulated by the *Batson* Court. *Id.* at 2088–89.

[286] *Edmonson*, 111 S. Ct. at 2080.

allowed a Leesville truck to roll backward, pinning him against the construction equipment.[287] Leesville used two of its three authorized peremptory challenges to strike African-American prospective jurors.[288] Edmonson requested that the trial court ask Leesville to articulate race-neutral explanations for the strikes.[289] The trial court refused on the grounds that *Batson* did not apply in civil actions.[290]

Edmonson appealed to the United States Court of Appeals for the Fifth Circuit.[291] A divided en banc panel affirmed the trial court judgment and held that private civil litigants are not required by law to explain their use of peremptory challenges.[292] The en banc majority concluded that no state action exists where peremptory challenges are used by a private party and, therefore, no constitutional guarantees could be invoked by the litigant or the challenged jurors.[293]

The Supreme Court, in a majority opinion written by Justice Kennedy, reversed the en banc decision.[294] The Court held that racially motivated peremptory strikes offend the equal protection rights of the dismissed juror, regardless of whether the trial is criminal or civil.[295] In order to reach its conclusion, the Court determined that sufficient state action exists in civil litigation to warrant applying the Fourteenth Amendment prohibitions to the use of peremptory challenges.[296]

The *Edmonson* Court reiterated the *Powers* presumption that a prosecutor's racially motivated peremptory strikes violate the equal

---

[287] *Id.*

[288] *Edmonson*, 111 S. Ct. at 2081. The circuit court noted that Edmonson used all three of his peremptory challenges to remove white venire members while Leesville used its third challenge to strike a white prospective juror. *Edmonson*, 860 F.2d at 1310. Ultimately the jury was composed of eleven white members and one black member. *Edmonson*, 111 S. Ct. at 2081. This jury found for Edmonson but found him 80% contributorily negligent, reducing his damage award from $90,000 to $18,000. *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.* Initially, a divided panel held that the *Batson* rule applies to private litigants in civil cases. *Id.* According to the panel, the fundamental principle of *Batson* is that "the state's use, toleration, and approval of peremptory challenges based on race violates the equal protection clause." 860 F.2d at 1314. The court asserted that private litigants become state actors when they employ peremptory strikes and that to limit *Batson* to criminal cases alters *Batson*'s basic principle. *Id.* The full court of appeals then voted to hear the *Edmonson* appeal en banc. *Edmonson*, 111 S. Ct. at 2081.

[292] *See Edmonson*, 895 F.2d 218, 226 (5th Cir. 1990).

[293] *See id.* at 222.

[294] *Edmonson*, 111 S. Ct. at 2081.

[295] *See id.* at 2082.

[296] *See id.* at 2084–85. The Fourteenth Amendment does not impact private discrimination. *See id.* at 2082.

protection rights of the removed juror and that the defendant has third-party standing to raise the claims of the excluded juror.[297] The Court noted that the *Powers* rationale was based on over a century of cases intended to remove racial discrimination from the jury selection process.[298] While these cases primarily dealt with stopping government discrimination in criminal proceedings, the Court found no implicit approval of discrimination in the civil setting, where the injury to the juror is just as harmful.[299]

Although the Court made clear its distaste for the use of racially discriminatory peremptory strikes in civil proceedings, the Court conceded that an act that violates the Constitution when committed by a government official does not necessarily offend the Constitution when performed by a private individual.[300] The Court asserted, however, that government involvement in an activity may be so pervasive as to render the activity state action and the participants state actors subject to constitutional constraints, despite the participation of private citizens.[301] The Court then examined whether employing peremptory challenges in civil litigation is such an activity.[302]

The Court began its analysis by describing the two-part structure for determining the presence of state action.[303] The Court stated that the initial inquiry examines if the claimed divestiture of equal protection rights may arise from the operation of some right or privilege having its origin in state authority.[304] The Court found it obvious that peremptory challenges originate in state authority, because peremptory challenges are permitted only when the government authorizes their use through statute or common law.[305] Because there is no constitutional right to engage in peremptory strikes, the Court concluded, the defendant Leesville, or any other

---

[297] *Id.* at 2081.

[298] *Id.* at 2081–82.

[299] *Id.* at 2082.

[300] *Id.* The Court noted that constitutional guarantees generally limit only the scope of government behavior, not the behavior of private persons or entities. *Id.*

[301] *Id.*

[302] *Id.*

[303] *Edmonson*, 111 S. Ct. at 2082–83 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982)).

[304] *Id.* (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 939–41 (1982)).

[305] *Id.* at 2083. The Court observed that legislative grants and restrictions concerning peremptories date back to the founding of the Republic. *Id.* The Court also noted that peremptory challenges exist only inside a court of law, where their sole purpose is to allow litigants to assist the government in selecting an impartial jury. *Id.*

private civil litigant, could not participate in the alleged discriminatory behavior unless the government authorized the use of the peremptory challenge.[306]

The *Edmonson* Court then identified the second inquiry in its state action analysis as the determination of whether a private civil litigant who employs government-authorized peremptory challenges can be characterized as a state actor.[307] The Court identified three circumstances when the actions of a private person or entity can be considered governmental in nature.[308] The first circumstance occurs if the private actor relies on benefits and assistance from the government.[309] The second circumstance arises when the private actor carries out a traditional government function.[310] The third situation is created when the operations of government markedly increase the claimed deprivation.[311] The *Edmonson* Court determined that all three circumstances arise when the civil litigant uses peremptory challenges in a discriminatory manner.[312]

The Court reasoned that the first situation is implicated by the litigant's use of federal jury service procedures and the trial judge's

---

[306] *See id.* The Court quoted 28 U.S.C. § 1870, which not only grants each party three peremptory challenges but also gives discretion to the trial judge to allow for more challenges in cases involving several defendants or plaintiffs. *Id.*

[307] *Edmonson*, 111 S. Ct. at 2083.

[308] *Id.* The Court acknowledged that a "state actor" determination often centers on the peculiar facts of an individual situation. *Id.* (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982)).

[309] *Id.* at 2083 (citing Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 487–88 (1988); Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961)). In *Tulsa*, the Court found a valid due process claim when a creditor's assignee received no notice before a probate claim was time-barred and the defendant made use of state procedures with overt, significant assistance of state officials. 485 U.S. at 487–88. In *Burton*, the Court found a valid equal protection claim when a private restaurant, operating under a government lease in a building owned by a state agency, barred black customers. 365 U.S. at 726.

[310] *Edmonson*, 111 S. Ct. at 2083 (citing West v. Atkins, 487 U.S. 42, 54–55 (1988); Terry v. Adams, 345 U.S. 461, 469–70 (1953); Marsh v. Alabama, 326 U.S. 501, 508–09 (1946)). In *Terry*, the Court found sufficient state action to support a Fifteenth Amendment claim when a private all-white voter's association held an internal pre-primary election that effectively determined the outcome of the public primary. In *Marsh*, the Court found sufficient state action to support a First Amendment claim when a company-owned suburb outlawed religious literature distribution on a company-owned sidewalk. In *West*, the Court held that a private physician who contracts with a state prison is a state actor. *Cf.* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542–47 (1987) (no state action to support Fifth Amendment claim where defendant committee received corporate charter and substantial funding from Congress but enforced trademark as private corporation).

[311] *Edmonson*, 111 S. Ct. at 2083 (citing Shelley v. Kraemer, 334 U.S. 1, 19–21 (1948)). In *Shelley*, the Court found a valid equal protection claim when a state court was called upon to enforce private racially restrictive property covenants. 334 U.S. at 19–21.

[312] *Edmonson*, 111 S. Ct. at 2083.

control over the jury selection process.[313] As support, the Court referred to the numerous federal statutes that address all aspects of jury service, including juror qualifications, random selection procedures, non-exclusion criteria and the lawful excuse provision.[314] Also, the Court noted that the trial judge directly assists the private litigant by enforcing the discriminatory strike.[315]

According to the Court, the second circumstance—the performance of a traditional governmental function by a private person—is also implicated by the exercise of a peremptory challenge.[316] The Court concluded that because the jury is a governmental body, the selection of the jury is a governmental responsibility.[317] Therefore, the Court reasoned, when the government delegates its selection power to a private body, it delegates a governmental function and, with the delegation, the constitutional mandate of equal protection.[318] As a result, the Court concluded, participating in the jury selection process is participating in a function traditionally performed by the government.[319]

On this point the Court distinguished its 1981 decision in *Polk County v. Dodson,* which held that a public defender is not a state actor when engaged in representing a criminal defendant.[320] The *Edmonson* Court responded to defendant Leesville's reliance on *Polk County* by noting that the public defender's adversarial relationship to the government was an important factor in the *Polk County* decision.[321] The *Edmonson* Court asserted that within the specifics of

---

[313] *Id.* at 2083–85. The Court observed that state-sanctioned but otherwise private procedures do not rise to the level of state action unless the private party also receives substantial assistance from the government. *Id.* at 2083–84.

[314] *Id.* at 2084 (citing 18 U.S.C. § 243 (1988); 28 U.S.C. §§ 1861–1864, 1869 (1988)).

[315] *Id.* at 2084–85. The Court suggested that such a degree of government assistance makes the court not only a "'party to the [biased act]'" but also puts the court's "'power, property and prestige behind the [alleged] discrimination.'" *Id.* at 2085 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)).

[316] *Id.* at 2085.

[317] *See id.* The Court reasoned that because a jury weighs evidence, judges witness credibility and renders verdicts, it must be considered a governmental body. *Id.*

[318] *See id.* (citing Rendell-Baker v. Kohn, 457 U.S. 830, 841–42 (1982); Terry v. Adams, 345 U.S. 461, 469–70 (1953)). In *Terry,* the Court held the Fifteenth Amendment applied to a private voter association when it was selecting public candidates in county elections. In *Rendell-Baker,* the Court held that a private school, which was not compelled or influenced by state regulations in its discharge of school employees, was not subject to constitutional constraints.

[319] *See Edmonson,* 111 S. Ct. at 2086.

[320] *Id.* (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)).

[321] *Id.* (citing Polk County v. Dodson, 454 U.S. 312, 323 n.13 (1981)).

jury selection, however, both public and private litigants work toward the same governmental end, the selection of the jury.[322]

Finally, the Court concluded that the final circumstance—aggravation of the injury by operation of state authority—is present when a litigant uses a discriminatory strike.[323] The Court stated that the injury is aggravated because the discrimination occurs in a court of law.[324] Noting that a trial is a public proceeding for the purpose of securing justice, the Court reasoned that racial discrimination within the courtroom mars the integrity of the judicial proceeding and offends the dignity of the public and the courts.[325] The Court concluded that allowing racial discrimination in an official forum only intensifies the injury to the excluded juror.[326]

The Court emphatically asserted that the courtroom, whether civil or criminal, must be free of racial bias.[327] The Court stated that even if the public perceives the jury system as fair because of the parties' role in shaping the jury, "if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of, the Constitution."[328] The Court then remanded the case to the trial court to decide if plaintiff Edmonson had put forth a prima facie case of race discrimination.[329]

---

[322] *See id.* The Court stated that in civil litigation not involving the government, the government and litigants are not involved in an adversarial relationship. *Id.* When selecting a jury, the government and private litigants work together. *Id.* The private litigant therefore becomes a government actor when using peremptories during jury selection. *Id.* The government delegates selection of jurors to private litigants, but the action is attributable to the government and protected by the Constitution. *Id.*

[323] *Id.* at 2087.

[324] *Id.*

[325] *Id.*

[326] *Id.* The remainder of the Court's opinion in *Edmonson* consisted of a *Powers* three-part standing analysis. *See id.* at 2087–88. The Court concluded that a real injury exists for the private litigant because the allowance of race-based juror exclusions raises doubts as to the integrity and fairness the litigant receives from the judicial process. *See id.* at 2087–88. The Court observed that there is a direct connection between the litigant and the jurors in any proceeding and that substantial cost and time barriers are present that make it unlikely that excluded jurors will initiate discrimination suits. *Id.* The Court therefore held that a private litigant has sufficient third-party standing to raise the equal protection claims of excluded jurors. *Id.* at 2087.

[327] *Id.* at 2088.

[328] *Id.*

[329] *Edmonson*, 111 S. Ct. at 2088–89. The Court observed that the *Batson* prima facie case requires the consideration of all relevant evidence, including whether there is any pattern in the challenges against a particular race. *Id.* (citing Batson v. Kentucky, 476 U.S. 79, 96–97 (1986)). The Court stated that it was leaving to the trial court the task of developing evidentiary standards for implementing its decision. *Id.* at 2089.

In her dissent, Justice O'Connor challenged the majority's conclusion that the decision to exercise a peremptory challenge is a public act.[330] Justice O'Connor contended that the nature of the peremptory is one of private choice.[331] Although she recognized that the government is intimately involved with creating and providing a forum to resolve private quarrels, Justice O'Connor asserted that the government is not responsible for the actions of private litigants in the government-sponsored courtroom.[332]

Justice O'Connor argued that the majority decision rested on two erroneous assumptions: first, that the exercise of peremptory challenges by a private litigant requires significant government assistance; and second, that the exercise is a traditional government function.[333] Justice O'Connor reasoned that no government assistance is involved when a litigant decides to use a peremptory strike.[334] She argued that much of the statutory evidence used by the Court to show government assistance in the exercise of a peremptory strike was irrelevant and independent from the specific statutory grant of power.[335] Justice O'Connor described the extent of government participation in a litigant's use of a peremptory challenge as authorizing the procedure and allowing any individual challenge to take place.[336] This limited participation, according to

---

[330] *Id.* (O'Connor, J., dissenting). The Chief Justice and Justice Scalia joined in Justice O'Connor's dissent. *Id.*

[331] *Id.* at 2089 (O'Connor, J., dissenting). Justice O'Connor stated:

> It is the nature of a peremptory that its exercise is left wholly within the discretion of the litigant. The purpose of this long standing practice is to establish for each party an "'arbitrary and capricious species of challenge'" whereby the "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another'" may be acted upon. Lewis v. United States, 146 U.S. 370, 376 (1892), quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *353.

Id. at 2089–90 (O'Connor, J., dissenting).

[332] *See id.* at 2090 (O'Connor, J., dissenting). Justice O'Connor asserted that one common rule has emerged from earlier state action cases: constitutional guarantees of equal protection apply only where the "'[government] is *responsible* for the specific conduct of which the plaintiff complains.'" *Id.* (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

[333] *Edmonson*, 111 S. Ct. at 2089 (O'Connor, J., dissenting).

[334] *See id.* at 2090–91 (O'Connor, J., dissenting).

[335] *Id.* at 2090 (O'Connor, J., dissenting). Justice O'Connor contended that the Court's statutory evidence related to the government's obligation of providing jury panels and not to government participation in selecting individual jurors. *Id.* Justice O'Connor analogized the majority's use of the federal statutes to claiming that "the building of roads and provision of public transportation makes state action of riding on a bus." *Id.*

[336] *Id.* at 2090–92 (O'Connor, J., dissenting). Justice O'Connor observed that a judge's acquiescence to the removal of a juror falls well below the level of state involvement in cases

Justice O'Connor, did not rise to the level of the significant assistance standard.[337]

Next, Justice O'Connor argued that the use of a peremptory strike is not a traditional government function because the purpose of the challenge is to refuse jurors, not to select jurors.[338] On this point, Justice O'Connor argued that the majority misinterpreted precedent by failing to recognize that for private action to be considered state action, the private action must be an exclusively governmental function.[339] Because peremptory challenges are not the exclusive province of state or federal officials, but instead are exercised rather frequently by private entities, Justice O'Connor concluded that their use cannot be considered traditionally governmental in character.[340]

Contrary to the majority's reasoning, Justice O'Connor asserted that *Polk County* was controlling in the present case because it illustrated that a lawyer's actions in the courtroom are not state action when the lawyer represents a private client.[341] Justice O'Connor reasoned that it is a private choice to exercise strikes, no matter who makes the decision—private counsel or public defender.[342] By

---

where the Court held that state action existed. *Id.* at 2090–91 (O'Connor, J., dissenting) (citing Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 487 (1988) (state statute directed executrix to publish notice and district court issued order requiring the same); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (state agency was so involved with private restaurant that the Court held them to be "joint participants" in alleged discrimination); Shelley v. Kraemer, 334 U.S. 1, 19 (1948) (state court was petitioned to enforce facially discriminatory restrictive covenants)).

Justice O'Connor argued that the state activity in the present case was more analogous to the state activity in a 1978 case, *Flagg Brothers v. Brooks*, and a 1974 case, *Jackson v. Metropolitan Edison Co.*, cases in which the Court held that no state action existed. *Id.* at 2091–92 (O'Connor, J., dissenting) (citing Flagg Bros. v. Brooks, 436 U.S. 149, 164–65 (1978) (warehouseman relied on non-mandatory New York UCC provisions in his proposed sale of non-paying customer's goods); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974) (private utility terminated plaintiff's service via procedures approved by state utility commission)).

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

[338] *See id.* Justice O'Connor noted the common law roots of the challenge and observed that the procedure has traditionally been implemented by "unguided private choice," not government action. *Id.* at 2092–93 (O'Connor, J., dissenting).

[339] *Id.* at 2093 (O'Connor, J., dissenting). Justice O'Connor pointed to the exclusively governmental functions recognized in earlier state action cases. *Id.* at 2093–94; *see also* Terry v. Adams, 345 U.S. 461, 468–70 (1953) (public elections); Marsh v. Alabama, 326 U.S. 501, 508–09 (1946) (community government); *cf.* Rendell-Baker v. Kohn, 457 U.S. 830, 840–43 (1982) (private schools); *Jackson*, 419 U.S. at 358–59 (private utilities).

[340] *See Edmonson*, 111 S. Ct. at 2093–94 (O'Connor, J., dissenting).

[341] *Id.* at 2094 (O'Connor, J., dissenting) (citing Polk County v. Dodson, 454 U.S. 312, 318–19 (1981)).

[342] *Id.* at 2094–95 (O'Connor, J., dissenting). In effect, Justice O'Connor noted, lawyers

employing strikes, argued Justice O'Connor, counsel perform the traditional adversarial function of protecting clients' interests.[343] In conclusion, Justice O'Connor recognized the unjust nature of racial discrimination, but reiterated that not every unjust or injurious act is unconstitutional.[344] She noted that because the government is not responsible for a private litigant's exercise of peremptory challenges, the defendant had no equal protection claim.[345]

Justice Scalia also filed a separate dissent.[346] He argued that the majority decision was more harmful than helpful to minority interests.[347] Justice Scalia asserted that, after *Edmonson,* courts would have to apply *Batson* to criminal defendants.[348] He reasoned that if all race-based peremptory strikes are prohibited, then minority defendants lose the opportunity to maximize sympathetic jurors by striking white venire members.[349] Justice Scalia also argued that because the time involved in forcing civil litigants to show race-neutral causes for peremptory strikes would promote delay and inhibit the court from reaching the merits of the case, the Court's decision created additional burdens for overcrowded courts.[350]

In sum, the *Edmonson* Court concluded that a litigant's use of peremptory challenges is sufficiently associated with government conduct to be attributed to the state.[351] The *Edmonson* decision also implied that, like a civil litigant's peremptory challenges, a criminal defendant's use of peremptory strikes might be considered state action.[352] Nevertheless, the Court distinguished civil litigants from criminal defendants, noting that civil litigants are not in an adversarial relationship with the state.[353] Still, the *Edmonson* holding, coupled with the *Powers* holding that created race-neutral standing, persuaded the three Georgia Supreme Court dissenters in *State v.*

---

step into the shoes of their clients; therefore, so as long as the client is private, the lawyer's actions in the courtroom are private. *See id.*

[343] *Id.* (O'Connor, J., dissenting).

[344] *Id.* at 2095 (O'Connor, J., dissenting).

[345] *Id.*

[346] *Id.* at 2095 (Scalia, J., dissenting).

[347] *See id.*

[348] *Id.* Justice Scalia said that "the effect of [*Edmonson v. Leesville*] (which logically must apply to criminal prosecutions) will be to prevent the *defendant* from [using race-based strikes] so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible." *Id.*

[349] *Id.*

[350] *See id.* at 2095–96 (Scalia, J., dissenting).

[351] *Id.* at 2086.

[352] *See id.*

[353] *Id.*

McCollum that *Batson* governed a criminal defendant's use of peremptory challenges.[354]

IV. The Peremptory Challenge: What's Left for the Criminal Defendant

State courts and state legislatures have been reluctant to place limitations on a criminal defendant's employment of peremptory challenges. Those state courts that first limited the defendant's strikes used non-equal protection reasoning.[355] State courts, like the Supreme Court, recently became more willing to extend the *Batson* equal protection reasoning.[356] Nevertheless, before *McCollum*, only two state high courts and two circuit courts employed an equal protection analysis to prohibit defendants' race-based strikes.[357] Likewise, although state legislatures also had authority to prohibit racially motivated strikes, none limited defendant strikes.[358] The United States Supreme Court, in *Georgia v. McCollum*, ended state control of criminal defendants' racially motivated challenges.[359]

A. *The Criminal Defendant's Use of Peremptory Challenges in the State and Lower Federal Courts*

Very few states sought to limit the use of peremptory challenges.[360] Generally, objection to the use of discriminatory strikes was based not on an equal protection provision of the state's constitution, but rather on some other provision of that constitution.[361]

---

[354] 405 S.E.2d 688, 689, 691, 693 (Hunt, J., Benham, J., Fletcher, J., dissenting separately) (Ga. 1991).

[355] *See* Goldwasser, *supra* note 13 at 810, & n.13.

[356] *See* State v. Levinson, 795 P.2d 845, 849–50 (Haw. 1990); People v. Kern, 554 N.E.2d 1235, 1236 (N.Y.), *cert. denied*, 111 S. Ct. 77 (1990).

[357] United States v. De Gross, 913 F.2d 1417, 1423 (9th Cir. 1990), *rev'd and remanded* 960 F.2d 1443 (1992) (*en banc*); *Kern*, 554 N.E.2d at 1236; *Levinson*, 795 P.2d at 850; *see also* United States v. Greer, 939 F.2d 1076, 1086 (5th Cir.), *reh'g granted*, 948 F.2d 934 (1991).

[358] *See* Saltzburg & Powers, *supra* note 55, at 376–77. See *infra* notes 426–30 and accompanying text for a discussion of the failure of state legislatures to regulate peremptory challenges.

[359] 112 S. Ct. 2348, 2359 (1992).

[360] *See* Goldwasser, *supra* note 13, at 810 & n.13; E. Vaughn Dunnigan, *supra* note 145 at 355 n.2.

[361] *See, e.g.*, People v. Wheeler, 583 P.2d 748, 758 (Cal. 1974) (decided under California Constitution); Commonwealth v. Soares, 387 N.E.2d 499, 515 (Mass.) (decided under Massachusetts Constitution), *cert. denied*, 444 U.S. 881 (1979). Even when the state courts based their decisions in part under the United States Constitution, they did not invoke the Fourteenth Amendment as a means of regulating peremptory challenges. *See* Holley v. J & S Sweeping Co., 192 Cal. Rptr. 74, 77 (Ct. App. 1983) (decided under California Constitution

Only three state courts placed restrictions on a defendant's use of discriminatory strikes.[362]

California's high court, which was the first to limit discriminatory challenges in any way, is one of three courts that extended restrictions to defendants prior to *Batson*.[363] In 1978, the Supreme Court of California held in *People v. Wheeler* that strikes motivated by group bias violate the California Constitution's version of the Sixth Amendment.[364] The court relied upon Article I, Section 16, of the California Constitution, which states that "trial by jury is an inviolate right and shall be secured to all."[365] The court asserted that the right to an impartial jury is implicit.[366]

Wheeler involved two African-American men charged with the murder of a white grocery store owner during a robbery.[367] The prosecutor used several of his peremptory challenges to remove every African-American prospective juror.[368] The resulting all-white jury convicted the defendants.[369]

In reversing the judgments, the Supreme Court of California reasoned that the jury must be representative of the community in order to achieve a fair trial.[370] The court noted that discriminatory strikes undermine any attempt to empanel a jury that approximates a cross section of the community.[371] The *Wheeler* court thus established that discriminatory use of peremptory strikes violates the

---

and Seventh Amendment); Fields v. People, 732 P.2d 1145, 1146 (Colo. 1987) (decided under Colorado Constitution and Sixth Amendment).

[362] *See, e.g., Wheeler*, 583 P.2d at 765 n.29 ("[T]he People no less than individual defendants are entitled to trial by an impartial jury drawn from a representative cross-section of the community."); State v. Neil, 457 So. 2d 481, 487 (Fla. 1983) ("The state, no less than the defendant, is entitled to an impartial jury."); *Soares*, 387 N.E.2d at 517 n.35 ("[W]e deem the Commonwealth equally to be entitled to a representative jury, unimpaired by improper exercise of peremptory challenges by the defense."); *see also* Dunnigan, *supra* note 145 at 355 n.2. To avoid facing the possibility of limiting a defendant's use of strikes, a number of pre-*Batson* federal circuit courts declined to consider a prosecutor's motivations for using peremptory challenges. Goldwasser, *supra* note 13, at 810 (citing United States v. Leslie, 783 F.2d 541, 564–65 (5th Cir. 1986); United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984); United States v. Newman, 549 F.2d 240, 250 n.8 (2d Cir. 1977)).

[363] *See* Saltzburg and Powers, *supra* note 54, at 349 & n.56.

[364] 583 P.2d 748, 758 (1978).

[365] *Id.* at 754.

[366] *Id.*

[367] *Id.* at 752.

[368] *Id.* at 752–53.

[369] *Id.* at 752, 754.

[370] *Id.* at 762. The court recognized that the random process of selecting prospective jurors would sometimes lead to unbalanced juries. *Id.*

[371] *Id.* at 761.

defendant's right under the state constitution to trial by a jury drawn from a fair cross section of the community.[372]

In a footnote to its decision, the *Wheeler* court asserted that this right to trial by a jury that fairly represents the community extends to the State as well as defendants.[373] The highest courts in Massachusetts, Florida and New Jersey adopted the *Wheeler* decision.[374] Other state courts that considered the question of a prosecutor's right to employ discriminatory strikes, however, did not address the issue of a defendant's use of such challenges.[375] Since *Batson*, however, a few state courts have used the equal protection clauses of their state constitutions to place limits on a defendant's use of peremptory challenges.[376] The New York high court was the first to extend equal protection reasoning to criminal defendants.[377]

In 1990, in *People v. Kern*, the Court of Appeals for New York held that the state's equivalent of the Fourteenth Amendment prohibits the defendant's discriminatory use of peremptory chal-

---

[372] *Id.* at 761–62.

[373] *Id.* at 765 n.29.

[374] Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass.), *cert. denied*, 444 U.S. 881 (1979); State v. Neil, 457 So. 2d 481, 486 (Fla. 1983); State v. Gilmore, 511 A.2d 1150, 1155 (N.J. 1986). In the 1979 case of *Commonwealth v. Soarès*, the Massachusetts Supreme Judicial Court held that the Declaration of Rights of the Constitution of the Commonwealth prohibits the use of peremptory challenges solely to eliminate members of certain recognized community groups from the jury. *See* 387 N.E.2d at 515 & n.29, 516 & n.33. (state constitution prohibits juror exclusion on basis of sex, race, color, creed or national origin). *Soares* involved three African-American men who participated in a street fight in Boston's "Combat Zone" with members of the Harvard University football team following a team celebration. *Id.* at 502–03, 505. Defendants were convicted of first degree murder of one team member as well as various assault charges. *Id.* at 502–03. At trial, the prosecution used peremptory challenges to strike twelve of the thirteen African-Americans qualified to sit on the jury. *Id.* at 508. The *Soares* court adopted the reasoning of *People v. Wheeler*, asserting that the state constitution required that a jury approximate a fair cross section of the community. *Id.* at 515 & n.30. The *Soares* court emphasized that allowance of discriminatory strikes would nullify the right to trial drawn from a representative cross section. *Id.* The court thus established that the use of discriminatory strikes to exclude members of "discrete" groups merely because of presumption of group bias violates the cross section requirement. *Id.* at 516. Citing the *Wheeler* court, the *Soares* court noted that the decision would extend to defense use of peremptories. *Id.* at 517 n.35. The Supreme Court of Florida likewise adopted the *Wheeler* and *Soares* decisions, although limiting its holding to apply only when discriminatory strikes are used against African-Americans. *Neil*, 457 So. 2d at 487. The New Jersey decision, State v. Gilmore, 511 A.2d at 1166 was decided after *Batson* was handed down.

[375] *See* Riley v. State, 496 A.2d 997, 1012 (Del. 1985), *cert. denied*, 487 U.S. 1022 (1986); State v. Crespin, 612 P.2d 716, 717–18 (N.M. Ct. App. 1985).

[376] State v. Levinson, 795 P.2d 845, 849 (Haw. 1990); People v. Kern, 554 N.E.2d 1235, 1236 (N.Y.), *cert. denied*, 111 S. Ct. 77 (1990); People v. Gary M., 526 N.Y.S.2d 986, 994 (N.Y. Sup. Ct. 1988).

[377] *See Levinson*, 795 P.2d at 849.

lenges.[378] *Kern* involved three white teens charged with manslaughter, based upon their participation in an attack against three African-American men.[379] During jury selection, the defendants employed peremptory strikes to remove those prospective African-American jurors whom they could not remove for cause.[380] The prosecution moved the trial court to require that the defendants provide race-neutral explanations for the strikes.[381] The trial court granted the motion and held the defendants to the *Batson* rule for future challenges.[382] The defendants appealed to the Court of Appeals for New York, arguing that neither the state constitution nor the Federal Constitution limits a criminal defendant's exercise of peremptory strikes.[383]

The Court of Appeals held that the civil rights clause and the equal protection clause of the New York Constitution prohibit race-based strikes.[384] First, the court reasoned that jury service is a privilege of citizenship and therefore merits protection from racial discrimination.[385] The court noted that the state legislature declared petit jury service a civil right.[386] The court stated that race-based strikes harm the excluded juror by denying that juror the privilege to participate in the judicial system.[387] The *Kern* court also noted that the state may not disqualify citizens from the venire because of race.[388] The court concluded that eliminating racial discrimination

[378] 554 N.E.2d at 1236.

[379] *Id.* *Kern* was an appeal from the highly publicized "Howard Beach Trial." *Id.* The Howard Beach incident occurred in December of 1986, when a group of white teens chased and viciously attacked three African-American men who were visiting a neighborhood pizzeria. *See id.* at 1236–38. One man was killed when, in an attempt to flee, he ran across a highway and was struck by a car. *Id.* at 1238.

[380] *Id.* at 1239.

[381] *Id.*

[382] *Id.* For a variety of reasons, a number of prospective jurors that the defendants unsuccessfully attempted to strike were not seated on the jury. *Id.* The jury that ultimately convicted the three appellants contained no jurors to whom the defendants objected. *Id.* at 1239–40.

[383] *Id.* at 1240.

[384] *Id.* at 1241.

[385] *Id.* at 1242.

[386] *Id.* at 1243 (citing N.Y. CIV. RIGHTS LAW § 13 (McKinney 1991) "No citizen of the state . . . shall be disqualified to serve as a juror . . . on account of race."). The court rejected the defendants' assertion that the statute was meant to govern the Jury Commissioner's behavior. *Id.*

[387] *Id.* at 1242 (citing Batson v. Kentucky, 476 U.S. 79, 87–88 (1986); McCray v. New York, 461 U.S. 961, 968 (1983) (Marshall, J. dissenting from denial of certiorari); Ballard v. United States, 329 U.S. 187, 195 (1946)). The *Kern* court also asserted that discriminatory strikes harm society by casting doubt upon the integrity of criminal trial proceedings. *Id.*

[388] *Id.*

from venire selection is meaningless if parties could subsequently strike a juror because of race.[389] Thus, the court held that the civil rights clause of the state constitution prohibits use of peremptory challenges for purposeful racial exclusion.[390]

The *Kern* court then considered whether discriminatory strikes violate the state constitution's equal protection provision.[391] The court noted that the *Batson* decision described prosecutorial race-based strikes as violating the equal protection rights of jurors and damaging public perception of the judicial system.[392] The court also noted that Chief Justice Burger, in dissent, concluded that the same restrictions would "inevitably" apply to the defense.[393] The *Kern* court intimated that the state was acting to protect the rights of both the excluded jurors and the community.[394]

The *Kern* court then proceeded to reply to defendants' assertion that because they were not state actors, they could not violate the state equal protection clause.[395] The court held that the state is sufficiently involved in defendants' peremptory challenges to characterize defendants as state actors.[396] The court reasoned that state action is present when the violative action is "fairly attributable to the state."[397] Such attributable actions occur, stated the *Kern* court, when the state is involved in and enforces the prohibited conduct.[398] The court concluded that the state is significantly involved in the defendants' use of peremptory strikes because the state authorizes

---

[389] *Id.*

[390] *Id.* at 1243.

[391] *Id.*

[392] *Id.* (citing Batson v. Kentucky, 476 U.S. 79, 88–89 (1986)).

[393] *Id.* (citing Batson v. Kentucky, 476 U.S. 79, 125–26 (1986) (Burger, C.J., dissenting)).

[394] *Id.* at 1244.

[395] *Id.*

[396] *Id.* at 1246. In reaching this decision, the court reasoned that the defendants' reliance on *Polk County v. Dodson* was misplaced. *Id.* at 1244–45. The *Kern* court read the *Polk County* decision narrowly, asserting that *Polk County* established only that the actions of a state employee are not necessarily attributable to the state. *Id.* at 1244. See *supra* notes 255–74 and accompanying text for complete discussion of *Polk County*.

[397] *Kern*, 554 N.E.2d at 1244 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982)).

[398] *Id.* As an example, the *Kern* court referred to *Shelley v. Kraemer* as an example of state enforcement and participation in discriminatory behavior. *Id.* (citing Shelley v. Kraemer, 334 U.S. 1, 19 (1948)). In *Shelley*, the Court held that judicial enforcement of racially discriminatory restrictive covenants is state action because "the States have made available to [persons choosing to discriminate] the full coercive power of government to deny [black citizens] the enjoyment of property rights." *Id.* In her *Edmonson v. Leesville* dissent, Justice O'Connor distinguished *Shelley*, noting that the state courts used coercive force to encourage discrimination and impose conformity on parties who did not choose to discriminate. 111 S. Ct. 2077, 2091 (1991) (O'Connor, J., dissenting.)

the use of peremptory challenges, summons jurors to service and oversees voir dire.[399] Moreover, the juror sits in a public courtroom, is informed of dismissal from service by the judge, and is escorted from the courtroom by uniformed officials.[400] Thus, the court held that the defendants' use of discriminatory strikes is state action subject to the New York state equal protection provision, which prohibits the use of race-based challenges.[401] At least one other court has already adopted the *Kern* reasoning.[402] In a 1990 case, the Hawaii Supreme Court held that the equal protection clause of the Hawaii State Constitution prohibits defendants from exercising discriminatory challenges.[403]

Only the Ninth and Fifth Circuits directly addressed the issue of whether *Batson* applies to a defendant's use of peremptory challenges.[404] In the 1990 case of *United States v. De Gross,* the Ninth Circuit held that equal protection principles limit a criminal defendant's use of discriminatory strikes.[405] In *De Gross,* the United States objected to defendant De Gross's use of peremptory challenges to remove male venirepersons.[406] The court first reasoned that the government has standing to assert the equal protection rights of the stricken jurors.[407] The court then asserted that a defendant's use of peremptory challenges is state action because the right to use strikes is a right created by the state and because the defendant is assisted by state procedures and state officials.[408] Thus, the court held that criminal defendants are subject to the constraints of *Batson* when engaging in peremptory strikes.[409]

In the 1992 en banc rehearing, the Ninth Circuit affirmed the 1990 decision, holding that equal protection principles prohibit a criminal defendant from peremptorily striking a venireperson on the basis of gender.[410] The court addressed several issues including

---

[399] *Kern*, 554 N.E.2d at 1245.

[400] *Id.*

[401] *Id.* at 1246.

[402] State v. Levinson, 795 P.2d 845, 849–50 (Haw. 1990).

[403] *Id.* The Hawaii court extended the reach of *Kern* by including discriminatory gender strikes. *Id.* at 849–50.

[404] United States v. De Gross, 913 F.2d 1417, 1423 (9th Cir. 1990), *rev'd and remanded* 960 F.2d 1433 (1992) (*en banc*); United States v. Greer, 939 F.2d 1076, 1086 (5th Cir.), *reh'g granted*, 948 F.2d 934 (1991). See *supra* note 426 for a discussion of State v. Greer.

[405] *De Gross*, 913 F.2d at 1423.

[406] *Id.* at 1419. De Gross was female. *Id.*

[407] *Id.* at 1421.

[408] *Id.* at 1423–24.

[409] *Id.* at 1423.

[410] 960 F.2d 1433, 1438 (1992) (*en banc*). *De Gross* was overturned on the grounds that

(1) whether the government has standing to object to a defendant's strike; (2) whether a gender-based peremptory challenge, like a race-based one, is unconstitutional; and (3) whether equal protection constraints limit criminal defendants, like prosecutors, from exercising discriminatory challenges.[411] The court reasoned that, under *Powers,* the government has standing to object to a criminal defendant's peremptory challenges based on the government's own injury and the injury to the challenged venirepersons.[412] The court also reasoned that *Edmonson* imposed equal protection limits on criminal defendants' peremptory challenges.[413] Thus, the *De Gross* decision expanded the *Batson* principle in terms of both protected classes and prohibited parties.[414]

First, the court explained that the violation of the venireperson's rights injures the government by impugning the jury system.[415] The court then stated that the government's relationship to venirepersons is sufficient to ensure that it will vigorously defend their rights.[416] Finally, the court pointed out that it is unlikely that excluded venirepersons would assert their own rights because of pro-

---

the prosecutor's purposeful gender discrimination against a juror violated De Gross's Fifth Amendment right to equal protection of the laws. *Id.* at 1442–43.

[411] *Id.* at 1436–42.

[412] *Id.* at 1436–37.

[413] *Id.* at 1439–40.

[414] *See id.* at 1443. In extending *Batson,* the *De Gross* court stated that all of the evils that the *Batson* decision was designed to eliminate also arise when gender discrimination is permitted. *Id.* at 1438. Among these "evils", the court listed: (1) harm to the excluded venirepersons; (2) undermining of public confidence in the judicial system; and (3) stimulation of community prejudice. *Id.*

Additionally, the court noted that sexually discriminatory peremptory strikes violate the defendant's right to be tried by a jury chosen pursuant to nondiscriminatory criteria. *Id.* The court noted that strikes based on gender, like strikes based on race, have nothing to do with an individual's qualifications as a juror. *Id.*

While the court recognized that the governmental objective of impaneling a fair and impartial jury is important, it found that strikes based on gender are not substantially related to achieving this objective. *Id.* at 1439. The court stated that only strikes based on a party's "sudden and immediate impression that a particular venireperson will be partial" would foster the impaneling of an impartial jury, and gender-based strikes by definition are not based on such impressions. *Id.* Rather, the court pointed out, gender-based strikes are based on either the false assumption that members of a certain group are unqualified to serve as jurors or on the false assumption that members of a certain group cannot impartially consider the case against a member of their group. *Id.* Such false assumptions cannot justify gender discrimination any more than they can justify racial discrimination. *See id.* at 1442.

[415] *Id.* at 1436.

[416] *Id. See* Singleton v. Wulff, 428 U.S. 106, 114–15 (1976) (holding that third-party standing is permissible only where the third party will defend as hardily as would the party whose rights are being protected).

cedural difficulties and lack of incentive due to small financial stakes and the expense of litigation.[417]

In order to legitimize the position that *Batson's* constitutional prohibition applied to a criminal defendant, the court concluded that a defendant's peremptory strike is state action.[418] The court determined that the logic of the Supreme Court's decision in *Edmonson* was applicable in a criminal context.[419] In finding state action, the court noted, the parties "make extensive use of state procedures with the overt, significant assistance of state officials" in exercising peremptory challenges.[420] The court also characterized the peremptory challenge as a "unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protection against discrimination," whether in a civil or criminal context.[421] Finally, following the *Edmonson* reasoning, the court concluded that the injury caused by discriminatory peremptories is aggravated by the fact that the government allows it to occur in the courthouse.[422]

A concurrence to the majority decision argued that the holding of *Edmonson* should be confined to the civil arena.[423] The concurrence asserted that a criminal defendant cannot fairly be described as a state actor because in a criminal trial, as opposed to a civil trial, an adversarial relationship exists between the defendant and the state.[424] The concurrence stated that the "defendant's and the prosecutor's interest in criminal cases are in direct conflict at every stage, including that of jury selection . . . ," and therefore the *Edmonson* reasoning must be limited to civil proceedings.[425] The concurrence, quoting Act II of Gilbert and Sullivan's *The Pirates of Penzance,* called the majority's state action analysis "A Paradox, A Paradox / A most ingenious paradox . . . ," and suggested that the majority's concerns about legitimizing the discrimination could be assuaged by a simple disclaimer by the judge to prospective jurors before the commencement of voir dire.[426]

---

[417] *Id.*

[418] *Id.* at 1440.

[419] *Id.*

[420] *Id.*

[421] *Id.* at 1441.

[422] *Id.*

[423] *Id.* at 1445. (Reinhardt, C.J., concurring in judgment).

[424] *Id.* at 1444. (Reinhardt, C.J., concurring in judgment).

[425] *Id.*

[426] *Id.* at 1447, n.6. (Reinhardt, C.J., concurring in judgment). The majority, rejecting the concurrence's distinction between civil and criminal proceedings, argued that the conflict

In addition to court-imposed limits, state legislatures have also placed limits upon peremptory challenges.[427] Because states authorize peremptory challenges, state legislatures may regulate their use.[428] Texas seems to be the only state to have used this regulatory power to prohibit prosecutorial use of discriminatory strikes.[429] The Texas statute empowers the defendant and judge to remove the entire jury pool if the prosecutor engages in discriminatory strikes.[430] No state, however, has enacted legislation preventing a defendant from using discriminatory strikes, other than those states that have codified judicial decisions.[431]

In sum, previous to the Supreme Court deciding *Georgia v. McCollum,* only the New York Court of Appeals, the Hawaii Supreme Court and the United States Courts of Appeals for the Ninth and Fifth Circuits applied *Batson* limitations to a criminal defendant's peremptory challenges.[432] Some state courts used other reasoning, such as their Sixth Amendment equivalents, to limit a criminal defendant's use of peremptory challenges.[433] State legislatures, despite their apparent ability to do so, did not prohibit discriminatory strikes by criminal defendants.[434]

B. Georgia v. McCollum: *The Demise of the Peremptory Challenge*

In the 1992 case of *Georgia v. McCollum,* the United States Supreme Court held that the Constitution prohibits a criminal de-

---

between the defendant and the State is purely conceptual. *Id.* at 1441. Rather, the court opined, while the defendant's interests are opposed to those of the prosecutor, the defendant's interests are consistent with the state's interest in administering a fair and just trial. *Id.*

Like the Ninth Circuit, the Fifth Circuit also limited criminal defendants' use of discriminatory strikes. *See* United States v. Greer, 939 F.2d 1076, 1086 (5th Cir.), *reh'g granted*, 948 F.2d 934 (1991). In *Greer*, the court held that *Edmonson* rendered the *Batson* prohibitions applicable to criminal defendants' peremptories. *Id.* at 1085–86, 1086 n.9. The court concluded that *Batson* prohibits peremptory challenges based on race, religion or national origin. *Id.* at 1086.

[427] *See, e.g.*, TEX. CRIM. PROC. CODE ANN. art. 35.261 (West 1989); ALA. CODE vol. 23A, rule 18.4 (1990).

[428] *See* Saltzburg & Powers, *supra* note 54, at 376–77. The Supreme Court has stated that the matter of peremptory challenges is under legislative control. *E.g.*, Hayes v. Missouri, 120 U.S. 68, 70 (1887) (legislature has power to determine number of peremptory challenges made available to each party).

[429] TEX. CRIM. PROC. CODE ANN. art. 35.261 (West 1989) (granting defendant right to request a new jury pool if prosecution uses race-based peremptories).

[430] *Id.*

[431] See generally the state statutes relating to jury selection and criminal proceedings.

[432] *See supra* notes 377–408 and accompanying text.

[433] *See supra* notes 359–74 and accompanying text.

[434] *See supra* notes 409–13 and accompanying text.

fendant from using racially motivated peremptory challenges.[435] The Court reasoned that a criminal defendant's use of racially motivated strikes offends the Equal Protection Clause of the Constitution because such use of challenges harms the excluded jurors and the community,[436] and because the criminal defendant can be considered a state actor subject to constitutional constraints.[437] The *McCollum* decision established that no party in any proceeding may use a peremptory strike to exclude a juror solely on the basis of race.[438]

McCollum involved three white family members who ran a dry-cleaning business in Albany, Georgia.[439] The McCollums were charged with assaulting two customers, a married African-American couple.[440] Race became a central issue in the case when the African-American community widely distributed a pamphlet alleging that the attack was racially motivated and requesting a boycott of the McCollums' business.[441] At the McCollums' trial, before voir dire began, the State motioned the court to prohibit the McCollums from striking African-Americans from the jury.[442] The trial court denied the motion and the State made an interlocutory appeal to the Supreme Court of Georgia.[443]

In a two-paragraph opinion, the Supreme Court of Georgia refused to extend the *Batson* rule to the criminal defendant's use of peremptory challenges.[444] The court noted that the United States Supreme Court had not expressly required such an extension.[445] The court relied upon the historical use of the peremptory challenge as justification for denying the State's motion.[446] Three Justices filed separate dissents, each arguing that the Supreme Court's *Edmonson* and *Powers* decisions prohibited the use of discriminatory strikes by every possible party, including the criminal defendant.[447]

---

[435] 112 S. Ct. 2348, 2359 (1992).

[436] *Id.* at 2353–54.

[437] *See id.* at 2353.

[438] *Id.* at 2359.

[439] *Justices to Review Race as a Basis for Jury Exclusions, Georgia Prosecutors Call Practice Unlawful*, ATLANTA J., Nov. 4, 1991, at A3.

[440] *Id.*

[441] Georgia v. McCollum, 112 S. Ct. at 2351.

[442] State v. McCollum, 405 S.E.2d 688, 689 (1991).

[443] *Id.*

[444] *Id.*

[445] *Id.*

[446] *Id.* The court stated: "Bearing in mind the long history of jury trials as an essential element of the protection of human rights, this court declines to diminish the free exercise of peremptory strikes by a criminal defendant." *Id.*

[447] *McCollum*, 405 S.E.2d at 689, 691, 693 (Hunt, J., Benham, J., Fletcher, J., dissenting separately).

In an opinion written by Justice Blackmun, the United States Supreme Court reversed and remanded the Georgia Supreme Court decision.[448] The Court held that criminal defendants are governed by the precedent established in *Powers v. Ohio* and *Edmonson v. Leesville*.[449] The Court reasoned that the McCollums' status as criminal defendants was irrelevant to their right to employ peremptory challenges.[450] To reach this conclusion, the Court employed a four-factor analysis: (1) whether a criminal defendant's racially discriminatory exercise of peremptory challenges inflicts the harms addressed by *Batson;* (2) whether a criminal defendant's exercise of peremptory challenges constitutes state action for the purposes of the Equal Protection Clause; (3) whether the State has third-party standing to challenge a defendant's discriminatory use of peremptory challenges; and (4) whether a prohibition against the discriminatory exercise of peremptory strikes violates a criminal defendant's constitutional rights.[451]

The Court began its analysis by reiterating that *Batson* protects not only individual defendants but also the "dignity" of the excluded jurors and the "integrity of the courts."[452] The Court noted that regardless of who utilizes discriminatory strikes, the harm to the juror, open and public discrimination, remains the same.[453] In addition, the Court stated that this harm undermines public confidence in the judicial process.[454]

The Court then discussed the need for public confidence in jury selection procedures in race-related criminal trials.[455] The Court emphasized that emotions in affected communities are especially volatile in circumstances involving race-related crimes.[456] The Court asserted that public confidence is as undermined by a defendant obtaining an acquittal through use of discriminatory strikes, as by circumstances where the State engages in discriminatory jury selection and obtains a conviction.[457] Thus, the Court

---

[448] *McCollum*, 112 S. Ct. at 2359.
[449] *See id.* at 2353–59.
[450] *See id.* at 2357–59.
[451] *Id.* at 2353.
[452] *Id.* See *supra* notes 191–202 for a discussion of this reasoning in the *Powers* decision.
[453] *McCollum*, 112 S. Ct. at 2353.
[454] *Id.* at 2353–54.
[455] *Id.* at 2354.
[456] *Id.*
[457] *Id.*

concluded, public confidence in the integrity of the justice system is necessary to maintain peace and order.[458]

The Court next acknowledged that although a criminal defendant's strikes harm the excluded jurors and the community, this harm was insufficient to establish an equal protection violation.[459] The Court observed that it was also necessary to consider whether the acts of a criminal defendant could be state action.[460] Because all cases other than *Edmonson* involved challenges made by prosecutors, obvious state actors, the Court adopted the *Edmonson* analytical framework.[461]

The Court began by reviewing the two-part inquiry utilized by the *Edmonson* Court.[462] The *McCollum* Court stated that the first inquiry, "whether the claimed constitutional deprivation has resulted from the exercise of a right or privilege having its source in state authority," was satisfied if the peremptory challenge is "permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury."[463] The Court determined that this first inquiry was satisfied because the McCollums' right to use peremptory challenges was established by Georgia statutory law.[464]

The second inquiry, "whether the private party charged with the deprivation can be described as a state actor" involves three factors: "(1) the extent to which the actor relies on governmental assistance and benefits; (2) whether the actor is performing a traditional governmental function; and (3) whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[465] The Court determined that defendants such as the McCollums satisfied all three factors.[466] As to the first factor, the Court noted that *Edmonson* held that the jury system as a whole could not exist without overt government participation.[467] The

---

[458] *Id.* This decision was released only a few months after the decision to acquit the accused police officers in the Rodney King trial resulted in widespread rioting in Los Angeles.

[459] *Id.*

[460] *Id.*

[461] *Id.*

[462] *Id.* This inquiry was adopted by the *Edmonson* Court from the test set forth in Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982). *See McCollum*, 112 S. Ct. at 2354 n.7.

[463] *Id.* at 2354–55 (citations omitted).

[464] *Id.* at 2355.

[465] *Id.* (citations and internal quotations omitted).

[466] *See id.* at 2355–56.

[467] *Id.* at 2355.

Court then recognized that Georgia provides for the compilation of jury lists, establishes criteria for jury services and for cultivating a jury pool, summons jurors to Court under state authority, pays jurors an expense allowance and administers an oath.[468] Thus, the Court determined that the defendant in a Georgia criminal case relies on government assistance and benefits equivalent to those present in *Edmonson*.[469]

The Court next considered the second factor, whether the peremptory challenge can be considered a traditional government function.[470] The Court again relied on *Edmonson*'s holding that the sole purpose of peremptory challenges is to allow parties to assist the government in selecting an impartial jury.[471] The Court noted that *Edmonson* recognized that the purpose of the jury system is to guard the rights of litigants and to ensure the "continued acceptance of the laws by all of the people."[472] The Court concluded that the peremptory challenge was even more tied to a traditional government function in a criminal context because jury selection fulfills a constitutionally compelled government function.[473]

The Court ended its analysis under this second inquiry by noting the *Edmonson* Court's observation that the courtroom setting magnifies the harm of the private litigant's discriminatory strike and adds to the perception of state action.[474] The *McCollum* Court stated that this characterization was also true for criminal trials.[475] The Court concluded that no matter what party engages in discriminatory strikes, the strike will be perceived to be the work of the state.[476] Thus, the Court held that a criminal defendant's use of discriminatory strikes is state action subject to constitutional restrictions.[477]

The Court then distinguished the *Polk County* decision.[478] The Court held that *Polk County* did not preclude a finding of state action in all situations where a defender and the state are adversaries.[479] The Court reasoned that *Polk County* held only that the public

---

[468] *Id.*
[469] *Id.*
[470] *Id.*
[471] *Id.*
[472] *Id.* (internal citations omitted).
[473] *Id.*
[474] *Id.* at 2356.
[475] *Id.*
[476] *Id.*
[477] *Id.* at 2357.
[478] *Id.* at 2356.
[479] *Id.*

defender's adversarial relationship prevented the defender's public employment from being sufficient to support a finding of state action.[480] The Court continued that whether a defender can be considered a state actor depends on the nature and context of the specific action in question.[481] The Court noted that it had previously held that a public defender is a state actor when making personnel decisions on behalf of a state.[482] The Court also noted that the *Polk County* decision itself stated that public defenders might be considered state actors when performing administrative, and possibly investigative, functions.[483]

In conclusion, the Court asserted that the exercise of peremptory challenges differed from other adversarial defense functions.[484] The Court reasoned that the ability to use peremptory strikes to select a jury was the power to choose government employees.[485] Thus, the Court determined that a defendant's use of peremptory challenges is state action governed by the constitutional mandate of race-neutrality.[486] The Court stated that whenever a private actor's conduct is characterized as state action it is likely motivated by self-interest and, therefore, defendants' use of discriminatory strikes to serve their own interests does not preclude a finding of state action.[487]

The *McCollum* Court next addressed whether the State has standing to mount a *Batson* attack.[488] The Court began by reiterating that *Powers* held that a white criminal defendant has standing to raise the equal protection rights of excluded jurors.[489] The Court also noted that in *Edmonson,* the Court applied the *Powers* three-part standing analysis to determine that civil litigants can raise an excluded juror's equal protection rights.[490]

The Court first asserted that the State suffers a cognizable injury, satisfying the first prong of the standing analysis, when the

---

[480] *Id.*
[481] *Id.*
[482] *Id.* (citing Branti v. Finkel, 445 U.S. 507 (1980)).
[483] *Id.*
[484] *Id.*
[485] *Id.*
[486] *Id.*
[487] *Id.* at 2356–57.
[488] *Id.* at 2357.
[489] *Id.* The Court reiterated that under *Powers,* a litigant has standing to assert a claim for a third party if: (1) the litigant suffered a concrete injury; (2) the litigant has a close relationship to the third party; and (3) the third party is unable to protect his or her own interest. *Id.*
[490] *Id.*

fairness and integrity of the judicial process is undermined.[491] The Court then explained that the second prong of the standing analysis, a close relationship with the third party, is satisfied because such a relationship is established between the State and the juror during voir dire.[492] Finally, the third prong, inability of the third party to raise the claim, is satisfied because "barriers to a suit by an excluded juror are daunting."[493] Thus, the Court held that the State has standing to assert the rights of excluded jurors.[494]

Finally, the *McCollum* Court held that the rights of the criminal defendant are not greater than the interests served by *Batson*.[495] First, the Court pointed out that peremptory challenges are not protected by the Constitution.[496] The Court noted that the peremptory challenge has "very old credentials" and noted that a litigant's ability to help shape the jury is one reason why the jury system and jury verdicts are widely accepted.[497] The Court reiterated, however, the *Edmonson* Court's observation that "if race stereotypes are the price for acceptance of a jury panel as fair . . . such a price is too high to meet the standard of the Constitution."[498] Thus, the Court concluded that the exercise of racially motivated peremptory challenges is unconstitutional.[499]

Chief Justice Rehnquist and Justice Thomas each filed concurrences.[500] Justices O'Connor and Scalia dissented separately.[501] In a one-paragraph opinion, Chief Justice Rehnquist stated that although he believed *Edmonson* was decided wrongly, he also believed the Court was bound by its precedent and therefore joined the majority's conclusion.[502] Justice Thomas also emphasized his belief

---

[491] *Id.* The Court explained that the *Powers* Court found that criminal defendants suffer cognizable injury because racial discrimination casts doubt on the integrity of the judicial process and the *Edmonson* Court held that this injury was not limited to the criminal sphere. *Id.*

[492] *Id.* (citing Powers v. Ohio, 111 S. Ct. 1364, 1372 (1991)). The Court described the State as having an even closer relationship with the excluded juror than the criminal defendant because the State is the "logical and proper" party to defend the excluded juror's constitutional rights. *Id.*

[493] *Id.* (citing Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991)).

[494] *Id.*

[495] *Id.* at 2358.

[496] *Id.*

[497] *Id.*

[498] *Id.* (internal quotations omitted).

[499] *Id.* at 2359.

[500] *Id.*

[501] *Id.* at 2361, 2364.

[502] *Id.* at 2359 (Rehnquist, C.J., concurring in the judgment).

that the McCollums were governed by *Edmonson*.[503] Justice Thomas noted that although he therefore joined the decision, he was displeased that constitutional restraints were placed on peremptory challenges.[504] Justice Thomas asserted that *McCollum* was an unfavorable decision for African-American criminal defendants.[505] He explained that in *Strauder v. West Virginia,* the Supreme Court recognized that the racial composition of a jury may affect the outcome of a criminal proceeding.[506] Therefore, according to Justice Thomas, *Strauder* rested on the assumption that all-white juries might unfairly judge African-American criminal defendants.[507] Thus, continued Justice Thomas, members of the defendant's race who sit on the jury can overcome racial bias and help the defendant obtain a fair trial.[508]

In *Batson,* stated Justice Thomas, the Court moved away from *Strauder* by holding that "without some actual showing," suppositions that certain jurors may harbor racial prejudice are illegitimate.[509] Justice Thomas recognized negative consequences resulting from the *McCollum* decision.[510] Justice Thomas asserted that the decision prioritized a citizen's right to sit on a jury over the rights

---

[503] *Id.* (Thomas, J., concurring in the judgment).

[504] *Id.* (citing Batson v. Kentucky, 476 U.S. 79 (1986); Powers v. Ohio, 111 S. Ct. 1364 (1991); Edmonson v. Leesville, 111 S. Ct. 2077 (1991)). Justice Thomas asserted that *Batson* and its progeny subverted the reasoning and result of Strauder v. West Virginia. *Id.* See *supra* notes 79–84 and accompanying text for a discussion of the *Strauder* decision.

[505] *Id.* at 2360 (Thomas, J., concurring in the judgment). Some evidence exists supporting Justice Thomas' conclusion that minority defendants' ability to secure representative juries will be harmed by the *McCollum* decision. *See* State v. Carr, 413 S.E.2d 192, 193 (Ga.), *petition for cert. filed,* (1992). In the 1992 case of *State v. Carr,* decided before *Georgia v. McCollum,* the Georgia Supreme Court held that an African-American criminal defendant is not prohibited from using racially motivated peremptory strikes. *Id.* at 193. *Carr* involved Willie J. Carr, an African-American man indicted for drug-related offenses. *Id.* at 192. Carr used all of his peremptory challenges to remove white panelists. *Id.* Georgia used two peremptory strikes and removed two African-American panelists. *Id.* The jury consisted of eleven African-Americans and one Hispanic. *Id.*

The State then requested that the court require Carr to give race-neutral explanations for his challenges. *Id.* The court refused, reasoning that its decision in *State v. McCollum* was controlling. *Id.* at 193. One justice, in a special concurrence, noted that the concurrence preserved the question of a criminal defendant's ability to use racially motivated strikes pending the Supreme Court's decision in *Georgia v. McCollum. Id.* at 193 (Fletcher, J., concurring specially). Thus, the court established that the ability of African-American criminal defendants to use racially motivated strikes would be governed by the Supreme Court decision of *Georgia v. McCollum. Id.* at 93.

[506] *Id.*

[507] *Id.*

[508] *Id.*

[509] *Id.*

[510] *Id.*

of criminal defendants, and left defendants with less ability to protect themselves.[511] Justice Thomas concluded that the Court ignored the benefits derived when members of the criminal defendant's race sit on the jury, benefits recognized in *Strauder*.[512]

In a dissenting opinion, Justice O'Connor contended that the majority opinion was unfaithful to the precedent that established that criminal defendants and their counsel are not government actors when performing traditional trial functions.[513] Justice O'Connor argued that criminal defendants are not state actors and thus not subject to equal protection restraints.[514] She asserted that the Court did not engage in a realistic appraisal of the relationship between the criminal defendant and the government acting as accuser.[515]

Justice O'Connor asserted that *Polk County* held that a public defender does not act under color of state law when performing traditional defense functions.[516] She explained that defense lawyers are adversaries of the state and that defense lawyers best serve the public by not acting in concert with the state.[517] Furthermore, noted Justice O'Connor, the independence of defense counsel is constitutionally mandated.[518]

Justice O'Connor argued that the majority's opinion ignored *Polk County*'s holding that criminal defense is a private function, not state action.[519] She emphasized that the majority attempted to rationalize its decision by characterizing defendants as state actors when making peremptory challenges but government adversaries when performing other defense functions.[520] This reasoning failed,

---

[511] *Id.* Also, according to Justice Thomas, the decision continued a slippery slope *Batson* began. *Id.* The Justice explained that the Court would eventually have to decide whether African-American defendants could strike white venirepersons and whether peremptories could be exercised on basis of gender. *Id.* at 2360–61 (Thomas, J., concurring in the judgment).

[512] *Id.* at 2361 (Thomas, J., concurring in the judgment).

[513] *Id.* (O'Connor, J., dissenting).

[514] *See id.*

[515] *Id.*

[516] *Id.*

[517] *Id.* at 2362 (O'Connor, J., dissenting).

[518] *Id.* (citing Polk County v. Dodson, 454 U.S. 312, 322 (1981) (quoting Gideon v. Wainwright, 372 U.S. 335 (1963))). O'Connor put forth that "Gideon v. Wainwright 'established the right of state criminal defendants to the guiding hand of counsel at every step of the proceeding against [them]'. . . . Implicit in this right 'is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.'" *Id.* (citations omitted).

[519] *Id.*

[520] *Id.*

however, according to Justice O'Connor, because peremptory challenges are a traditional defense function.[521]

Moreover, continued Justice O'Connor, a private party's exercise of a privilege created by the state is not state action if initiated by the private party.[522] The government does not influence the criminal defendant's decision to use peremptory challenges.[523] As a result, concluded Justice O'Connor, the criminal defendant is an adversary of the state and, under *Polk County,* cannot be considered a state actor.[524]

Justice O'Connor completed her dissent by explaining that the majority seemed preoccupied with ensuring non-discriminatory jury selection procedures.[525] Justice O'Connor reminded the majority that only the government can be held to constitutional constraints.[526] Moreover, continued Justice O'Connor, the *McCollum* decision might fail to advance non-discriminatory criminal justice.[527] According to Justice O'Connor, the decision will inhibit minority defendants from securing minority representation on juries.[528] Justice O'Connor concluded that "[i]n a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors, there is cause to question the implications of this Court's good intentions."[529]

Finally, Justice Scalia, referring to the *Edmonson* dissents, also dissented from the majority decision.[530] Justice Scalia joined in Justice O'Connor's analysis, although he disagreed with her argument that *McCollum* could be distinguished from *Edmonson.*[531] Like Justice O'Connor, Justice Scalia concluded with an admonishment that the Court's desire to promote good race relations would harm criminal defendants' ability to obtain fair trials.[532]

---

[521] *Id.* (citing Swain v. Alabama, 380 U.S. 202, 212–19 (1965); Lewis v. United States, 146 U.S. 370, 376 (1892)).

[522] *Id.* at 2363 (O'Connor, J., dissenting).

[523] *Id.*

[524] *Id.* O'Connor stated that *Edmonson* did not render *Polk County*'s holding inapplicable to criminal defendants as *Edmonson* only dealt with civil litigants who are, by definition, not in adversarial relationships with the government. *Id.*

[525] *Id.* at 2364 (O'Connor, J., dissenting).

[526] *Id.*

[527] *Id.*

[528] *Id.*

[529] *Id.*

[530] *See id.* (Scalia, J., dissenting).

[531] *Id.* at 2365 (Scalia, J., dissenting).

[532] *Id.*

V. ANALYSIS

Balancing the use of discriminatory challenges by a defendant against the inherently ugly presence of racial discrimination in a courtroom is not simple. Situations such as those presented in *State v. Kern* and *Georgia v. McCollum* disturb society's sense of fairness.[533] It seems only right and reasonable that members of the victim's community have a vested interest in participating in the ensuing judicial proceedings. It appears unfair that defendants might manipulate a jury by striking members of the victim's community.

Still, this country holds a deep-seated notion that criminal defendants deserve special deference.[534] Of all persons present in the courtroom, only the criminal defendant faces loss of life and liberty.[535] For this reason the defendant deserves protection from any vigilante justice that might result from the link between victim and community. It is fundamental to the American judicial system that a defendant receive a fair, impartial trial.[536]

In *McCollum,* the United States Supreme Court faced an unenviable dilemma: either allow the defendant to strike jurors for no apparent reason other than race, or deny the criminal defendant a traditional right. The Court chose to remove the traditional defendant right.[537] The Court's decision should not have been unexpected. Justice Kennedy, writing for the Court in *Edmonson,* made the Court's agenda clear: racial discrimination has no place in the courtroom, regardless of whether the proceedings are civil or criminal.[538] The *Powers* and *Edmonson* decisions indicated the depth of the Supreme Court's hostility toward racially motivated peremptory strikes while laying the groundwork for the *McCollum* decision.[539] Although only a few years ago it appeared unimaginable that the prohibition such as the one articulated in *Batson v. Kentucky* could ever reach criminal defendants,[540] the Court's activity in 1991 created precedent that made the *McCollum* decision inevitable.

---

[533] See *supra* notes 378–403 and accompanying text for a discussion of the *Kern* case, and notes 435–532 and accompanying text for a discussion of the *McCollum* decision.

[534] See *supra* notes 38–48 and accompanying text for a discussion of traditional defendant rights.

[535] *Id.*

[536] *See supra* notes 38–76 and accompanying text.

[537] See *supra* notes 435–532 and accompanying text for a discussion of the *McCollum* decision.

[538] 111 S. Ct. 2077, 2088 (1991).

[539] See *supra* notes 174–250 and 275–354 and accompanying text for a discussion of the *Powers* and *Edmonson* decisions.

[540] *See* Powers v. Ohio, 111 S. Ct. 1364, 1376 (1991) (Scalia, J., dissenting).

Over the course of 1990 and 1991, the Supreme Court did three things that foreshadowed the extension of *Batson* to criminal defendants. First, in *Holland v. Illinois,* the Court rejected the Sixth Amendment as a means for prohibiting discriminatory strikes.[541] Next, the Court was increasingly prolific regarding its hostility toward discrimination in the courtroom.[542] Finally, in *Powers v. Ohio* and *Edmonson v. Leesville,* the Court created a solution for noted obstacles to extending *Batson.*[543]

Support for the argument that *McCollum* was inevitable is provided by examining the Court's decision in *Holland v. Illinois.* In *Holland,* the Court held that the Sixth Amendment provides no basis for raising a challenge to the use of discriminatory strikes.[544] *Holland* involved a white defendant who objected to a prosecutor's use of peremptory challenges to remove African-American venirepersons.[545] The *Holland* Court reasoned that the fair cross section requirement of the Sixth Amendment applies to the venire, but not the petit jury.[546]

An extension of the Sixth Amendment would have allowed any defendant, regardless of race, to object to the exclusion of an identifiable group of persons from the jury process.[547] The State, however, has no Sixth Amendment right. The Sixth Amendment would not allow a prosecutor to challenge defense peremptories.[548] Nor would the Sixth Amendment permit the Court to use an injury to the dismissed venireperson as grounds for a constitutional challenge to race-based strikes, because jurors, like the State, are not afforded rights under the Sixth Amendment.[549] Therefore, the only avenue available for the Court to prohibit defendants from discriminatorily using peremptory challenges was the Fourteenth Amendment.

Commentators both for and against the extension of *Batson* acknowledged that the Fourteenth Amendment was not obviously applicable to criminal defendants.[550] These commentators noted

---

[541] 483 U.S. 474, 480.

[542] *See* Edmonson v. Leesville, 111 S. Ct. 2077, 2081 (1991); *Powers,* 111 S. Ct. at 1366; *Holland,* 493 U.S. at 481.

[543] See *infra* notes 553–62 and accompanying text for a discussion of how *Powers* resolved the standing obstacle and notes 563–68 and accompanying text for a discussion of how *Edmonson* resolved the state action obstacle.

[544] 493 U.S. at 478.

[545] *Id.* at 476.

[546] *Id.* at 476–77.

[547] *Id.* at 477.

[548] *See supra* notes 42–47 and accompanying text; *see also* Zirlin *supra* note 26, at 243–47.

[549] See *supra* note 42 for the text of the Sixth Amendment.

[550] *See* Alschuler, *supra* note 27, at 198; Goldwasser, *supra* note 13, at 811–20.

that both the government's standing to assert a *Batson* challenge and the characterization of defense strikes as state action were problematic.[551] In addressing the standing of racially dissimilar defendants in *Powers*, and the use of peremptory challenges by civil litigants in *Edmonson*, however, the Court created precedent that made it possible for the Court to declare that it had no choice but to extend the *Batson* rule.[552]

By reinterpreting existing precedent to allow defendants to challenge the state exclusion of a juror, whether or not the defendant and the juror were of the same race, the *Powers* Court eliminated the standing obstacle that prevented the extension of *Batson* to criminal defendants.[553] Commentators had asserted that, because the State has no equal protection rights, it could not claim that a criminal defendant's racially discriminatory use of peremptory challenges violated those rights.[554] In order for a prosecutor to invoke *Batson*, therefore, a state needed authority to assert the claims of another.

In *Powers*, the Court asserted that the excluded juror has an equal protection right that the State violates when it discriminatorily strikes the juror.[555] Moreover, the Court determined that someone other than the excluded juror must vindicate those rights when violated.[556] Therefore, the Court held that defendants may raise the claim of the excluded juror.[557] By creating a basis for third-party standing, however, the Court also opened the door to prosecutorial challenges. If, after *Powers*, a criminal defendant used racially motivated peremptory strikes, the State could arguably bring a Fourteenth Amendment claim to vindicate the excluded juror's rights.

Under the *Powers* reasoning, however, the State could not rely upon third-party standing unless the State could satisfy three criteria: (1) injury-in-fact; (2) close relationship with the injured party; and (3) some hinderance preventing the injured party from protecting his or her own interest.[558] The second criteria (relationship) and third criteria (obstacle) are obviously fulfilled under the *Powers*

---

[551] *Id.*

[552] Georgia v. McCollum, 112 S. Ct. 2348, 2358 (1992).

[553] 111 S. Ct. at 1374–77.

[554] Goldwasser, *supra* note 13, at 811–20; Zirlin, *supra* note 26, at 238–43.

[555] 111 S. Ct. at 1370.

[556] *Id.* at 1373.

[557] *Id.*

[558] *Id.* at 1370–71.

characterization as applied to criminal defendants seeking third-party standing.[559] Still, unless the discriminatory use of peremptory challenges by the criminal defendant caused the State some cognizable injury, the State would not be able to assert the excluded juror's equal protection right. In *Powers,* Justice Kennedy described as a cognizable injury the doubt cast on the integrity of the judicial process as well as the doubt placed on the fairness of the proceeding by racial discrimination in the selection of jurors.[560] According to the *Powers* Court, both the defendant and the excluded juror share an interest in eliminating racial discrimination in the courtroom.[561] Although *Powers* involved a defendant seeking to object to the peremptories, certainly this is the kind of injury equally suffered, and interest shared, by the government as by a defendant. As a result, the State could argue that *Powers* created a basis for granting it third-party standing.

Finally, the *Powers* holding resolved the third-party standing problem raised by the State's racial neutrality. Under *Batson,* defendants could only raise objections to the exclusion of members of the same group background.[562] The government, of course, has no race or group identity. Therefore, under a strict reading of *Batson,* the State would never be able to challenge the defense's strikes. The application of third-party standing to challenge peremptory strikes avoids this difficulty. As a result of the *Powers* decision, defendants received standing to assert third-party claims of jurors subjected to prosecutorial discrimination, regardless of race.[563] *Powers,* therefore, provided the basis for granting prosecutors standing under the guise of protecting jurors' constitutional rights.

The *Edmonson* decision also circumvented noted obstacles. In particular, *Edmonson* neatly resolved the argument that the Fourteenth Amendment did not apply to a criminal defendant's use of peremptory challenges because the defendant was not a state actor.[564] Generally, racial discrimination only violates the Constitution when attributable to state action.[565] In *Edmonson,* the Court held that the use of peremptory challenges in a civil trial is state action.[566]

---

[559] See *supra* notes 205–27 and accompanying text for a discussion of the three-part test.

[560] 111 S. Ct. at 1371.

[561] *Id.* at 1371–72.

[562] 476 U.S. 79, 94 (1986).

[563] 111 S. Ct. at 1373.

[564] See *supra* notes 302–26 and accompanying text for a discussion of the Court's characterization of the use of peremptory challenges as state action.

[565] *See supra* notes 252–54, 275–81 and accompanying text.

[566] 111 S. Ct. at 2095 (O'Connor, J., dissenting).

The Court focused on three factors that implicate the government in the use of peremptory challenges. First, peremptory challenges are granted either by the legislature or by common law.[567] Next, because jury selection is a traditional government function, and because the judge generally controls jury selection, the peremptory challenge can be viewed as a delegation of government power to a private person.[568] Finally, the court is a public forum and therefore the offensiveness of racial discrimination is aggravated by the presence of state authority.[569] As a result, *Edmonson* extended *Batson* to civil litigants and non-governmental parties. The reasoning that turned a civil defendant into a state actor may be applied with equal vigor to a criminal defendant.

The *Batson, Powers* and *Edmonson* holdings constrained the defendant's use of the peremptory challenge. The *Powers* and *Edmonson* decisions provided precedent for the Court to argue that the Fourteenth Amendment reaches the criminal defendant. Still, in order for the constitutional prohibitions against discriminatory strikes to reach the criminal defendant, the Court needed to conclude that the exercise of peremptory strikes is state action.

In *Batson,* the Court held that a state prosecutor cannot employ racially motivated strikes.[570] The *Batson* District Attorney was clearly a state actor; he represented and was employed by the state. In *Polk County,* the Court held that a public defender does not act under color of state law when performing traditional defense functions.[571] The Court noted that defense counsel opposes the designated government representative.[572] This adversarial relationship is essentially a government function.[573] Thus, the Court ruled that a public defender is not a state actor when performing as an adversary of the state.[574] The *Polk County* Court emphasized that the adversarial relationship is in the public interest, assisting in the advancement of truth and fairness.[575]

Peremptory strikes, like the traditional defense functions at issue in *Polk County,* are adversarial behavior. The Court has de-

---

[567] *See supra* notes 302–06 and accompanying text.
[568] *See supra* notes 307–19 and accompanying text.
[569] *See supra* notes 322–26 and accompanying text.
[570] 476 U.S. at 89.
[571] 454 U.S. 312, 325 (1981).
[572] *Id.* at 318.
[573] *Id.* at 318–19.
[574] *Id.* at 325.
[575] *Id.* at 318.

scribed the Sixth Amendment as creating an equal starting point from which the adversaries engage in strikes in order to remove any bias in favor of the opponent.[576] The purpose of the peremptory, according to the Court, is to prevent each party from obtaining an advantage at the expense of the other party.[577] This is certainly adversarial action.

The *McCollum* decision ignores the importance of the independent position of defense counsel recognized in *Polk County*.[578] Defense counsel guide defendants through each step of the trial proceedings. In order to be effective in this role it is imperative that counsel be free of state control. If the decision when to employ peremptory challenges can be regulated because it is state action, other rights granted to the defendant can likewise be limited. With defense counsel under the thumb of the state, the effective representation of the defendant is compromised.

Moreover, the *Edmonson* decision contains further evidence that precedent did not justify the *McCollum* decision on state action. In *Edmonson v. Leesville*, the Court ruled that private litigants can be state actors.[579] The Court was careful, however, to distinguish its reasoning in light of *Polk County*.[580] First, the Court noted that civil litigants have no adversarial relationship with the government.[581] Also, the state provides a forum for a private dispute.[582] The use of the court is a privilege provided by the state.[583] The circumstances of the criminal defendant, however, are clearly different. When the criminal defendant is present in the courtroom, the government is a party to the dispute, and the defendant is not in the courtroom by permission but by demand.

Furthermore, in *Edmonson*, the Court noted that the determination of state action is a question of fact.[584] In order to be a state actor three criteria must be met: reliance on government assistance and benefits; participation in a traditional government function;

---

[576] *See supra* notes 163–67 and accompanying text.

[577] *Id.*

[578] See *supra* notes 267–74 and accompanying text for a discussion of the Court's characterization of defense counsel as private actors.

[579] See *supra* notes 282–354 and accompanying text for a discussion of the *Edmonson* decision.

[580] 111 S. Ct. at 2086.

[581] *Id.*

[582] *Id.* at 2087.

[583] *Id.*

[584] *Id.* at 2083.

and injury aggravated by incidence of government authority.[585] The criminal defendant does not rely upon government assistance or benefits, nor is criminal defense a traditional government function. Private defense counsel obviously receive no government assistance, and the public defender has been separated from government while acting as counsel.[586] The Sixth Amendment right to counsel cannot justify describing criminal defense as a traditional government function. Criminal defense is not done exclusively, or even primarily, by the government. The legislative authorization of peremptory challenges should no more be considered a government benefit than any constitutionally or legislatively bestowed right.

In stretching to reach criminal defendants, the Court relied on poor reasoning. The accused cannot logically be considered a state actor when exercising the constitutional right to defend against the deprivation of life or liberty by the state. The use of peremptory strikes to remove potentially biased jurors is an act of defense against the state. Furthermore, although these challenges are granted by the state, and take place in a courtroom, the prohibition is not justified by prior decisions.

Even more disturbing than the Court's narrow use of precedent is the effect of its decision. In an ideal world, courts could distinguish between the racially motivated strike and a strike used to prevent discrimination by removing a juror who the defendant believes harbors racial prejudice.[587] In reality, it will be difficult, however, to distinguish between the two situations.[588] Because the defendant faces such severe penalties, an imperfect device is better than no device. Whatever the injury to the excluded juror, it cannot compare to the injury sustained by a defendant convicted by a prejudiced jury.[589]

As a result of the *McCollum* decision, the criminal defendant is more likely to be tried by a jury of persons whom the defendant suspects are biased.[590] Because voir dire is ineffective for eliminating all but the most blatantly biased jurors, the peremptory is the only

---

[585] *Id.*

[586] See *supra* notes 255–74 and accompanying text for a discussion of the *Polk County* decision.

[587] *See* Brief for Respondent at 4, Georgia v. McCollum, 112 S. Ct. 2348 (No. 92-732).

[588] *Id.*

[589] *But cf. McCollum*, 112 S. Ct. at 2358 (discrimination is too high a price to pay for allowance of defendants' use of unrestricted peremptory strikes).

[590] See *supra* notes 46–67 and accompanying text for a discussion of the relative merits of for cause and peremptory challenges.

true means of ensuring that criminal defendants believe their juries harbor no prejudice. As a result of the *McCollum* decision, the defendant is required to accept state-selected jurors. Defendants are thus dependent upon their prosecutors to ensure the impartiality of their jury. Clearly, this is not compatible with the Court's concern for appearances of judicial fairness.[591]

The *McCollum* Court subverted the historical purpose of the peremptory challenge and ignored the special position of the criminal defendant. Traditionally, peremptory challenges have served to assist the interests of the accused, not promote a state interest in securing a representative jury in a non-discriminatory manner.[592] Of all potential parties in any trial, only the criminal defendant faces the loss of liberty, even life. The *McCollum* Court concluded, however, that even if the accused receives special deference in the criminal justice system, the right of prospective jurors to be considered for participation in the jury outweighs the right of a defendant in a criminal action to use a peremptory strike.[593] The *McCollum* Court emphatically asserted that "'if race stereotypes are the price for acceptance of a jury panel as fair' . . . such a 'price is too high to meet the standard of the Constitution.'"[594] This weighing of the interests results in a division of power balanced in favor of the State.

VI. Conclusion

McCollum provided a sympathetic case for the Court's further expansion of *Batson*. Certainly the idea of keeping African-Americans off this jury, where the crime was allegedly one of hate, sounds abhorrent and seems a perfect illustration of the kind of bigotry originally challenged in *Batson*. The defense peremptory fell victim to the Court's commitment to its assertion that discriminatory challenges harm the juror and the community.

Because this assertion was a forceful theme in both the *Powers* and the *Edmonson* decisions, it was reasonable to expect that the Court would again focus on this personal and societal harm when examining *McCollum*. The Supreme Court's recent activity indicated

[591] *See Powers*, 111 S. Ct. at 1372.

[592] *See supra* notes 64–76 and accompanying text.

[593] 112 S. Ct. at 2358.

[594] *Id.* See *supra* notes 495–99 for a discussion of the Court's reasoning regarding peremptory challenges as a traditional defendants' right. This line of reasoning directly conflicts with the Court's earlier emphasis on the need for public acceptance of the judicial system as free from bias and reliance on public belief in judicial integrity to establish an equal protection injury. *See supra* notes 451–57.

a predisposition of a majority of the Justices to agree with the assertion by Justice Marshall in his *Batson* concurrence: the discriminatory use of the peremptory challenge by criminal defendants is not compatible with the Equal Protection Clause of the Fourteenth Amendment.[595] Moreover, despite his obvious disapproval, Justice Scalia clearly believed that the *Edmonson* reasoning was applicable to defense counsel.[596]

It was clear that the defendant's unchecked use of peremptory challenges was certain to fall in *McCollum*. The Court's pre-*McCollum* activity indicated that the Court had concluded that the affront to the dignity of excluded jurors outweighed any advantage secured to the defendant through unmonitored peremptory strikes. By characterizing the injury to excluded jurors as constitutionally prohibited, the Court made the fate of the discriminatory challenge clear. Having eliminated the problems of standing and state action, the peremptory challenge, not constitutionally guaranteed, could not survive a *Batson* attack.

SHARON LEIGH NELLES

[595] *See Batson*, 476 U.S. at 108 (Marshall, J., concurring).
[596] 111 S. Ct. at 2095 (Scalia, J., dissenting).