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Fourteenth Amendment--Peremptory Challenges and the Equal Protection Clause

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FOURTEENTH AMENDMENT— PEREMPTORY CHALLENGES AND THE EQUAL PROTECTION CLAUSE

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

I. INTRODUCTION

Batson v. Kentucky subjected a prosecutor's peremptory jury challenges to the restrictions of the Equal Protection Clause of the Constitution.¹ In *Edmonson v. Leesville Concrete Co.*, the Court for the first time extended *Batson* to private litigants in civil trials.² In order to make this extension, the Court in *Edmonson* found that a private litigant exercising a peremptory challenge involves sufficient state action to subject such a challenge to constitutional restrictions. This Note finds that the Court correctly selected the test established in *Lugar v. Edmonson Oil Co.*³ to determine the existence of state action in a private peremptory jury challenge. Although the Court correctly found state action, this Note also reasons that this result is not as obvious as the Court suggests. In the final analysis, the statutory foundation of peremptory challenges, the involvement of the trial judge in the exercise of peremptory challenges, and the effects of discriminatory challenges on the parties, jurors and community together prove that a peremptory challenge exercised by a private litigant in a civil trial constitutes state action. For this reason, the Supreme Court appropriately extended *Batson* to civil trials. Finally, this Note explores the negative consequences articulated by Justice Scalia in his dissent and finds that Justice Scalia oversimplified and probably overstated the potential hazards of the *Edmonson* decision.

II. HISTORICAL BACKGROUND

The Supreme Court historically has invoked the Equal Protection Clause in jury selection proceedings. The Court first addressed the issue of racial discrimination in jury selection over one hundred years ago in *Strauder v. West Virginia*.⁴ In *Strauder*, a black male ac-

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

² *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2078 (1991).

³ 457 U.S. 163 (1982).

⁴ 100 U.S. 303 (1880).

cused of murder was to be tried before a jury.⁵ Since at that time West Virginia law mandated that all juries consist entirely of white males, the trial court summoned an all white venire for jury selection.⁶ Strauder objected to the racial composition of the venire, claiming that he was being denied the right possessed by white males to be tried before a jury consisting of his racial peers.⁷

Reversing a West Virginia Supreme Court decision denying Strauder's claim, the United States Supreme Court held that a black defendant denied the right to a jury consisting of his racial peers is denied the equal protection guaranteed by the Constitution.⁸ The Court reasoned that white males in West Virginia derived inherent benefits from a jury composed entirely of white individuals.⁹ A black defendant denied the right to a jury composed of black individuals is denied these inherent benefits solely on account of his race.¹⁰

Almost ninety years later in *Swain v. Alabama*, the Court again addressed the subject of racial discrimination in jury selection.¹¹ The prosecutor in *Swain* used peremptory challenges to strike the only six black individuals on the jury venire.¹² The defendant, a black male, charged that the prosecutor's actions in securing an all-white jury denied the defendant equal protection of the laws.¹³ The trial court denied the defendant's motions, and on appeal the Alabama Supreme Court affirmed the conviction.¹⁴

The United States Supreme Court affirmed the decision of the state courts, although in a qualified manner.¹⁵ After dismissing Swain's claims concerning the selection of grand jurors and the petit jury venire, the Court denied Swain's claim that the state's use of peremptory challenges violated the Equal Protection Clause.¹⁶ In so doing, the Court focused on the nature of the peremptory challenge and stated "that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."¹⁷

⁵ *Id.* at 304.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 310.

⁹ *Id.* at 309.

¹⁰ *Id.*

¹¹ 380 U.S. 202 (1965).

¹² *Id.* at 210.

¹³ *Id.* at 203-204. Defendant Swain was indicted and convicted of rape in the Circuit Court of Tallageda County, Alabama, and sentenced to death.

¹⁴ *Id.* at 203.

¹⁵ *Id.* at 224.

¹⁶ *Id.* at 209.

¹⁷ *Id.* at 220.

The Court concluded that imposing a requirement for the trial court to examine peremptory challenges at the request of a defendant would defeat the purpose of peremptory challenges.¹⁸ The Court created a strong presumption that the prosecutor uses the state's peremptory challenges in an effort to select a fair and impartial jury.¹⁹

While deciding that the defendant cannot challenge the removal of black individuals from a *particular* jury, the Court questioned the presumption in favor of the prosecutor when a state removes all black individuals from juries over a significant period of time.²⁰ Upon proof of such a pattern, the Court may infer that the state is denying black individuals the right to jury participation and therefore denying blacks equal protection under the law.²¹

Thus, to successfully challenge the prosecutor's use of peremptory challenges under *Swain*, a defendant had to prove consistent and systematic discriminatory use of peremptory challenges by the state. This standard placed a great burden on defendants; indeed, the Court in *Swain* held that the defendant failed to overcome this heavy burden of proof.²² In the two decades following this decision, the large burden of proof faced by defendants insulated prosecutors' peremptory challenges from constitutional review.²³

Twenty years later, the Supreme Court removed the obstacles presented by this severe burden of proof in *Batson v. Kentucky*.²⁴ The Court stated that by requiring proof of a series of discriminatory acts to redress a constitutional violation, a denial of equal protection of the laws to a single defendant would go unchallenged.²⁵ The Court noted that previous decisions permitted the establishment of

¹⁸ *Id.* at 222. The Court stated that the "essential nature" of the peremptory challenge is that no reason is necessary for its use. The Court reasoned that the nature of this challenge has traditionally played an essential role in the creation of an impartial jury. *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 224.

²¹ *Id.* The Court stated,

Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory challenge system is being used to deny the Negro the same right and opportunity to participate in the administration of justice as the white population. These ends the peremptory challenge is not designed to facilitate or justify.

Id.

²² *Id.*

²³ See *Batson v. Kentucky*, 476 U.S. 79 (1986) (explaining that lower courts had observed that defendants would find it difficult to undertake the investigation efforts necessary to meet the burden of proof).

²⁴ *Id.*

²⁵ *Id.* at 95.

a prima facie case of discrimination from evidence surrounding the venire selection in a single case and held that the same standards of proof should apply to peremptory challenges.²⁶

Batson thus established that if a defendant could make a prima facie case that a prosecutor's peremptory challenge was motivated by racial discrimination, the prosecutor would be required to offer a race-neutral explanation for the state's peremptory challenge.²⁷ Such an explanation must consist of more than an assertion that the challenged juror would be partial to the defendant because of the juror's race.²⁸ Upon offering of the race-neutral explanation, the trial court must decide if the defendant has established that the prosecutor has engaged in purposeful discrimination.²⁹

The Court defended its relaxation of the *Swain* proof standard in two ways.³⁰ First, the Court asserted that in reality peremptory challenges too often are exercised to remove black individuals from juries.³¹ Second, the Court rebutted the state's argument that a lower burden of proof would result in serious administrative burdens on the courts by noting that state courts already using the evidentiary standard set forth in this decision had not experienced significant administrative problems as a result.³²

Thus, after *Batson* a criminal defendant can challenge a prosecutor's use of a peremptory challenge under the Equal Protection Clause. If the defendant can make a prima facie case that the prosecutor exercised the challenge in a racially discriminatory manner, the court must require that the prosecutor offer a race-neutral explanation for the peremptory challenge. The Court decided *Batson*

²⁶ *Id.* at 96. See *Castenada v. Partida*, 430 U.S. 482 (1977) (finding a prima facie case of racial discrimination in grand jury selection from statistical disparities and discriminatory selection methods); *Alexander v. Louisiana*, 405 U.S. 625 (1972) (finding a prima facie case of racial discrimination in grand jury selection from selection procedures and the pool of potential jurors).

²⁷ *Batson*, 479 U.S. at 96. The Court said that to establish a prima facie case of discrimination, the defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the jury. The defendant then must show that these facts and any other relevant circumstances raise an inference that the prosecutor's motives in exercising the peremptory challenge were discriminatory. *Id.*

²⁸ *Id.* at 97. The Court stated, "The core guarantee of Equal Protection, ensuring citizens that their state will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the juror's race." *Id.*

²⁹ *Id.* at 98.

³⁰ *Id.*

³¹ *Id.* at 99.

³² *Id.* The Court provided little support for this assertion, citing one California case in which the court could find no evidence of administrative difficulties. *Id.* (citing *People v. Hall*, 35 Cal. 3d 161, 672 P.2d 854 (1983)).

in the context of a criminal trial and did not comment on application of the holding to peremptory jury challenges in a civil trial. The Court addressed this issue in *Edmondson*.

III. FACTS AND PROCEDURAL HISTORY

Thaddeus Donald Edmonson, a black male construction worker, was injured while on the job at Fort Polk, Louisiana, a federal enclave.³³ Edmonson sued Leesville Concrete Company in the United States District Court for the Western District of Louisiana and asserted that a Leesville employee caused a truck to roll backward and pin Edmonson against construction equipment, causing Edmonson's injury.³⁴ Edmonson requested a trial by jury.³⁵

As authorized by federal statute, during voir dire Leesville used two of its three peremptory challenges to remove black persons from the prospective jury.³⁶ Edmonson asked the District Court to require Leesville to offer a race-neutral reason for its challenges, pursuant to the Supreme Court's decision in *Batson v. Kentucky*.³⁷ The District Court denied Edmonson's request, stating that *Batson* does not apply to civil proceedings.³⁸ Completion of the jury selection process resulted in a jury of eleven white individuals and one black individual.³⁹

After the trial proceedings, the jury rendered a verdict for Edmonson and assessed his total damages at \$90,000.⁴⁰ The jury, however, found that Edmonson's contributory negligence accounted for eighty percent of the fault and awarded him a total of only \$18,000.⁴¹

Edmonson appealed the case on the grounds that *Batson* required Leesville to offer a race-neutral explanation for its peremptory challenges.⁴² Reversing the District Court, a divided panel of the Court of Appeals for the Fifth Circuit held that *Batson* indeed applies to a private attorney representing a private party, and that peremptory challenges may not be used in a civil trial for exclusions based solely on the prospective juror's race.⁴³ The Court of Ap-

³³ *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2080 (1991).

³⁴ *Id.* at 2080.

³⁵ *Id.* at 2081.

³⁶ *Id.*

³⁷ 476 U.S. 79 (1986).

³⁸ *Edmondson*, 111 S. Ct. at 2081.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

peals remanded the case to the trial court to consider whether Edmonson had established a prima facie case of racial discrimination pursuant to *Batson*.⁴⁴

The full court of the Fifth Circuit ordered a hearing en banc, and a divided panel affirmed the District Court's holding that a private attorney in a civil case need not present race-neutral explanations for peremptory jury challenges.⁴⁵ The Supreme Court granted certiorari to decide the issue of whether *Batson* applies to civil trials.⁴⁶

IV. SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

Justice Kennedy delivered the opinion of the Court.⁴⁷ He began the opinion by stating that the Constitution's protections of individual liberty and equal protection generally apply only to governmental actions.⁴⁸ Although always invidious, racial discrimination only violates the Constitution if attributed to state action.⁴⁹ Therefore, the Court addressed to what extent a private litigant exercising a peremptory challenge in a civil case constitutes state action subject to constitutional restrictions.⁵⁰

The Court recognized that courts must often consider where to draw the line between governmental and private conduct.⁵¹ While the actions of private parties ordinarily rest beyond the reach of the Constitution, governmental authority sometimes permeates an activity to such a large extent that the private parties involved are subject to constitutional restraints.⁵² In *Lugar v. Edmondson Oil Co.*, the Court considered the state action question in the context of a due process challenge to a state's procedure allowing private parties to obtain pre-judgment attachments.⁵³ Under *Lugar*, constitutional restrictions apply to rights deprivations which (1) result from the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Justices White, Marshall, Blackmun, Stevens and Souter joined in the majority opinion. Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined. Justice Scalia also filed a separate dissenting opinion.

⁴⁸ *Edmondson*, 111 S. Ct. at 2082.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that issuance of liquor license by state to private fraternal organization does not implicate state in discriminatory guest policies of fraternal organization).

⁵² *Edmondson*, 111 S. Ct. at 2082.

⁵³ 457 U.S. 922 (1982).

exercise of a right or privilege having its source in state authority, and (2) are charged to a state actor.⁵⁴

The Court stated that private litigants' peremptory challenges obviously fulfill the first *Lugar* requirement because peremptory challenges are intended to permit the litigants to assist the government in ensuring the impartiality of the jury and are derived from statute or decisional law.⁵⁵ Without the authorization of an Act of Congress, Leesville would not have been able to engage in the discriminatory peremptory challenges.⁵⁶

The Court analyzed three factors in applying the second requirement for a constitutionally prohibited deprivation under *Lugar*.⁵⁷ The Court first assessed the extent to which the private actor relies on governmental assistance and benefits and concluded that the peremptory challenge system could not exist without the significant participation of the government.⁵⁸ The government summons jurors, restricts their freedom of movement during trials and subjects them to public scrutiny.⁵⁹ In addition, the judge places the authority of the court behind a peremptory challenge by dismissing the stricken juror.⁶⁰

Second, to determine whether Leesville was a state actor, the Court assessed the extent to which the action in question involves the performance of a traditional function of the government.⁶¹ The Court noted that a peremptory challenge is used in selecting a jury that exercises the power of the court and of the government granting the court's jurisdiction.⁶² A civil jury in federal court is generally responsible for factual determinations, and a decision enforceable by the court will incorporate the judgment of the jury.⁶³

⁵⁴ *Id.* at 937. In *Lugar*, the Court held that a private party obtaining a pre-judgment attachment pursuant to a procedure created by the state constituted state action. *Id.*

⁵⁵ *Edmondson*, 111 S. Ct. at 2083.

⁵⁶ *Id.* The Court stated that exercise of a peremptory challenge is not a constitutional right, it is solely a creature of statute. *Id.* "In civil cases, each party shall be entitled to three peremptory challenges." 28 U.S.C. 1970 (1988).

⁵⁷ *Edmondson*, 111 S. Ct. at 2083.

⁵⁸ *Id.* at 2084. "It cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist." *Id.*

⁵⁹ *Id.* The Court noted that these jury procedures were established by statute. *Id.* (citing 28 U.S.C. 1970).

⁶⁰ *Id.* The Court also stated that because the trial judge oversees the exclusion of jurors for cause, the judge determines which jurors remain subject to peremptory challenges. *Id.*

⁶¹ *Id.* at 2085.

⁶² *Id.* "The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor." *Id.*

⁶³ *Id.*

The Court asserted that when the objective of a proceeding is to determine representation on a governmental body,⁶⁴ that proceeding constitutes state action.⁶⁵ For these reasons, the Court concluded that the selection of jurors with the aid of peremptory challenges is a traditional function of government and not beyond the reach of constitutional restrictions.⁶⁶

Finally, the Court addressed whether the injury caused is aggravated in a unique way by the incidents of governmental authority and concluded that this factor also indicated that Leesville acted as a state actor.⁶⁷ The injury caused by racial discrimination is made more severe because it occurs in the courtroom itself.⁶⁸ This discrimination brings into question the fairness of processes fundamental to the Constitution.⁶⁹ The Court also emphasized that the Supreme Court has consistently stated that discrimination in the qualifications or selection of jurors offends the integrity of the courts.⁷⁰

The Court concluded from this analysis that the private peremptory challenge fulfills both of the *Lugar* requirements, and therefore constitutional restrictions apply to this deprivation of jury service.⁷¹ Because exclusion from a jury for racial reasons violates the potential juror's equal protection rights, a racially motivated peremptory challenge constitutes an infringement of these equal

⁶⁴ The Court compared its holding in *Terry v. Adams*, 345 U.S. 461 (1953). *Edmondson*, 111 S. Ct. at 2085. The Court in *Terry* found sufficient state action where a private organization administered whites-only elections to select Democratic candidates to run in primary elections in Ford Bend County, Texas. *Edmondson*, 111 S. Ct. at 2085 (citing *Terry*, 345 U.S. at 481).

⁶⁵ *Edmondson* at 2086. The Court continued,

Were it not for peremptory challenges, there would be no question that the entire process of determining who will serve on the jury constitutes state action. The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised.

Id.

⁶⁶ *Id.* Significantly, the Court distinguished *Polk County v. Dodson*, 454 U.S. 312 (1981) where the Court held that a public defender is not a state actor in his general representation of a criminal defendant. *Edmondson*, 111 S. Ct. at 2086 (citing *Dodson*, 454 U.S. at 325). The Court stated that this decision turned on the fact that the public defender had an adversarial relationship with the government, a condition not present in a civil case involving two private litigants. *Id.* The Court instead relied on *West v. Atkins*, 487 U.S. 42 (1988) where the Court found that a private physician was a state actor after contracting with the state to provide medical services to state prison inmates. *Edmondson*, 111 S. Ct. at 2086.

⁶⁷ *Id.* at 2087.

⁶⁸ *Id.*

⁶⁹ *Id.* "Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." *Id.*

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

⁷¹ *Id.*

protection rights.⁷²

Next, the Court considered whether an opposing litigant may raise on his own behalf the rights of the excluded potential juror.⁷³ Ordinarily, a litigant cannot rely on the rights of third parties to make a claim for relief, but exceptions to this general rule exist.⁷⁴ The Court asserted that a litigant can raise a claim on behalf of a third party if the litigant can demonstrate that he has suffered a concrete, redressable injury, that he has a close relationship to the third party, and that serious obstacles would hamper the third party's effort to independently assert his rights.⁷⁵ The Court held that the present case met all three of these factors, and therefore a private litigant could raise the excluded juror's rights.⁷⁶

The Court quickly discharged the second and third factors.⁷⁷ While jurors have the right to sue after peremptory racial exclusions, the barriers to such suits, as in criminal trials, are severe.⁷⁸ In addition, through voir dire the litigant and jurors develop a close relationship which continues throughout the trial.⁷⁹

As for the remaining factor of the existence of an injury to the litigant, the Court found that the litigant had suffered a cognizable injury after a racial peremptory exclusion.⁸⁰ Civil juries, like criminal juries, must act lawfully and impartially, and their decisions are binding on the courts.⁸¹ Racial discrimination in the selection of jurors in both criminal and civil trials jeopardizes the fairness of the judicial process.⁸² The Court concluded that to avoid fundamental unfairness, racial discrimination must be expelled from the courtroom.⁸³

In conclusion, since equal protection restrictions applied to

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* (citing *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991)).

⁷⁵ *Id.* (citing *Powers*).

⁷⁶ *Id.* The Court reasoned, "All three of these requirements for third-party standing were held satisfied in the criminal context, and they are satisfied in the civil context as well." *Id.* (citing *Powers*).

⁷⁷ *Id.* at 2087-88.

⁷⁸ *Id.* at 2087.

⁷⁹ *Id.* at 2088. The Court continued, "exclusion of a juror on the basis of race severs that relation in an invidious way." *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* The Court added that means other than a race-based peremptory challenge exist for litigants to satisfy themselves of the jury's impartiality. The Court stated that if a litigant believes that a member of a certain race cannot be impartial, "the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color." *Id.*

Leesville's peremptory challenge and Edmonson could claim the rights of the excluded jury, the Court reversed the decision of the Court of Appeals and remanded the case for further proceedings to determine whether a *prima facie* case of racial discrimination had been established.⁸⁴

B. THE DISSENTING OPINIONS

1. *Justice O'Connor's Dissent*

Justice O'Connor dissented, arguing that a peremptory challenge in a civil case does not constitute state action.⁸⁵ Justice O'Connor asserted that while the government creates the trial structure and process, the government is not responsible for everything that occurs within trial proceedings.⁸⁶ A peremptory strike of a juror by a private litigant is a matter of private choice.⁸⁷

In deciding whether Leesville's use of a peremptory challenge is fairly attributed to the government, Justice O'Connor stated that the complicated state action doctrine closely relates to the facts of each case.⁸⁸ She stated that the basis of the state action test is that constitutional restrictions apply when the government is responsible for the specific conduct involved.⁸⁹ Justice O'Connor noted that the majority addressed this requirement by stating that private parties use peremptory challenges with the overt, significant participation of the government, and that the use of peremptory challenges is a traditional function of government.⁹⁰ According to Justice O'Connor, both of these assertions are incorrect.⁹¹

Justice O'Connor challenged the Court's evidence of government participation in the peremptory process.⁹² Justice O'Connor

⁸⁴ *Id.* at 2089.

⁸⁵ *Id.* (O'Connor, J. dissenting). Justice O'Connor was joined by Chief Justice Rehnquist and Justice Scalia.

⁸⁶ *Id.* (O'Connor, J. dissenting). "The government erects the platform; it does not thereby become responsible for all that occurs upon it." *Id.* (O'Connor, J. dissenting).

⁸⁷ *Id.* (O'Connor, J. dissenting). Justice O'Connor further explained that by allowing litigants to strike jurors for any reason, the peremptory challenge supports the perception and reality of an impartial jury. *Id.* at 2090 (O'Connor, J. dissenting). The peremptory challenge provides a means by which private parties can make choices to accomplish the goal of an impartial jury. *Id.* (O'Connor, J. dissenting). "In both criminal and civil trials, the peremptory challenge is a mechanism for the exercise of private choice in the pursuit of fairness." *Id.* (O'Connor, J. dissenting).

⁸⁸ *Id.* at 2089 (O'Connor, J. dissenting).

⁸⁹ *Id.* (O'Connor, J. dissenting).

⁹⁰ *Id.* (O'Connor, J. dissenting). Justice O'Connor did not proceed through the *Lugar* test; she makes no mention of such a test. *Id.* (O'Connor, J. dissenting).

⁹¹ *Id.* (O'Connor, J. dissenting).

⁹² *Id.* at 2090. (O'Connor, J. dissenting).

stated that practices noted by the Court such as the establishment of jury qualifications are independent from the use of peremptory challenges.⁹³ According to Justice O'Connor, the only participation of the government in the peremptory challenge process occurs when the judge advises the juror that he or she has been excused. Through this action, the government does not compel, encourage, or approve peremptory challenges.⁹⁴ Justice O'Connor also asserted that actions of a private attorney in a courtroom do not constitute state action simply because of the location of the trial.⁹⁵ Although racism is an abhorrent condition, the government cannot be held responsible for every action within a courtroom.⁹⁶ Therefore, contrary to the Court's assertion, the government does not significantly or overtly participate in the peremptory challenge process.⁹⁷

Justice O'Connor also argued that contrary to the Court's conclusion, the exercise of a peremptory challenge is not a traditional government function.⁹⁸ Peremptory challenges are not part of the government's jury selection process.⁹⁹ As jurors struck in peremptory challenges otherwise satisfy the requirements for jury service, the private litigant, not the government, rejects the jurors.¹⁰⁰ Justice O'Connor noted the long history of private peremptory challenges and reasoned that this action is "traditionally" a private litigant's

⁹³ *Id.* (O'Connor, J. dissenting). Justice O'Connor continued, "All of this government action is in furtherance of the Government's distinct obligation to provide a qualified jury; the Government would do these things even if there were no peremptory challenges." *Id.* (O'Connor, J. dissenting).

⁹⁴ *Id.* (O'Connor, J. dissenting). Justice O'Connor stated that "the judge does little more than acquiesce . . . by excusing the juror." She also noted that in some jurisdictions peremptory challenges take place in the absence of any court personnel. *Id.* (O'Connor, J. dissenting).

⁹⁵ *Id.* at 2091 (O'Connor, J. dissenting). Justice O'Connor reasoned that *Dodson* obviously illustrates that the mere location in a courtroom does not constitute, by itself, state action. *Id.* (O'Connor, J. dissenting).

⁹⁶ *Id.* (O'Connor, J. dissenting).

⁹⁷ *Id.* at 2092. (O'Connor, J. dissenting). Justice O'Connor analogized this state action question to the one presented in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In *Jackson*, the Court ruled that a private utility company's termination of electrical service pursuant to a procedure approved by the state utility commission did not constitute state action. *Jackson*, 419 U.S. at 358. Justice O'Connor stated that the utility commission's approval role was similar to a trial judge's approval of peremptory challenge in that neither government party encouraged the private action. *Edmondson*, 111 S. Ct. at 2092. (O'Connor, J. dissenting).

⁹⁸ *Id.* (O'Connor, J. dissenting).

⁹⁹ *Id.* (O'Connor, J. dissenting).

¹⁰⁰ *Id.* (O'Connor, J. dissenting). "Whatever reason a private litigant may have for using a peremptory challenge, it is not the government's reason." *Id.* (O'Connor, J. dissenting).

function.¹⁰¹

Justice O'Connor also explained that the Court's opinion in *Polk County v. Dodson*¹⁰² controls this case.¹⁰³ In *Dodson*, the Court held that a public defender, employed by the state, does not act under color of state law when representing a defendant in a criminal trial.¹⁰⁴ Following this opinion, Justice O'Connor stated that when performing the adversarial functions of a trial, a private attorney acts in the interests of the private litigant, independent of the government.¹⁰⁵ Justice O'Connor found no reason to distinguish a public defender in a criminal trial from a private attorney in a civil case against another private attorney.¹⁰⁶

Justice O'Connor then concluded that the government is not responsible for the use of peremptory strikes by private litigants.¹⁰⁷ Private peremptory challenges, therefore, are not subject to the restrictions of the Equal Protection Clause.¹⁰⁸

2. Justice Scalia's Dissent

Justice Scalia added a separate dissent discussing the potential costs of the Court's decision.¹⁰⁹ He stated that minority litigants, especially in criminal cases, would no longer be able to seek to prevent an all-white jury.¹¹⁰ For this reason, although proving race-based peremptory challenges of white jurors would be difficult, Justice Scalia asserted that in criminal cases this decision will result in a net loss to minority litigants.¹¹¹ In civil cases, Justice Scalia added, this decision will not harm minority litigants so seriously, but it "does not represent an unqualified gain either."¹¹²

Justice Scalia also expressed his concerns about the drain on court resources that would result from enforcement of this deci-

¹⁰¹ *Id.* at 2093. (O'Connor, J. dissenting). "Peremptory challenges are not a traditional government function; the 'tradition' is one of unguided private choice." *Id.* (O'Connor, J. dissenting).

¹⁰² 454 U.S. 312 (1981).

¹⁰³ *Edmondson*, 111 S. Ct. at 2094. (O'Connor, J. dissenting).

¹⁰⁴ *Dodson*, 454 U.S. at 325.

¹⁰⁵ *Edmondson*, 111 S. Ct. at 2094. (O'Connor, J. dissenting).

¹⁰⁶ *Id.* O'Connor reasoned one should not assume that because attorneys in an adversarial relationship with the state are not state actors, attorneys who are not in such a relation are state actors. *Id.* (O'Connor, J. dissenting).

¹⁰⁷ *Id.* at 2095 (O'Connor, J. dissenting).

¹⁰⁸ *Id.* (O'Connor, J. dissenting).

¹⁰⁹ *Id.* (Scalia, J. dissenting).

¹¹⁰ *Id.* (Scalia, J. dissenting). Justice Scalia assumed that this decision logically applies to criminal defendant's peremptory challenges. *Id.* (Scalia, J. dissenting).

¹¹¹ *Id.* (Scalia, J. dissenting).

¹¹² *Id.* (Scalia, J. dissenting).

sion.¹¹³ Justice Scalia reasoned that giving attorneys on both sides of civil cases the right to object to peremptory challenges and appeal denial of such objections will significantly add to the courts' burdensome administrative duties.¹¹⁴ Justice Scalia asserted that the high number of *Batson* claims made in recent years indicates that judges and lawyers will spend an "enormous" amount of time implementing this decision.¹¹⁵

V. ANALYSIS

A. THE COURT CORRECTLY SELECTED THE *LUGAR* TEST TO DETERMINE STATE ACTION

Edmonson forced the Court to determine whether state action exists in a peremptory challenge exercised by a private litigant in a civil trial. This situation called for the Court to select a state action test from the several tests previously used by the Court and lower federal courts. The Court correctly selected the two-part state action test established in *Lugar*.

The watershed *Batson* decision, for the first time, seriously exposed a prosecutor's peremptory challenges to the limits of the Equal Protection Clause of the Constitution. That decision granted defendants the right to ask for a race-neutral explanation for a prosecutor's peremptory challenge after the defendant presented a prima facie case of racial discrimination.¹¹⁶ The Court justified the *Batson* decision by stating that a peremptory challenge with a purely racial motivation violates the defendant's equal protection rights under the Fourteenth Amendment.¹¹⁷

Constitutional protections, including the Equal Protection Clause, reach only the realm of state action and do not restrict the actions of private parties, no matter how invidious.¹¹⁸ "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action . . . and private conduct, against which the [Fourteenth] Amendment affords no shield, no matter how unfair the conduct may be."¹¹⁹ Clearly, a prosecutor using peremptory chal-

¹¹³ *Id.* (Scalia, J. dissenting).

¹¹⁴ *Id.* at 2096 (Scalia, J. dissenting). "Thus, yet another complexity is added to an increasingly Byzantine system of justice that devotes more and more of its energies to sideshows and less and less to the merits of the case." *Id.* (Scalia, J. dissenting).

¹¹⁵ *Id.* (Scalia, J. dissenting). Justice Scalia mentioned the possibility that Congress or the states may abolish peremptory challenges altogether. He stated that such a result would cause justice to suffer in a "different fashion." *Id.* (Scalia, J. dissenting).

¹¹⁶ *Batson*, 479 U.S. at 93.

¹¹⁷ *Id.* at 98.

¹¹⁸ *Edmondson*, 111 S. Ct. at 2082.

¹¹⁹ *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 191 (1988)

lenges involves state action, as the prosecutor is acting on behalf of the government. *Batson*, therefore, did not directly or explicitly address the state action issue.

In a civil trial, it is not clear whether state action is present in the use of peremptory challenges. The litigants are private parties utilizing private counsel resolving disputes between private parties. Indeed, before *Edmonson* the Supreme Court had not extended *Batson* to civil trials.¹²⁰ The Court correctly identified that the central issue involved in whether to extend *Batson* to civil trials is whether peremptory challenges in a civil trial involve sufficient state action to subject these challenges to the restrictions of the Equal Protection Clause.¹²¹

Prior to *Edmonson*, two federal circuits had extended the *Batson* ruling to civil trials.¹²² Neither of these rulings, however, presented a persuasive rationale to resolve the issue faced in *Edmonson*. *Reynolds v. City of Little Rock* involved a Section 1983 action against the City of Little Rock by the administrator of a private individual's estate.¹²³ The attorney representing the City used two of his peremptory challenges to exclude black individuals from the jury.¹²⁴ In deciding the plaintiff's claim that these challenges violated the Equal Protection Clause, the court held that *Batson* applies to government actors, regardless of whether the context is a civil or criminal trial.¹²⁵ The City obviously constituted a government actor; therefore *Batson* and the Equal Protection Clause applied to the City's peremptory challenges.¹²⁶

In *Fludd v. Dykes*, the plaintiff brought a Section 1983 action against the deputy and sheriff of Richmond County, Georgia.¹²⁷ The defendant's attorney used two of his peremptory challenges to remove the only two black individuals on the venire.¹²⁸ The plaintiff

(refusing to find state action in the involvement of the National Collegiate Athletic Association in the suspension of head basketball coach Jerry Tarkanian by the University of Nevada-Las Vegas).

¹²⁰ Jere W. Morehead, *Prohibiting Race-based Peremptory Challenges: Should the Principle of Equal Protection Be Extended to Private Litigants?*, 65 TUL. U. L. REV. 833, 834 (1991).

¹²¹ Since *Edmonson* originated in federal court, the Court applied the Equal Protection part of the Fifth Amendment due process clause. *Edmonson*, 111 S. Ct. at 2080.

¹²² *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989); *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990).

¹²³ *Reynolds*, 893 F.2d at 1005.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1008. The city claimed that *Batson* did not apply in the civil trial because that decision was concerned with Sixth Amendment protections for criminal defendants, not Seventh Amendment provisions for civil juries. *Id.*

¹²⁶ *Id.* at 1009.

¹²⁷ *Fludd*, 863 F.2d at 824.

¹²⁸ *Id.*

objected to these challenges on equal protection grounds and asked the trial court to require a race-neutral explanation for the challenges.¹²⁹ The federal District Court overruled the plaintiff's objection, holding that *Batson* did not apply to civil proceedings.¹³⁰

The Court of Appeals for the Eleventh Circuit reversed the District Court and applied the *Batson* decision to the Section 1983 action.¹³¹ The *Fludd* court reasoned that the trial judge's decision to overrule the plaintiff's objection to the defendant's peremptory challenges and proceed to trial denied the rights of the objecting party.¹³² The trial judge, a state actor, ignored the plaintiff's contention that the jury was selected in a racially discriminatory manner and therefore engaged in activity violative of the Equal Protection Clause.¹³³

The *Fludd* reasoning has been criticized as not providing a boundary for the presence of state action.¹³⁴ If a trial judge's decision to proceed to trial is the only state action necessary for extending the reach of constitutional restrictions, state action may be found in a wide range of private actions with minimal government involvement.¹³⁵ A fundamentally important implication of this approach could be to seriously constrain the activities of a criminal defense attorney, contrary to the well-established freedom criminal defense attorneys now enjoy.¹³⁶

The Court in *Edmonson* could not follow the logic of *Reynolds* because the government is not a party in this case. Additionally, without an explicit rejection, the Court correctly ignored the *Fludd* reasoning. Instead, the Court correctly applied the self-limiting state action test established in *Lugar*, which does not bring about the potentially dangerous side effects of *Fludd*.

The *Lugar* state action test was formulated by the Court in the context of a charge that a private party had acted jointly with the state in depriving the plaintiff of his property without due process of law.¹³⁷ In *Lugar*, an oil supplier sought prejudgment attachment of

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 823.

¹³² *Id.* at 828.

¹³³ *Id.* Although the sheriff and deputy were government actors, the Eleventh Circuit did not use this situation as justification to extend *Batson*.

¹³⁴ See Note, *Eleventh Circuit Restricts the Discriminatory Use of Peremptory Challenges in Civil Litigation*, 103 HARV. L. REV. 586, 589 (1989).

¹³⁵ *Id.* "If mere judicial toleration of a discriminatory private decision constitutes state action, as *Fludd* suggests, courts could encounter difficulties in limiting state culpability in other situations involving substantially less government participation." *Id.*

¹³⁶ *Id.* at 590.

¹³⁷ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982).

the plaintiff's property pursuant to state law after suing in state court on a debt owed by the plaintiff.¹³⁸ The plaintiff objected to this attachment on due process grounds.¹³⁹

The Court stated that to sustain a constitutional claim, the "conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the state."¹⁴⁰ Drawing on precedent, the Court annunciated a two-part test to determine the question of fair attribution.¹⁴¹ First, the alleged unconstitutional deprivation

must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.¹⁴²

Although the Court did not discuss alternatives to the *Lugar* test in *Edmonson*, the Court in deciding other state action questions has applied different tests, resulting in a very murky state action doctrine.¹⁴³ Before looking at whether the Court was correct in deciding that a peremptory challenge fulfills the *Lugar* test, one must ask then whether this is an appropriate test to apply. Although the Court has often drawn a line between private and state action to resolve constitutional claims, *Lugar* is the first case where the Court explicitly set forth the two-part state action test.¹⁴⁴

Two other prominent state action tests were available to the Court in *Edmonson*. The Court established an early test in *Burton v. Wilmington Parking Authority*.¹⁴⁵ In *Burton*, a restaurant located within an off-street parking building owned and operated by an agency of the state discriminated against black individuals.¹⁴⁶ The restaurant owners leased the space from the state agency.¹⁴⁷ In deciding

¹³⁸ *Id.*

¹³⁹ *Id.* at 925.

¹⁴⁰ *Id.* at 937.

¹⁴¹ *Id.* See *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (state action found in a private creditor utilizing state-created garnishment procedures); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (state action found in private creditor's execution of a vendor's lien to secure disputed property); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (Section 1983 action allowed against a private creditor exercising prejudgment replevin).

¹⁴² *Lugar*, 457 U.S. at 937. Although these principles are related, they are not always identical. The *Lugar* Court stated that the two principles merge together when a constitutional deprivation is charged to a party with a clear official character. The principles are separate, however, when the charged actor is a private party. *Id.*

¹⁴³ Hala Ayoub, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. L. REV. 893, 894. (1984).

¹⁴⁴ *Id.* at 908.

¹⁴⁵ 365 U.S. 715 (1961).

¹⁴⁶ *Id.* at 716.

¹⁴⁷ *Id.*

whether sufficient state action was present to sustain an Equal Protection Clause claim, the Court noted that both the restaurant owners and the state derived benefits from their relationship.¹⁴⁸ The Court concluded that this symbiotic relationship brought the actions of the restaurant under the scope of the restrictions of the Fourteenth Amendment.¹⁴⁹

This interdependent relationship thus became the test to use in determining the existence of state action. Clearly, the presence of such an interdependent relationship warrants a finding of state action in many activities of a private party. This test, however, confines a state action finding to a particular set of circumstances. Although since *Burton* courts have tried to manipulate this symbiotic relationship test to apply to different kinds of relationships, more recently this test has been limited in its application to lessor/lessee relationships.¹⁵⁰ Such a test would not be useful in the case of peremptory challenges because the relationship between a state judge and a private litigant is fundamentally different from a lessee and lessor relationship.

Later, in *Jackson v. Metropolitan Edison Co.*, the Court stated that there must exist "a sufficiently close nexus" between the state and the challenged action of the private individual or entity for the challenged action to be fairly treated as that of the state itself.¹⁵¹ The Court further developed this "nexus" test in *Blum v. Yaretsky*.¹⁵² In *Blum*, a private nursing home discharged or transferred patients who no longer needed the level of care provided by the nursing home, effectively reducing or terminating the patients' Medicaid coverage.¹⁵³ In deciding that insufficient state action was present, the Court forwarded three principles necessary to constitute state action.¹⁵⁴ First, a sufficiently close nexus must be found between the

¹⁴⁸ *Id.* at 724.

¹⁴⁹ *Id.*

¹⁵⁰ Ayoub, *supra* note 143, at 902 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982)). In *Rendell-Baker*, the Court declined to find state action in a private non-profit school discharging personnel. The Court distinguished the case from *Burton*, explaining that the school was a contractor who was employed by the government, not a lessee of the government. *Id.* at 842.

¹⁵¹ 419 U.S. 345 (1974). In *Jackson*, a privately owned and operated utility regulated by the state terminated the account of a customer. *Id.* at 347. The plaintiff charged that this termination constituted a due process violation. *Id.* The Court held that the state's regulatory activities did not constitute sufficient state action to sustain a due process claim. *Id.* at 358.

¹⁵² 457 U.S. 991 (1982).

¹⁵³ *Id.* at 995.

¹⁵⁴ *Id.* at 1004.

state and challenged action.¹⁵⁵ Second, for state action to exist, the state must exercise coercive power over or provide significant encouragement to the private actor.¹⁵⁶ Third, the required nexus may be present when a private entity has exercised powers that are traditionally the exclusive prerogative of the state.¹⁵⁷

The *Lugar* test is more appropriate than the "nexus" test to apply to peremptory challenges. The type of private action involved in peremptory challenges is similar to the private action in *Lugar*. In *Lugar*, the prejudgment attachment procedure required that Edmonson allege a belief that Lugar was disposing of or might dispose of his property to satisfy his creditors.¹⁵⁸ After this petition was filed, the county sheriff executed a writ of attachment.¹⁵⁹ This procedure is similar to the process of a peremptory challenge, where the private litigant exercises the challenge, and the trial judge is the party who actually dismisses the stricken juror. In addition, like the peremptory challenge, the attachment procedure is a procedure established by statute.¹⁶⁰

The private action in *Blum*, on the other hand, involved an action by a health care provider in an area regulated by the state.¹⁶¹ The state in *Blum* did not assist in executing a certain procedure, but instead acted in response to a private action as part of a regulatory scheme governing the allocation of health benefits.¹⁶² A peremptory challenge in a civil trial has little in common with Medicaid regulations governing benefit allocation for nursing home care. Thus, because *Lugar* involves a more analogous fact situation than *Blum*, the Court in *Edmonson* correctly applied the *Lugar* test to determine whether a peremptory challenge constitutes state action.¹⁶³

¹⁵⁵ *Id.* (citing *Jackson v. Metropolitan Edison Co.* at 351).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1005 (citing *Jackson*, 419 U.S. at 353). The Court in *Blum* held that a reduction of Medicaid benefits as a result of the discharge of patients did not constitute state action under this test. *Id.* The Court reasoned that the Medicaid benefit reductions were only responses to decisions of private physicians and administrators to discharge patients. *Id.*

¹⁵⁸ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Blum*, 457 U.S. at 994.

¹⁶² *Id.*

¹⁶³ Nevertheless, the selection of one test over the other may not be crucial to the analysis. The *Lugar* test appears to incorporate at least some of the factors present in *Blum*. In considering whether a right or privilege is created by a state, a court would inevitably consider whether the state sanctioned or encouraged the action in question. Similarly, in determining the status of a private party as a state actor, the court would discuss whether the activity is traditionally reserved to the state and whether state officials have significantly aided the private actor.

B. THE COURT CORRECTLY CONCLUDED THAT THE *LUGAR* TEST RESULTS IN A FINDING OF STATE ACTION

The Court applied the *Lugar* test and held that Leesville's peremptory challenges constituted sufficient state action to warrant the application of Equal Protection Clause restrictions. The Court correctly found that a private litigant's peremptory challenge has its source in state action. In addition, although the Court incorrectly asserted that the peremptory challenge is a traditional state function, the involvement of the state in the exercise of a peremptory challenge and the harm of racial discrimination in this process indicate that Leesville sufficiently resembled a state actor.

The Court quickly disposed of the first *Lugar* requirement, that the action depriving rights must be caused by the exercise of some right created by the state.¹⁶⁴ An examination of historical and current sources of peremptory challenges illustrates that the right to exercise peremptory challenges does indeed have its source in state authority.

The Constitution does not create a right of peremptory challenges; the only source of these challenges is statutory.¹⁶⁵ As early as 1790, Congress established the right to peremptory challenges.¹⁶⁶ At that time, a defendant was entitled to 35 peremptories in trials for treason and twenty peremptories in trials for other felonies punishable by death.¹⁶⁷ States followed the lead of the federal government and enacted statutes granting litigants the right to peremptory challenges.¹⁶⁸ The peremptory challenges utilized by Leesville in *Edmonson* were pursuant to 28 U.S.C. 1870 which states in part: "In civil cases, each party shall be entitled to three peremptory challenges."¹⁶⁹ Without this statutory authorization, the litigants in *Edmonson* would not have been able to exercise peremptory challenges.¹⁷⁰ Clearly the exercise of a peremptory challenge has its source in federal statute and fulfills the first prong of the *Lugar* state action test.

The second prong of the *Lugar* test is more troublesome than the first. The Court in *Edmonson* analyzed three different considera-

¹⁶⁴ *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2083 (1991).

¹⁶⁵ *Id.*

¹⁶⁶ *Swain v. Alabama*, 380 U.S. 202, 214 (1965).

¹⁶⁷ *Id.* (citing 1 Stat. 119 (1790)).

¹⁶⁸ *Id.* at 215. "In every state, except where peremptory strikes are a substitute, peremptory challenges are given by statute to both sides in both criminal and civil cases, the number in criminal cases still being considerably greater." *Id.* at 217.

¹⁶⁹ 28 U.S.C. 1870 (1988).

¹⁷⁰ *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2083 (1991).

tions to determine whether a private attorney exercising a peremptory challenge in a civil trial acts as a state actor.¹⁷¹ These factors include (1) the extent to which the actor relies on governmental assistance and benefits; (2) whether the actor is performing a traditional government function; and (3) whether the injury caused is furthered by the invoking of government authority.¹⁷² While reaching the correct result on this second *Lugar* requirement, the Court incorrectly concluded that a peremptory challenge is a traditional government function. However, in exercising peremptory challenges, Leesville relied on governmental assistance, and the injury caused by a racially discriminatory peremptory challenge is furthered by the government's involvement. These two conclusions justify the Court's holding that Leesville acted as a state actor.

In looking at the extent to which the actor relies on governmental assistance and benefits, the Court discussed the many steps involved in the jury selection process.¹⁷³ Certainly, without the governmental establishment of the elements of the jury selection process, the private litigants would have no jury from which to exercise peremptory challenges. However, as the dissent noted, this jury selection activity is simply a prerequisite to the exercise of peremptory challenges.¹⁷⁴ A finding that in making a peremptory challenge a private litigant relies on the assistance of the government must rest not on the fact that the government is responsible for the existence of the jury, but instead should rely on governmental involvement in the peremptory challenge process.¹⁷⁵

When a lawyer exercises a peremptory challenge, the trial judge actually excuses the juror.¹⁷⁶ The trial judge also may decide which side exercises the last challenge, may require a simultaneous exercise of challenges, and may require that one party exercise his challenges first.¹⁷⁷ Justice O'Connor's dissent dismissed this judicial involvement as insignificant participation of the government and in doing so ignored the fact that without this participation of the trial judge, peremptory challenges would be worthless.¹⁷⁸ Since the trial

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 2084. Among the steps mentioned are: the establishment of jury credentials, adoption of a plan for locating and summoning jurors, defining the jury wheel, and procedures for assignment to grand and petit juries. *Id.*

¹⁷⁴ *Id.* at 2090 (O'Connor, J. dissenting).

¹⁷⁵ *Id.* (O'Connor, J., dissenting).

¹⁷⁶ *Id.* at 2084.

¹⁷⁷ *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218, 233 (5th Cir. 1990) (Rubin dissenting).

¹⁷⁸ *Edmonson*, 111 S. Ct. at 2085.

judge presides over jury selection and ultimately excludes jurors, a peremptory challenge without the cooperation of the trial judge would result in the challenged juror remaining in the venire.¹⁷⁹ The action of a judge in facilitating a peremptory challenge is therefore not a simple ministerial function; it is actually an overt act by a governmental actor to put the weight of the government behind a private action.¹⁸⁰

This significant assistance of the state in a peremptory challenge is similar in degree to the state assistance found in *Tulsa Professional Collection Services v. Pope*.¹⁸¹ In *Tulsa*, the state court's involvement in probate proceedings, particularly the activation of a time bar on claims against an estate, was considered sufficiently substantial involvement for a finding of state action in depriving a creditor of due process.¹⁸² Without court activation of the time bar, the denial of the claims of the creditor could not have occurred.¹⁸³ Similarly, in *Edmonson*, if the trial judge had not excused the jurors, the peremptory challenges would not have removed the black individuals from the jury.¹⁸⁴

Justice O'Connor incorrectly relied on *Jackson* to show that the assistance of the government in peremptory challenges does not rise to the state action level.¹⁸⁵ In *Jackson*, a utility customer claimed that a service cutoff violated his due process rights under Section 1983.¹⁸⁶ In denying that the involvement of the state utility commission constituted state action, the Court noted that the only connection of the commission with the cutoff policy was the utility company's notice filing with the state commission and the lack of any commission action to prohibit the policy.¹⁸⁷ This assistance of the state utility commission is considerably less significant than the assistance given by the trial judge to peremptory challenges. The utility commission did not explicitly facilitate the cutoff policy or the service cutoff; the commission only failed to object to the general policy as part of its oversight responsibilities.¹⁸⁸

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ 485 U.S. 478 (1988).

¹⁸² *Id.* at 491.

¹⁸³ *Id.* at 487.

¹⁸⁴ *Edmonson*, 111 S. Ct. at 2085.

¹⁸⁵ *Id.* at 2091 (O'Connor, J. dissenting). "*Jackson* is a more appropriate analogy to this case The termination was not state action because the state had done nothing to encourage the particular termination practice." *Id.* (O'Connor, J. dissenting).

¹⁸⁶ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 347 (1974).

¹⁸⁷ *Id.* at 357.

¹⁸⁸ *Id.*

The second factor used by the Court to conclude Leesville resembled a state actor is that a peremptory challenge is traditionally a state function.¹⁸⁹ This result is at the least suspect. While peremptory challenges are part of a larger jury selection process established by the government, it is not clear when one looks narrowly at a peremptory challenge whether this action is a traditional government function.

As the dissent noted, private parties have had the right to use peremptory challenges in civil trials for over one hundred years.¹⁹⁰ This right was conferred on opposing litigants in an effort to use the adversarial process to ensure an impartial jury in a civil trial.¹⁹¹ A private litigant uses a peremptory challenge for his own reasons and not for reasons forwarded by the state.¹⁹² It would seem, then, that the challenge itself is traditionally a private function, and not an action traditionally reserved for the state.

The majority improperly relied on *West v. Atkins*¹⁹³ in this context. In *West*, the state contracted with a private physician to provide health care services to prison inmates.¹⁹⁴ The Court stated in *West* that the state had a constitutional obligation under the Eighth Amendment to provide adequate health care to inmates in state correctional facilities.¹⁹⁵ The Court found that because the private physician was acting as an employee of the state in fulfilling legal obligations of the state, the private physician was a state actor.¹⁹⁶

Unlike the provision of health care to state prison inmates, in exercising a peremptory challenge, a private litigant does not undertake an action to fulfill a legal obligation of the state. While federal law authorizes the use of peremptory challenges, the private litigant is not *obligated* to use these challenges in the same way that a private physician employed by the state is required to provide adequate health care to inmates. In *West*, if the physician did not provide the health care services, the state failed to meet its legal obligations.¹⁹⁷ However, a private attorney's failure to use a peremptory challenge will not subject the state to any legal action.

*Terry v. Adams*¹⁹⁸ is slightly more useful in establishing that per-

¹⁸⁹ *Edmonson*, 111 S. Ct. at 2085.

¹⁹⁰ *Id.* at 2092 (O'Connor, J. dissenting).

¹⁹¹ *Swain v. Alabama*, 380 U.S. 202, 218 (1965).

¹⁹² *Edmonson*, 111 S. Ct. at 2092 (O'Connor, J. dissenting).

¹⁹³ 487 U.S. 42 (1988).

¹⁹⁴ *Id.* at 44.

¹⁹⁵ *Id.* at 56.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 56.

¹⁹⁸ 345 U.S. 461 (1953).

emptory challenges could be considered a traditional function of government.¹⁹⁹ Like in the Democratic primary elections in *Terry*, the private action of peremptory challenges is part of a larger government function. However, the relationship of the challenged action and the electoral process in *Terry* differs from the relationship of peremptory challenges and the overall jury selection process. Unlike the peremptory challenge process, the selection of candidates for office is not traditionally a private part of a larger government function. Conducting elections is in every way a traditional government function.

The Court correctly reasoned that its third state actor factor is fulfilled by a private litigant using a peremptory challenge.²⁰⁰ Clearly, "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself".²⁰¹ Racial discrimination in the exclusion of jurors harms the parties to the case, the excluded jurors and the community at large.²⁰²

The Court in *Batson* noted that discrimination in jury selection violates the rights of defendants to be afforded the protections inherent in trial by jury.²⁰³ This harm equally applies to civil and criminal litigants. A black litigant in a civil trial has the same right to a jury selected in a non-discriminatory fashion as a black defendant in a criminal trial. Like criminal trials, civil trials involve interests vital to the litigants.²⁰⁴ In a civil trial a jury can deny a litigant needed relief for a deprivation of health or property and can deny compensation for a constitutional violation.²⁰⁵ These significant interests warrant protection from the dangers of a jury selected in a racially discriminatory fashion.

Discriminatory peremptory challenges also harm the jurors involved.²⁰⁶ Denying participation in our nation's court system solely because of race suggests that the class affected is inherently unable

199 The Court in *Terry* found state action in a scheme in which a private organization, the Jaybird Democratic Association, conducted elections in which only white individuals voted to select candidates to run in Democratic party primaries in Ford Bend County, Texas. *Id.* at 1154. In Texas at that time, the Democratic candidates were virtually assured victory. *Id.*

200 *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991).

201 *Id.*

202 Amici Curiae Brief of American Civil Liberties Union at 4, *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (No. 89-7743) [hereinafter ACLU Brief].

203 *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

204 ACLU Brief, *supra* note 202, at 5.

205 *Id.* at 6.

206 *Id.*

to fulfill a basic obligation of citizenship.²⁰⁷ This denial stigmatizes not only the excluded jurors, but also other members of the racial group.²⁰⁸ This racial exclusion harms jurors in both criminal and civil trials.

Finally, racially-biased jury selection procedures harm the public at large.²⁰⁹ A properly functioning judicial system requires public confidence in the impartiality of the courts.²¹⁰ A jury selection process containing mechanisms used in a racially discriminatory manner undermines this public confidence, whether in a criminal or civil setting.²¹¹

State action advances all of these harms in peremptory jury challenges. The trial judge is the actor that actually excuses the excluded juror after a peremptory challenge. The peremptory challenge takes place within the state or federally operated court system. The court system symbolizes the authority of the federal government and state and local governments. The fact that the racial discrimination occurs within this context creates the harm to the community and significantly worsens the harm to the jurors and the litigants.²¹²

In looking at the state actor question, then, a peremptory challenge in a civil trial is undertaken with the significant and overt assistance of the state — the trial judge facilitates the challenge by excusing the stricken juror. In so doing, the trial judge places the weight of the court behind the peremptory challenge. This action of the trial judge, along with the general context of the governmental court system, also facilitates the harmful effects of a racially discriminatory peremptory challenge. These harmful effects are felt by the private litigant, the excluded jurors, and the public at large.

The Court failed to prove that a peremptory challenge constitutes a traditional government function. More accurately, the peremptory challenge is a traditionally private process within an overall governmental jury selection process. This point alone, however, does not jeopardize the Court's state action finding. The governmental assistance represented by the trial judge and the harm caused by invoking this assistance renders Leesville a state actor, subject to constitutional restrictions.

²⁰⁷ *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

²⁰⁸ ACLU Brief, *supra* note 202, at 7.

²⁰⁹ *Id.* at 8.

²¹⁰ *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991).

²¹¹ *Id.*

²¹² *Id.*

C. JUSTICE SCALIA OVERSTATED THE POTENTIAL NEGATIVE EFFECTS OF THIS DECISION

In his separate dissent, Justice Scalia made two warnings about the implications of *Edmonson*.²¹³ First, Scalia warned of the effect on criminal defense of an extension of *Batson* to criminal defense counsel's peremptory challenges.²¹⁴ *Batson* did not require criminal defense counsel to offer race neutral explanations for peremptory challenges, and the Court in *Edmonson* made no reference to this issue. Justice Scalia asserted that the civil trial extension of *Batson* logically applies to criminal defense counsel, and that this application would have a chilling effect on the ability of minority criminal defendants to create racially favorable juries.²¹⁵

However, there are obstacles to this extension to criminal defendants. Applying *Batson* to criminal defendants would present constitutional questions not present in extending this holding to civil trials.²¹⁶ This application to criminal defendants may violate the Fifth Amendment right to remain silent or the Sixth Amendment guarantee of effective counsel.²¹⁷ Applying *Batson* to criminal defense counsel also raises policy questions not present when considering the civil trial extension, such as the significant differences in roles and resources between prosecutors and criminal defendants.²¹⁸ The disproportionate resources generally available to the state in criminal trials would give the state an advantage in offering proof of discriminatory intent in the exercise of peremptory challenges.²¹⁹ In addition, because a criminal defendant faces imprisonment and sometimes death if convicted, perhaps a criminal defendant should retain the right to use peremptory challenges without any restrictions.²²⁰

A second problem with the extension of *Batson* to criminal de-

²¹³ *Id.* at 2095 (Scalia, J. dissenting).

²¹⁴ *Id.* (Scalia, J. dissenting).

²¹⁵ *Id.* (Scalia, J. dissenting). At the time of this writing, the Court has granted certiorari to determine this very issue. In *State v. McCollum*, 405 S.E.2d 688 (1991), three white defendants in a criminal assault trial struck all the black jurors from the venire. The Court agreed on November 4th, 1991 to consider whether *Batson* should be extended to this situation. *Georgia v. McCollum* (S. Ct.), No. 91-372, Nov. 4, 1991.

²¹⁶ ACLU Brief, *supra* note 202, at 18.

²¹⁷ *Id.* Regarding the Fifth Amendment, a proceeding to determine the purpose of a peremptory challenge may require a defendant to present self-incriminating evidence. As for the Sixth Amendment, depriving a defense attorney of the right to freely use peremptory challenges may violate the Sixth Amendment's guarantee of effective counsel.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

fendants arises when considering the rights involved in a prosecutor's challenge to a criminal defendant's peremptory challenge.²²¹ A prosecutor's constitutional challenge to a defendant's peremptory challenge would in part be an attempt to ensure that a trial is sufficiently fair to the state. Nothing in the Constitution, however, entitles the state to a fair trial.²²² Constitutional protections generally protect individuals from the government, not vice-versa.²²³ Therefore, a prosecutor challenging the defendant's exercise of peremptory challenges on an equal protection basis may only involve the rights of the stricken jurors, not the state as a litigant.²²⁴

Third, to establish a *prima facie* case of discrimination in a peremptory jury challenge under *Batson*, the defendant must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove jurors of the defendant's race.²²⁵ This requirement would seem to eliminate the ability of a prosecutor to challenge a criminal defendant's peremptory challenge because the state is not a member of a cognizable racial group.²²⁶ In *Powers v. Ohio*, however, the Court held that a criminal defendant may object to a prosecutor's race-based exclusion of jurors regardless of the defendant's race.²²⁷ The Court reasoned that *Batson* is not limited to cases where the excluded jurors are of the same race as the defendant because the jurors' rights are violated even if the defendant is of a different race.²²⁸ Still, *Batson* required the defendant to be of the same race as the excluded jurors for a valid *prima facie* case of discrimination, and in remanding *Edmondson*, the Court instructed the lower court to use the same approach as *Batson* to determine the existence of a *prima facie* case of discrimination.²²⁹ A court applying *Batson* to criminal defendants would have to address whether the race of the litigant remains significant.²³⁰

²²¹ 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, 197 (1989).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* Alschuler reasons that prosecutors should be able to assert the rights of excluded jurors. *Id.*

²²⁵ *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

²²⁶ Alschuler *supra* note 221, at 198.

²²⁷ *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991).

²²⁸ *Id.*

²²⁹ *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2088-89 (1991). "In *Batson*, we held that determining whether a *prima facie* case has been established requires consideration of all relevant circumstances, . . . The same approach applies in the civil context." *Id.*

²³⁰ Alschuler lists several other limitations of *Batson*, besides the problems of applying the holding to criminal defendants. Alschuler, *supra* note 221, at 200. For example,

Justice Scalia also warned that by exposing peremptory challenges to constitutional restrictions, *Edmonson* will worsen the already crushing administrative burden on the courts.²³¹ The Court in *Batson* disposed of this concern by saying that states already using the *Batson* proof standard had not experienced any severe administrative problems.²³² In making this assertion, however, the Court offered very limited proof.²³³

Batson offered little guidance on the procedures lower courts are to use after a defendant successfully presents a prima facie case of discrimination in a peremptory jury challenge. One commentator suggests there are four possibilities that a court may follow: (1) an ex parte, in camera hearing in which the prosecutor offers a race neutral reason without the defendant being present or having the opportunity to rebut; (2) an open, non-adversarial hearing in which the defendant is present, but may not offer a rebuttal; (3) an open, adversarial hearing in which the defendant may rebut the prosecutor's explanation; or (4) a full evidentiary hearing in which the prosecutor testifies to the reasons for his peremptories, and the defendant has the option of cross-examination.²³⁴ Federal courts have split on which option to use.²³⁵ Some courts have allowed an ex parte hearing while others have required a full adversarial hearing.²³⁶ No federal court has yet used the fourth option, a full-scale evidentiary hearing.²³⁷

With such little guidance, it is not clear how trial judges will enforce the *Edmonson* decision. Most likely will not employ a full evidentiary hearing, so the most administratively costly option listed

Alschuler asserts that while prosecutors may not discriminate against blacks in peremptory challenges (after *Batson*), they may discriminate against women, homosexuals, handicapped individuals and different ethnic or religious groups. *Id.*

²³¹ *Edmonson*, 111 S. Ct. at 2096 (Scalia, J. dissenting).

²³² *Batson v. Kentucky*, 476 U.S. 79, 99 (1986).

²³³ *Id.* The Court cites a California case, *People v. Hall*, 35 Cal. 3d 161, 672 P. 2d 854 (1983) in which the California Supreme Court found no evidence that implementation of its version of this standard was burdensome for trial judges. In *Hall*, a black defendant accused of assault and false imprisonment challenged the prosecutor's use of peremptory challenges to strike black jurors. *Id.* at 855. The trial judge quickly accepted the prosecutor's race neutral explanation that was required as part of a *Batson*-type procedure. *Id.* at 856. The court held that the trial judge did not make a sufficient effort to evaluate the prosecutor's explanation in the context of the circumstances of the case. *Id.* at 859. The *Hall* court refuted the prosecution's charge that the procedure was unworkable by stating that other states had implemented such a procedure and that the prosecution offered no empirical evidence to support its claim. *Id.*

²³⁴ Brett M. Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 YALE L.J. 187, 189 (1989).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

above is probably not an issue. Certainly, however, any of the other three options involve varying degrees of administrative costs to the court. These processes have added time and cost to the criminal litigation process since *Batson* and will now begin to do so in civil trials.

All constitutional guarantees involve administrative costs, however.²³⁸ One may argue that the continued addition of constitutional guarantees and the costs imposed by these guarantees have made the criminal trial system unnecessarily expensive and time-consuming.²³⁹ The goal of *Edmonson*, however, may be worth the price. The Court has consistently stated that the very integrity of the judicial system is at stake when looking at racial discrimination in jury selection.²⁴⁰ Since discriminatory peremptory challenges call the integrity of the court system into question, the utility of removing this discrimination is potentially enormous.²⁴¹ If it is true that discrimination in peremptory jury challenges jeopardizes the integrity of the courts, the incremental administrative costs of adding *Batson* procedures to civil trials, whatever the costs may be, appear small in comparison.

VI. CONCLUSION

Edmonson continues the re-shaping of the right to exercise peremptory jury challenges which the Court started in *Swain*. The Court correctly indicated that *Batson* must apply to private litigants in civil trials if state action can be found in such a private peremptory challenge. However, perhaps in its eagerness to decry the racial discrimination alleged in *Edmonson*, the Court seemingly picked a state action test out of the air and stated that the private peremptory challenge overwhelmingly fulfills this test.

Holes in the Court's reasoning do not, in the end, prevent the Court from reaching the correct result on the state action question. The test used is appropriate, and the statutory basis of the peremptory challenge, the involvement of the court in its exercise, and the

²³⁸ *Id.* at 203.

²³⁹ See Alschuler *supra* note 221, at 199. "If one wanted to understand how the American trial for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than *Batson*." *Id.* (quoting William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 S. Ct. Rev. 97, 155).

²⁴⁰ Brief for Petitioner at 14, *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (No. 89-7743).

²⁴¹ Interestingly, in a concurrence in *Batson*, Justice Marshall stated that the only way to remove this discrimination was to totally eliminate peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J. concurring).

consequences of discrimination together constitute the state action necessary to warrant application of constitutional restrictions.

Justice Scalia's warnings are potential pitfalls of the *Edmonson* decision; however, they are oversimplified and probably overstated. As for the application of *Batson* to criminal defendants, the Court will soon enough indicate whether Justice Scalia is correct. The suggested administrative costs are uncertain in magnitude and must be weighed against the severe consequences of racial discrimination existing in the courts.

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