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State Action and Discriminatory Use of Peremptory Challenges in Civil Trials: Edmonson v. Leesville Concrete Co.

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STATE ACTION AND DISCRIMINATORY USE OF PEREMPTORY CHALLENGES IN CIVIL TRIALS: *EDMONSON V. LEESVILLE CONCRETE CO.**

I. INTRODUCTION

Excluding blacks from juries reflects one form of racial discrimination in America. As early as 1880, the Supreme Court ruled that the Fourteenth Amendment prohibited states from statutorily barring blacks from eligibility for jury service.[1] Today, although no formal discrimination is allowed in selecting the jury pool, racial bias still works in one way or another during the voir dire.

The peremptory challenge,[2] which affords counsel the right to strike a juror without assigning any reason, has been held by some to be "one of the most important . . . rights secured to the accused"[3] to assure a fair and impartial jury. Nevertheless, the use of peremptory challenges plays an important part in keeping racial discrimination in the jury-selection process.[4] When attorneys make decisions about jurors, they often lack

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

2. Attorneys may make two kinds of challenges during juror voir dire: "for cause" and peremptory. A challenge "for cause" requires judicial approval and that there be a "narrowly specified, provable and legally cognizable basis of [a juror's] partiality." Swain v. Alabama, 380 U.S. 202, 220 (1965). Challenges "for cause" are unlimited. *See* Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 546-50 (1970). A peremptory challenge, on the other hand, is "arbitrary and capricious" and historically can be exercised for any reason or no reason at all. *See Swain*, 380 U.S. at 219. Peremptory challenges are limited in number. In civil trials in federal court, each party is entitled to three peremptory challenges. *See* 28 U.S.C. § 1870 (1988). For a discussion of the history of peremptory challenges, see *Swain*, 380 U.S. at 214-17; JON M. VAN DYKE, JURY SELECTION PROCEDURES 282-84 (1977); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 9-12 (1991).

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

4. *See* Clara L. Meek, Note, *The Use of Peremptory Challenges to Exclude Blacks from Petit Juries in Civil Actions: The Case for Striking Peremptory Strikes*, 4 REV. LITIG. 175 (1984).

particularized information about the individuals drawn from the jury pool.[5] Consequently, they tend to act on the basis of stereotypes and presumptions. Peremptory challenges allow attorneys to act out their unconscious or hidden prejudices in choosing a jury, a practice that sometimes results in excluding a class of people based on race.[6]

Recognizing the injustice and impropriety in the use of peremptory challenges, the Supreme Court gradually has limited the extent to which peremptory challenges can be used to exclude potential jurors on account of their race. In 1986, the Court in *Batson v. Kentucky*[7] held that the prosecutor's race-based use of peremptory challenges violated the Equal Protection Clause of the Fourteenth Amendment.[8] The *Batson* Court did not, however, discuss the defendant's discriminatory use of peremptory challenges nor the possible application of this ruling to civil actions.[9]

Can private attorneys in civil trials peremptorily strike potential jurors based on their race without violating the Fourteenth Amendment? The answer to the question depends on whether the private attorney's conduct falls within state action, which is a prerequisite for any cause of action under the Fourteenth Amendment.[10] The *Batson* decision bans the discriminatory use of peremptory challenges by prosecutors who, as members of the executive branch of government in criminal proceedings, are state actors.[11] Therefore, the primary roadblock to extending *Batson* to a private litigant's attorney's use of peremptory challenges in civil trials has been the question of state action.[12] Since *Batson*, several federal

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5. *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, 211 (1989).

6. *See id.* at 211; Robert M. O'Connell, Note, *The Elimination of Racism from Jury Selection: Challenging the Peremptory Challenge*, 32 B.C. L. REV. 433, 439-53 (1991).

7. 476 U.S. 79 (1986).

8. *See id.* at 89.

9. In 1989, the Supreme Court denied certiorari to a case that would have allowed the Court to decide whether the Eleventh Circuit properly extended *Batson* to civil actions. *See* Fludd v. Dykes, 863 F.2d 822 (11th Cir.), *cert. denied*, Tiller v. Fludd, 493 U.S. 872 (1989). Justice White dissented and addressed the need to resolve this important issue. *See Tiller* at 901 (White, J., dissenting).

10. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.1 (4th ed. 1992).

11. *Batson*, 476 U.S. at 97-98.

12. For a detailed discussion of the state-action doctrine, see *infra* part III.A.

courts have ruled differently on this issue, and scholars have taken up the debate along the same divided lines.[13]

In *Edmonson v. Leesville Concrete Co.*,[14] the Supreme Court decided that a private attorney's use of discriminatory challenges in a civil trial constituted "state action" for the purpose of the Equal Protection Clause.[15] The Court extended the *Batson* rule to civil trials by adopting a liberal interpretation of the state-action principle.[16] Applying the *Lugar v. Edmonson Oil Co.*[17] state-action test, the Court found sufficient State involvement in the private litigants' use of peremptory challenges that private attorneys acted as state actors in striking down potential jurors in the jury-selection process.[18]

This comment focuses on whether a private attorney's use of peremptory challenges constitutes state action. For this purpose, Part II briefly describes the background of *Edmonson*. Part III examines the state-action principle and its application in the use of peremptory challenges in civil cases. Part IV analyzes the *Edmonson* Court's majority and dissenting opinions. Although this comment supports the Court's conclusion, it disputes some of the Court's reasoning. It argues that the Court should

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13. Some courts applying *Batson* have found that the state's involvement in the civil jury-selection process demonstrates sufficient "state action" for Fourteenth Amendment purposes. *See* Reynolds v. City of Little Rock, 893 F.2d 1004 (8th Cir. 1990); *Fludd*, 863 F.2d at 822; Clark v. Bridgeport, 645 F. Supp. 890 (D. Conn. 1986); Lee Goldman, *Toward a Colorblind Jury Selection Process: Applying the "Batson Function" to Peremptory Challenges in Civil Trials*, 31 SANTA CLARA L. REV. 147 (1990); Gerard G. Brew, Note, *The Civil Implications of* Batson v. Kentucky *and* State v. Gilmore*: A Further Look at Limitations on the Peremptory Challenges*, 40 RUTGERS L. REV. 891, 949-55 (1988); Comment, *Recent Cases*, 103 HARV. L. REV. 586, 586-91 (1989); O'Connell, *supra* note 6; David Pork, Comment, Edmonson v. Leesville Concrete Company Inc.*: Can the "No State Action" Shibboleth Legitimize the Racist Use of Peremptory Challenges in Civil Action*, 23 J. MARSHALL L. REV. 271 (1990). Other courts and commentators have concluded that *Batson* should not apply to civil actions. *See* Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1988), *reh'g granted en banc*, 895 F.2d 218 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2077 (1991); Esposito v. Buonome, 642 F. Supp. 760 (D. Conn. 1986); Timothy Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 TEX. TECH L. REV. 921, 929-30 (1988); David Kaston, Note, *Vitiation of Peremptory Challenge in Civil Actions:* Clark v. City of Bridgeport, 61 ST. JOHN'S L. REV. 155, 164 (1986); Eric Katz, Note, *Striking the Peremptory Challenge from Civil Litigation: "Hey Batson, Stay Where You Belong!,"* 11 PACE L. REV. 357 (1991).

14. *Edmonson*, 111 S. Ct. 2077 (1991).

15. *See id.* at 2080.

16. *See id.*

17. 457 U.S. 922 (1982).

18. *See Edmonson*, 111 S. Ct. at 2086.

base its decision on the totality of the circumstances—specifically, by weighing and balancing factors such as the courts' involvement in the whole jury-selection process, the delegation of selecting a jury to the private litigant, and the public's perception of the courts' enforcement of discriminatory use of peremptory challenges.[19]

II. *EDMONSON V. LEESVILLE CONCRETE CO.*: THE CASE HISTORY

The plaintiff in this case, Thaddeus Donald Edmonson, sued defendant Leesville Concrete Company for personal injuries arising from construction work. The trial took place in the District Court for the Western District of Louisiana.[20] During voir dire, defendant's counsel used two of his three peremptory challenges to remove prospective black jurors.[21] Edmonson, who was black, objected to the challenges. Relying on *Batson*, Edmonson's counsel requested that the court require the defendant to provide a race-neutral explanation for the peremptory strikes.[22] The district court refused Edmonson's request on the ground that *Batson* did not apply to civil proceedings.[23] Of the twelve jurors impaneled, eleven were white and one was black. The verdict rendered was unfavorable to the plaintiff.[24]

On appeal, a three-judge panel of the Fifth Circuit reversed and held that a private litigant's discriminatory use of peremptory challenges violated equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments [*Edmonson I*].[25] *Edmonson I* was the first post-

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19. *See* discussion *infra* parts V-VI.

20. Edmonson v. Leesville Concrete Co., No. 6:84-2871 (W.D. La. Sept. 28, 1987), 860 F.2d 1308 (5th Cir. 1988), *reh'g granted en banc*, 895 F.2d 218 (5th 1990), *rev'd* 111 S. Ct. 2077 (1991).

21. *See Edmonson*, 111 S. Ct. at 2081.

22. *See id.* In *Batson*, the court held that a defendant may establish a prima facie case of discrimination by demonstrating that: (1) he is a member of a cognizable racial group; (2) the prosecutor used peremptory challenges to remove venire members of the defendant's race; and (3) the facts and other relevant circumstances raise an inference of racial discrimination by the prosecutor. *See Batson*, 476 U.S. at 96. Once a prima facie case is made, the burden shifts to the prosecutor to come forward with race-neutral reasons to explain his or her use of peremptory challenges. *Id.* at 98. This race-neutral explanation must relate "to the particular case to be tried" and may not rest upon general claims of good faith in making individual selections. *Id.* at 97-98.

23. *Edmonson*, 111 S. Ct. at 2081.

24. *See id.* The jury rendered a $90,000 verdict for Edmonson, but attributed 80% of the fault to his contributory negligence, thus leaving him only $18,000. *See id.*

25. *See* Edmonson v. Leesville Concrete Co., 860 F.2d 1308 (5th Cir. 1988), *reh'g granted en banc*, 895 F.2d 218 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2077 (1991).

Batson civil case that did not involve a state entity as one of the parties.[26]

One month after the decision was issued, the Fifth Circuit granted an en banc rehearing of the case.[27] The en banc court restored the jury verdict, holding that the *Batson* rule could not be extended to compel private litigants to explain their use of peremptory challenges in a federal civil trial [*Edmonson II*].[28] The *Edmonson II* court based its decision on lack of state action.[29]

On June 3, 1991, the Supreme Court reversed the en banc circuit court opinion by holding that the exercise of peremptory challenges in this civil action was pursuant to a course of state action and was therefore subject to constitutional requirements.[30] Justice O'Connor dissented, joined by Chief Justice Rehnquist and Justice Scalia;[31] she argued that a State could not be held responsible for private parties' discriminatory use of peremptory challenges in civil actions.[32] Justice Scalia also filed a separate dissent.[33]

III. STATE-ACTION PRINCIPLE: PRIVATE PARTIES' USE OF PEREMPTORY CHALLENGES

A. *State Action*

The Constitution's protection of individual liberty and equality applies only to action by the government;[34] thus racial discrimination, no matter how odious, violates the Constitution only when attributable to state

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26. O'Connell, *supra* note 6, at 434, 460 (noting that pre-*Batson* cases were all federal civil-rights suits involving government agents or entities). *See* Fludd v. Dykes, 863 F.2d 822, 823 (11th Cir.) (defendant was county sheriff), *cert. denied*, Tiller v. Fludd, 493 U.S. 872 (1989); Wilson v. Cross, 845 F.2d 163, 164 (8th Cir. 1988) (defendants were police officers); Maloney v. Washington, 690 F. Supp. 687 (N.D. Ill.), *vacated sub nom.* Maloney v. Plunkett, 854 F.2d 152 (7th Cir. 1988) (one defendant was a mayor and one was a police commissioner); Clark v. City of Bridgeport, 645 F. Supp. 890, 890 (D. Conn. 1986) (defendant was a police officer); O'Connell, *supra* note 6, at 434 n.7.

27. *See Edmonson II*, 895 F.2d at 1308.

28. *See* Edmonson v. Leesville Concrete Co., 895 F.2d 218, 226 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991).

29. *See id.* at 221-22. For a detailed discussion of the *Edmonson* decisions, see O'Connell, *supra* note 6, at 460-84, and discussion *infra* part III.

30. *See Edmonson*, 111 S. Ct. at 2080.

31. *See id.* at 2089 (O'Connor, J., dissenting).

32. *Id.*

33. *See id.* at 2095 (Scalia, J., dissenting).

34. *See* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988).

action.[35] Although a private attorney's discriminatory use of peremptory challenges unfairly may work toward the exclusion of a minority from a jury, a party must show state action to invoke the protection of the Fourteenth Amendment.

The state-action principle finds its roots 100 years ago in the so-called *Civil Rights Cases*,[36] in which the Supreme Court held that the Fourteenth Amendment does not authorize Congress to prohibit discrimination by privately owned inns, conveyances, and places of amusement.[37] According to the Court, the Fourteenth Amendment provided redress against racial discrimination only by "the operation of State laws, and the action of State officers," not by private citizens.[38]

Although the state-action principle is easily defined, no bright line separates "private action" from "state action," especially in cases involving complicated interaction between private parties and the State.[39] As the Supreme Court pointed out in *Burton v. Wilmington Parking Authority*,[40] "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task,'"[41] and "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[42] Over the course of history, the Court has articulated several state-action "tests," such as the state-enforcement test,[43] the public-function test,[44] and the significant-involvement and sufficient-assistance tests.[45] The Court has recognized, however, that these tests, which are analyzed below, may represent nothing more than "different ways of characterizing fact-bound [state-action] inquiry."[46]

The Court set out the "state-enforcement" test in *Shelley v. Kraemer*,[47] in which it held that enforcing racially restrictive covenants

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35. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972).

36. 109 U.S. 3 (1883).

37. *See id.* at 24.

38. *Id.* at 11.

39. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

40. 365 U.S. 715 (1961).

41. *Id.* at 722.

42. *Id.*

43. *See infra* text accompanying notes 47-53.

44. *See infra* text accompanying notes 54-55.

45. *See infra* text accompanying notes 56-60.

46. Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982) (citing *Burton*, 365 U.S. at 722); *see infra* notes 47-69 and accompanying text.

47. 334 U.S. 1 (1948).

between private property owners by judicial officers in their capacities is to be regarded as action of the State.[48] In *Shelley*, a black purchaser bought a house in a mostly white neighborhood in St. Louis, Missouri.[49] A group of neighbors sued Shelley to block the sale based on a restrictive covenant in the 1911 deed that banned the sale or lease of the property to blacks or Mongolians.[50] The trial court upheld the validity of the covenant.[51] On appeal, the Supreme Court held that the racially motivated private restrictive covenants did not, in and of themselves, violate the Equal Protection Clause.[52] But, when a state court enforced such a covenant, the court became a state actor denying equal protection to the objecting party.[53]

Under the "public-function" test, when a private party engages in an "exclusively public function," his or her act may constitute state action.[54] For example, under the Fifteenth Amendment, a State cannot exclude blacks from voting by delegating to a private political organization the task of determining the qualifications of voters.[55]

According to the "significant-involvement" test, state action exists when sufficient contacts between the private party and the State show that the private act is accomplished with significant governmental assistance or that a "symbiotic relationship" exists between the private party and the

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48. *See id.* at 14, 20.

49. *Id.* at 4-5.

50. *See id.* at 4-6.

51. *See id.* at 6.

52. *See id.* at 13.

53. *See id.* at 19-20.

54. The "delegation-of-a-public-function" test of state action originated in Marsh v. Alabama, 326 U.S. 501, 506-07 (1946), and the White Primary Cases, including Nixon v. Condon, 286 U.S. 73, 88-89 (1932), and Terry v. Adams, 345 U.S. 461 (1953), which have been read as establishing that operating a town and running state and local elections are "intrinsically governmental functions" and hence, constitute state action no matter who performs them. *See* Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Bros. v. Brooks, 130 U. PA. L. REV. 1296, 1326 (1982).

55. Terry v. Adams, 345 U.S. 461, 469-70 (1953). In *Terry*, a voluntary club of white Texas Democrats—the Jay Bird Democratic Association—excluded blacks from their pre-primary election, and the winner, with few exceptions, ran unopposed in the primary. *See id.* at 463. The majority of justices, though writing separately, appeared to agree that there was a delegation of public function to the club, which subjected the club's practice to the Fifteenth Amendment. *See id.* at 481, 484.

State.[56] The extent of state activity in relation to the private party helps determine whether the State, in an apparently neutral action, has in fact, "significantly involved itself" in private discrimination.[57] For example, in *Moose Lodge No. 107 v. Irvis*,[58] a state-licensed private bar refused to sell liquor to a black customer solely because of his race.[59] The Court held that the State's issuance of the liquor license was too attenuated to support a finding of state action by the defendant and thus insufficient to trigger sanctions against the defendant's discriminatory practice under the Fourteenth Amendment.[60]

In the 1988 case of *Tulsa Professional Collection Services v. Pope*,[61] the Court offered yet another version of the substantial-assistance test. In this case, Oklahoma's Probate Code provided that creditors' claims against an estate are valid only if they are presented to the executor within certain time limits.[62] The plaintiff failed to comply with these limits, and the probate court denied its application for payment.[63] The Supreme Court held that even though the private use of state probate procedures did not necessarily rise to the level of state action, the probate court's intimate involvement throughout the probate proceeding has been so pervasive and substantial that it must be considered state action.[64]

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56. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-26 (1961). In *Burton*, the Court held that a privately owned restaurant that leased space in a governmental parking facility violated the Equal Protection Clause in refusing service to racial minorities. *See id.* at 721. State action was demonstrated because the State had "not only made itself a party to the refusal of service, but ha[d] elected to place its power, property and prestige behind the admitted discrimination." *Id.* at 725.

57. Reitman v. Mulkey, 387 U.S. 369, 380 (1967). In *Reitman*, the Supreme Court invalidated a California constitutional amendment guaranteeing property owners the right to refuse to sell or rent their real property to anyone they choose. *See id.* at 371. According to the Court, such an amendment would unconstitutionally involve the State in, and place the State's sanction on, private-housing discrimination. *See id.* at 378-79.

58. 407 U.S. 163 (1972).

59. *Id.* at 165.

60. *See id.* at 173-77.

61. 485 U.S. 478 (1988).

62. *See id.* at 479-81.

63. *See id.* at 482.

64. *See id.* at 487.

In *Lugar v. Edmonson Oil Co. Inc.*,[65] the Supreme Court formulated a new two-part test for state action.[66] First, the violation must be the result of the exercise of some privilege created and granted by the state.[67] Second, the party charged must be fairly described as a state actor.[68] The Court listed three categories of people who would be characterized as state actors: a governmental official; someone who has acted together with or received significant help from state officials; or someone whose conduct is otherwise attributable to the state.[69]

In retrospect, the Supreme Court has developed a variety of holdings and theories on the state-action question, varying with the facts of the cases before it. But, at the core of these tests lies a common question: is the involvement of the State in the private conduct sufficiently significant to hold the State responsible for the result of the private action?

B. *State Action and Peremptory Challenges*

Before the *Edmonson* decision, lower courts applied various state-action tests to deal with private litigants' discriminatory use of peremptory challenges in civil actions. Though focusing on the same factors, such as state involvement and the judge's role in administering jury selection, courts have arrived at different conclusions.[70] The Fifth Circuit's *Edmonson I* majority coupled with the *Edmonson II* dissent, and the *Edmonson I* dissent together with the en banc opinion in *Edmonson II*, represent the two different applications of the state-action principle in the discriminatory use of peremptory challenges.

1. *Edmonson I*

The *Edmonson I* court, after thoroughly examining state-action cases,[71] concluded that the case at hand involved more governmental

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65. 457 U.S. 922 (1982) (holding that a private creditor's joint participation with governmental officials in state-created attachment proceedings made the creditor a state actor).

66. *See id.* at 936-39.

67. *Id.* at 937, 939.

68. *Id.*

69. *Id.* at 937.

70. *See supra* note 13 and accompanying text.

71. *See* Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1310-12 (5th Cir. 1988), *reh'g granted en banc*, 895 F.2d 218 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2077 (1991).

action than was deemed necessary to establish state action.[72] A State is "intimately involved" in the entire jury-selection process, which includes the use of peremptory challenges, because the government summons the jurors, excuses the challenged jurors, and impanels the jury.[73] Moreover, peremptory challenges are authorized by statutes and are exercised in the course of a judicial proceeding.[74] Thus the state actor is the trial court judge who, as both agent and officer, administers the peremptory-challenge procedure and gives it the final approval.[75]

Applying the *Lugar* two-part test, Judge Thomas Gee, who dissented,[76] found that the second part of the test was not satisfied: a private litigant exercising peremptory challenges could not reasonably be considered a state actor.[77] According to Judge Gee, the role of the court in the exercise of peremptory challenges was "merely ministerial."[78]

2. *Edmonson II*

In *Edmonson II*, Judge Gee, this time writing for the en banc majority, reiterated the arguments he advanced in *Edmonson I*.[79] In addition, he relied on *Polk County v. Dodson*,[80] which held that a government-paid public defender was not a state actor and therefore not liable to her client under section 1983 of the Civil Rights Act.[81] By extension, according to Judge Gee, the private attorney in the civil trial served her client's interests only and not those of the State.[82]

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72. *See id.* at 1312.

73. *Id.*

74. *See id.* The court found that "[t]he government is inevitably and inextricably involved as an actor in the process by which a federal judge, robed in black, seated in a paneled courtroom, in front of an American flag, says to a juror, 'Ms. X, you are excused.'" *Id.* at 1313.

75. *See id.*

76. *Id.* at 1315 (Gee, J., dissenting).

77. *Id.* at 1315-16. For a discussion of the *Lugar* test, see *supra* text accompanying notes 65-69.

78. *Edmonson*, 860 F.2d at 1316 (Gee, J., dissenting).

79. *See* Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991).

80. 454 U.S. 312 (1981).

81. *Id.* at 320.

82. *See Edmonson*, 895 F.2d at 222. The court also pointed out that if any state interest was present in a civil trial, it was significantly lower than in a criminal case, and that the private counsel in the civil action therefore could not be said to be advancing any real governmental interest. *See id.*

Judge Rubin, writing in defense of his *Edmonson I* opinion, dissented in *Edmonson II*.[83] He acknowledged that action pursuant to some statute, with nothing more, did not satisfy the second prong of the *Lugar* test.[84] "Something more" is needed to demonstrate state action, and the active role played by the judge in the use of peremptory challenges provided that "something."[85]

IV. THE SUPREME COURT AND *EDMONSON V. LEESVILLE CONCRETE CO.*

The Supreme Court's majority[86] and dissenting[87] opinions focused on the same issue: whether the involvement of the court in the private litigant's use of peremptory challenges is sufficiently significant to find state action.[88]

A. *Majority Opinion*

The majority of the Court, agreeing with the *Edmonson I* majority and the *Edmonson II* dissent, held that in exercising peremptory challenges in civil trials, private attorneys functioned as state actors.[89] In reaching its conclusion, the Court applied the *Lugar* two-prong test,[90] asking first, whether the use of peremptory challenges had its source in state authority,[91] and second, whether the private attorney could be deemed to be a state actor.[92] The first part of the test was easily satisfied because the use of peremptory challenges had its source in statutes, and in this case, the challenges were exercised pursuant to federal law.[93]

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83. *Id.* at 227-38 (Rubin, J., dissenting).

84. *Id.* at 229.

85. *Id.* at 232-33.

86. *Edmonson*, 111 S. Ct. at 2082-83.

87. *Id.* at 2089 (O'Connor, J., dissenting); *id.* at 2095 (Scalia, J., dissenting).

88. The opinion also addressed the issue of standing, which is not discussed in this comment. *See id.* at 2087.

89. *Id.* at 2084-85.

90. *See id.* at 2083.

91. *See id.* (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 939-41 (1982)).

92. *See id.*

93. *See* 28 U.S.C. § 1870 (1988): "In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." *Id.*

The Court found that the facts surrounding the use of peremptory challenges in civil trials also satisfied the second part of the *Lugar* test.[94] Not only are peremptory challenges authorized by federal statute, the majority argued,[95] but also a private party uses peremptory challenges with the overt, significant assistance of the government.[96] Moreover, because peremptory challenges are used in selecting a jury—an entity that is a quintessential governmental body—choosing a jury involves the performance of a traditional governmental function.[97] Furthermore, the injury allegedly caused by the discriminatory use of peremptory challenges becomes aggravated in a unique way by the incidence of governmental authority because judicial procedures represent the government's constitutional authority.[98]

B. *Dissenting Opinions*

In her dissent, Justice O'Connor disputed the majority opinion on the extent of governmental involvement, as well as the nature of peremptory challenges.[99] According to Justice O'Connor, the State's involvement was not significant enough to find state action in the private litigant's use of peremptory challenges;[100] no state enforcement figured in the excusing of potential jurors after the exercise of peremptory challenges;[101] and the occurrence of discrimination within a courtroom could not turn a private act into a state one.[102] Thus, for Justice O'Connor, the State should not be held responsible for a private party's racially discriminatory use of peremptories.[103]

Justice Scalia wrote a separate dissent addressing the negative effect of the majority opinion on minority litigants.[104] According to Justice Scalia, the majority opinion, which logically must apply to defendants in criminal prosecutions, would inevitably prevent minority defendants in a

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94. *See Edmonson*, 111 S. Ct. at 2083.

95. *Id.* at 2084.

96. *Id.*

97. *See id.* at 2085.

98. *See id.* at 2087.

99. *See id.* at 2089-90 (O'Connor, J., dissenting).

100. *Id.* at 2091 (citing Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478, 487 (1988)).

101. *Id.* at 2091.

102. *Id.* at 2095.

103. *See id.* at 2084 (majority opinion).

104. *See id.* at 2095 (Scalia, J., dissenting).

criminal trial from using race-based strikes, thus depriving them of the opportunity to avoid having an all-white jury.[105] Moreover, administering the rule would inevitably add cost to the already overburdened justice system.[106] Currently, all litigants may lodge racial-challenge objections, and after the denial of an objection, appeal this denial—with the consequence of possibly overturning the judgment.[107]

V. ANALYSIS AND COMMENTS

Both the majority and the dissenting opinions in *Edmonson* applied the *Lugar* test, but they reached different conclusions about whether a private litigant's discriminatory striking down of potential jurors can be reasonably considered state action.[108] On a fundamental level, the majority and dissent register different understandings about the impact of peremptory challenges in the jury-selection process. As a result, the majority and dissenting justices disagreed on nearly all of the other issues they considered in determining the issue of state action: whether the extent of the court's involvement is significant; whether the State had enforced private discrimination by allowing the removal of potential jurors based on their race; whether the exercise of peremptory challenges constituted a performance of a public function; and whether the State should be held responsible for discrimination within the courthouse.[109]

When the State's role is concerned, the majority asserted, there is a necessity to step in and address racial bias in the legal system.[110] The dissenting justices stressed the State's limited role, insisting that a more impartial jury would result if the private litigants were allowed to interact with each other free from state interference.[111]

The majority's finding of state action may be justified, based on the totality of the circumstances around a private party's use of peremptory challenges in civil trials. When taken separately, any of the circumstances involved would not be enough to find the State responsible for the private attorney's use of peremptory challenges. When taken together, however, the aggregate effect warrants a finding of state action. In balancing all of

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105. *Id.*

106. *Id.* at 2095-96.

107. *See id.* at 2096.

108. *See id.* at 2082-83 (majority opinion); *id.* at 2089-93 (O'Connor, J., dissenting).

109. *See id.* at 2081 (majority opinion); *id.* at 2089 (O'Connor, J., dissenting).

110. *See id.* at 2088 (majority opinion).

111. *See id.* at 2089-90 (O'Connor, J., dissenting); *id.* at 2095-96 (Scalia, J., dissenting).

the factors, we should recognize that some factors are more important than others and thus should carry more weight. For example, the status of the peremptory challenges as an integral part of the jury-selection process contributes heavily to the finding of state action in the private attorney's conduct. The jury-selection process not only provides the larger context in which private parties exercise peremptory challenges, but also underlies the significant state involvement in, and the harm resulting from, the discriminatory use of peremptory challenges. Moreover, the totality-of-circumstances approach rejects a purely procedural analysis of the use of peremptory challenges. Instead, it assigns significant weight to (1) the excluded jurors' perception of a private party's discriminatory use of peremptory challenges, and (2) the harm to the excluded potential jurors and the public's confidence in the jury-selection process resulting from such use.

A. *Court Involvement in the Peremptory Challenges*

Both sides of the Court agreed that a private party's exercise of a state-created right or privilege does not, by itself, amount to state action.[112] But the consensus ended there.

The majority asserted that the court's involvement, through the court-administered jury-selection procedure and the presiding judge, made the private attorneys' use of peremptory challenges state action.[113] According to the majority, peremptory challenges have no utility outside the jury system, which is administered solely by the government.[114] Congress prescribed jury qualifications and jury-selection procedures:[115] the courts all adopt procedures to implement these statutes;[116] trial lawyers get information about prospective jurors from the court;[117] and

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112. *See id.* at 2083-84 (majority opinion); *id.* at 2089 (O'Connor, J., dissenting); *see also* Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982) (noting that "private parties [should not] face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them"); Flagg Bros. v. Brooks, 436 U.S. 149, 162-64 (1978) (finding that a proposed sale of a debtor's stored goods by a private warehouseman was not state action even though the warehouseman was acting pursuant to a state statute).

113. *See Edmonson*, 111 S. Ct. at 2084.

114. *See id.*

115. *Id.*

116. *Id.*

117. *Id.*

potential jurors are summoned by the court and receive a per diem wage fixed by statute for their services.[118]

In addition, the majority argued that the trial judge exercises substantial control over the voir dire and participates in the exercise of peremptory challenges.[119] The trial judge affects the exercise of peremptory challenges and for-cause challenges because of his or her ultimate role in the process. The judge may conduct the entire voir dire himself or herself, decide the range of information disclosed to attorneys about the potential jurors, oversee the exclusion of jurors for cause and thus determine which jurors remain eligible for the use of peremptories, and excuse a juror upon the exercise of a peremptory strike.[120]

In opposition, Justice O'Connor argued that the governmental administration of the jury-selection system was independent of private attorneys' use of peremptory challenges.[121] According to Justice O'Connor, while all other procedures concerning the jury selection were wholly administered by the State, attorneys were specifically given full discretion to exercise peremptory challenges.[122] Moreover, the judge does no more than acquiesce in the private decision to strike potential jurors; thus the judge's excusing the juror does not amount to state participation in the use of peremptory challenges.[123] Therefore, the jury-selection system cannot involve sufficient state involvement in the private attorneys' use of peremptory challenges so as to constitute state action.[124]

A court's administration of the jury-selection process, though providing a framework for the use of peremptory challenges, by itself does not provide sufficient state involvement to justify a finding of state action. The particular character of peremptory challenges in the jury-selection scheme must be taken into account. As Justice O'Connor stated, peremptory challenges differ from other statutory provisions concerning the jury-selection process, such as jury pooling, because a private litigant is allowed to strike any potential juror "without a reason stated, without injury and without being subject to the court's control."[125] Therefore, society must find a balance between the unique character of peremptory challenges and the statutory scheme of the jury-selection process.

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118. *Id.*

119. *See id.*

120. *Id.*

121. *See id.* at 2090 (O'Connor, J., dissenting).

122. *Id.* at 2092.

123. *Id.* at 2090.

124. *Id.* at 2091.

125. Swain v. Alabama, 380 U.S. 202, 212 (1965).

The special nature of the peremptory challenge determines a judge's role in the statutory scheme in which the challenges are exercised. Statutory provisions usually specify only the number of peremptory challenges available for each side, not the manner in which the challenges are to be exercised or jurors excused.[126] Consequently, the judge is expected to refrain from interfering in the litigants' decisions to peremptorily strike jurors. The judge's function after the exercise of peremptory challenges is simply to excuse the venire member from the courthouse.[127] Therefore, in the sense that no judgment or discretion is required of the judge, his or her role in the use of peremptory challenges serves a mere ministerial function.[128] Given this "minimal" involvement, a trial judge does not convert the private use of peremptory challenges into state action.[129]

The point can be further explained when we consider how the judge rules on objections regarding a party's use of peremptory challenges. When an attorney uses a peremptory challenge to strike a potential juror, the opposing attorney may object based on *Batson*. Upon an objection, the judge must first decide whether such use constitutes state action before ruling on any possible violation under the Fourteenth Amendment.[130] In determining whether state action is present, the judge must look at the attorney's decision to strike the prospective juror, not what the judge would do in response to the objection.[131] The judge's ruling on the objection is, of course, state action, but he or she does not participate in an attorney's decision to discriminate. The court's ruling comes only after the attorney has already used such challenges.[132] Therefore, the judge does not participate in private attorneys' exercise of peremptory challenges. Accordingly, the judge cannot provide the element of state authority needed to rule on the state-action question in the attorney's use of peremptory challenges.[133]

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126. *See* VAN DYKE, *supra* note 2, at 318-19.

127. *Edmonson*, 111 S. Ct. at 2091 (O'Connor, J., dissenting).

128. *Id.* at 2090.

129. *See* Katz, *supra* note 13, at 399.

130. *See* R. George Wright, *Litigating the State Action Issue in Peremptory Challenge Cases*, 13 AM. J. TRIAL ADVOC. 573, 582-83 (1989).

131. *See id.*

132. *See id.*

133. *Id.*

B. *"Exclusive" or "Traditional" Public Function?*

Applying the public-function test, the majority argued that peremptory challenges involve the performance of a traditional governmental function that attributes state action to the private attorneys' conduct.[134] The private attorneys exercise governmental power when they use peremptory challenges to select a jury, which is a quintessential governmental body.[135] The governmental function of peremptory challenges in the jury-selection process is one of the most significant factors that the Court considered in determining the issue of state action in *Edmonson.*

In holding that the private attorney became a government actor for the limited purpose of using peremptory challenges during the selection process,[136] the Court distinguished the public defender in *Polk County v. Dodson*[137] from private attorneys who use peremptory challenges. According to the Court, the relationship between the public defender and government in the criminal trial is adversarial, whereas in the jury-selection process, "the government and private litigants work for the same end."[138]

Rejecting the majority's interpretation of the public-function doctrine, Justice O'Connor argued that the doctrine requires not only "traditional government function" but also that the private actor exercise "a power 'traditionally exclusively reserved to the State.'"[139] Under this test to find state action, the private conduct must comprise something that

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134. *See Edmonson*, 111 S. Ct. at 2085.

135. *See id.*

136. *See id.* at 2086.

137. 454 U.S. 312 (1981).

138. *Edmonson*, 111 S. Ct. at 2086.

139. *Id.* at 2093 (O'Connor, J., dissenting) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)). The disagreement over the public-function doctrine is not new. In Flagg Bros. v. Brooks, 436 U.S. 149 (1978), Justice Rehnquist articulated the "exclusive" governmental-function test and held that the delegation of power to resolve disputes between debtors and creditors did not involve a delegation of "an exclusive prerogative of the sovereign." *Id.* at 160. Justice Stevens contested the Court's view in *Flagg Bros.* on the exclusivity of the public function. For him, the inquiry was "whether the State has delegated a function traditionally and historically associated with sovereignty." *Id.* at 171 (Stevens, J., dissenting). Therefore, he argued, the power to order a binding, non-consensual resolution of a conflict between private parties is a public function, and the state delegation of that power to a private party is, accordingly, state action. *Id.* at 176. The state action in *Flagg Bros.* came not from the clerk's ministerial role in signing the order, but from the "State's role in defining *and controlling* the debtor-creditor relationship." *Id.* at 173-74.

traditionally *only* the government does.[140] But, "it has never been exclusively the function of the government to select juries; peremptory strikes are older than the Republic."[141] Therefore, Justice O'Connor concluded, the use of peremptory challenges did not qualify as an exclusive governmental function.[142]

For Justice O'Connor, *Polk County v. Dodson*[143] was controlling. If a public defender—on public payroll—did not become a state actor in the courtroom, then neither could an attorney who was hired by the private litigant.[144] Disputing the majority's opinion, Justice O'Connor asserted that private attorneys in civil trials did not work for the same end as the government.[145] Instead, because attorneys representing clients on opposite sides are in an adversarial relation, they use peremptory challenges in direct opposition to one another and for precisely contrary ends.[146]

Justice O'Connor has taken peremptory challenges out of context. While peremptory challenges may be older than the Republic, they now operate only in the jury-selection process, and only the government traditionally has run the judicial system for its people.[147]

Moreover, the jury-selection process is a public function. Consequently, the attorneys' exercise of peremptory challenges can be deemed a state function delegated to private administration, analogous to the privately controlled state election.[148] That peremptory challenges are exercised by private litigants cannot change the governmental nature of the jury-selection system. Instead, the governmental nature of the jury-selection system makes peremptory challenges part of a public function.

Furthermore, *Dodson* cannot preclude a finding of state action in the private attorney's use of peremptory challenges.[149] What *Dodson* stands for is that public defenders are accredited with the same independent decisionmaking in their representation of clients that privately retained

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140. *Edmonson*, 111 S. Ct. at 2093 (O'Connor, J., dissenting).

141. *Id.*

142. *Id.*

143. 454 U.S. 312 (1981); *see supra* notes 80-81 and accompanying text.

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

145. *See id.* at 2086.

146. *Id.* at 2095.

147. *See id.* at 2085.

148. *See* Terry v. Adams, 345 U.S. 461, 469-70 (1953); *see also* O'Connell, *supra* note 6, at 474 n.364 (analogizing private attorneys to a corporation in a highly regulated business).

149. *See Edmonson*, 111 S. Ct. at 2086.

lawyers are.[150] Further, the Court in *Dodson* did not rule out the possibility that a public defender could be a state actor in other contexts.[151] For instance, the public defender can function as a state actor when performing administrative or investigative functions on behalf of the state.[152]

Finally, the Supreme Court has equated exclusion from participation in juries with denial of the elective franchise, in that the exclusion from a jury denies access to an important citizen-participation function.[153] More importantly, the misuse of peremptory challenges involves racial discrimination, requiring heightened judicial scrutiny and increased vigilance against violations.[154] Thus, it makes sense to hold that the exclusion of potential jurors as a result of racially based peremptory challenges violates the excluded jurors' constitutional rights protected under the Fourteenth Amendment.

C. *State Enforcement of Peremptory Challenges and State Responsibility: The Analogy to* Shelley v. Kraemer

Under the Equal Protection Clause, the government may not, by legislative or judicial action, give effect to private prejudices.[155] In *Edmonson*, the Court concluded that "[b]y enforcing a discriminatory . . . challenge, the court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.'"[156] Therefore, the State "in a significant way has involved itself with invidious discrimination."[157]

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150. *See Dodson*, 454 U.S. at 318-19.

151. *See id.* at 324-25.

152. *See id.* at 325.

153. *See id.*

154. *Id.*; *see also* Korematsu v. United States, 323 U.S. 214, 216 (1944) (finding that strict scrutiny is required to examine classifications based on race); Strauder v. West Virginia, 100 U.S. 303, 307-09 (1879) (holding that a state statute excluding blacks from juries is unconstitutional).

155. *See* Palmore v. Sidoti, 466 U.S. 429, 431, 433 (1984) (invalidating a Florida decision denying a white woman custody of her child because she was living with a black man); Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that courts may not enforce private covenants that discriminate on the basis of race).

156. *Edmonson*, 111 S. Ct. at 2085 (quoting Burton v. Wilmington Parking Auth., 356 U.S. 715, 725 (1961).

157. *Id.*

The arguments favoring a finding of state action based on state enforcement usually rely heavily on *Shelley v. Kraemer.*[158] The majority opinion, however, did not cite *Shelley* extensively on this point.[159] Because the Court did not characterize the judge's excusing the venire member as an enforcement of private discrimination, the Court apparently did not want to draw an analogy to *Shelley.*[160]

Justice O'Connor's dissent tried to distinguish *Shelley* from the case at hand.[161] In *Shelley,* the court used coercive power to force private parties to discriminate.[162] But in this case, according to Justice O'Connor, the peremptory challenges were voluntary in nature and were exercised at the complete discretion of the private litigants without the control of the court.[163] As the Supreme Court in *Blum v. Yaretsky*[164] noted, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must . . . be deemed that of the State."[165] The coercive power recognized in *Shelley* was also a factor in *Lugar v. Edmonson Oil Co.*,[166] in which the state's judicial system was used to attach the debtor's property in an attachment proceeding.[167]

But Justice O'Connor failed to take into account that the formal authority of the court was invoked by a private litigant's peremptory discharge of venire members.[168] Although no "coercive power" is

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158. *Shelley*, 334 U.S. at 1. For a detailed discussion of the case, see text accompanying *supra* notes 47-53.

159. *See Edmonson*, 111 S. Ct. at 2080-89.

160. *See id.* at 2084-85 (characterizing the action as an exercise of a traditional government function having no attributes of a private actor).

161. *See id.* at 2090-91 (O'Connor, J., dissenting).

162. *See id.* at 2091 (O'Connor, J., dissenting); Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 819 (1989).

163. *Edmonson*, 111 S. Ct. at 2091 (O'Connor, J., dissenting).

164. 457 U.S. 991 (1982).

165. *Id.* at 1004. The Fifth Circuit's *Edmonson* decision referred to this passage. *See* Edmonson v. Leesville Concrete Co., 895 F.2d 218, 221-22 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991).

166. 457 U.S. 922 (1982).

167. *See id.* at 924-25. An attachment proceeding is a state-sanctioned means of acquiring the property of another to satisfy a debtor or to pressure a debtor into finding an alternate means to meet a creditor's demands. *See* BLACK'S LAW DICTIONARY 126 (6th ed. 1990).

168. *See Edmonson*, 111 S. Ct. at 2087.

involved in the procedure,[169] the result of the peremptory challenge is to dismiss the potential juror and change the final composition of the jury. Moreover, to the extent that the potential jurors may not know that it is the private attorney, and not the court, who has excluded them from the jury service,[170] it can be said that the court has made itself a part of the discrimination "[b]y enforcing a discriminatory challenge."[171]

Some critics also argue that peremptory challenges differ from the restrictive covenants in *Shelley*, which were explicitly discriminatory.[172] Peremptory challenges are at least facially neutral, whereas the court in *Shelley* enforced discriminatory covenants on parties who did not want to discriminate.[173] Ample evidence shows, however, that peremptory challenges are frequently used for discriminatory purposes to the extent that their use cannot be characterized as neutral in nature.[174] Furthermore, the discriminatory application of facially neutral statutes has been found to violate the Fourteenth Amendment.[175] Simultaneously, the courts are often seen as supporting the private attorney's discriminatory practices.[176] As a result, an element of state enforcement is involved in private attorneys' use of peremptory challenges, and this element helps support a finding of state action.

D. *Discrimination Within the Courthouse: Perception of Unfairness?*

The *Edmonson* majority stressed that the effect of discrimination is odious because the discriminatory practices occurred within court

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

170. *See infra* notes 181-83.

171. *Edmonson*, 111 S. Ct. at 2085. The Court discussed this in the context of the role of the judge in the use of peremptory challenges and found that "[w]ithout the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose." *Id.*

172. *See Shelley*, 334 U.S. at 13; *see also* Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 12-14 (1959) (arguing that although the Fourteenth Amendment allows each citizen his or her personal prejudices, it bars access to state aid to induce others to conform with those prejudices).

173. *See Shelley*, 334 U.S. at 6-7; THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 29 (1989); JOSEPH R. NOLAN, TRIAL PRACTICE 53 (1981); VAN DYKE, *supra* note 2, at 145-51; Goldwasser, *supra* note 162, at 819 (stating that the peremptory challenges are facially neutral because the challenged jurors are identified by name or assigned number and the challenges are exercised pursuant to neutral statutes or rules).

174. *See* Meek, *supra* note 4, at 213-15.

175. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

176. *See infra* notes 181-83.

proceedings.[177] The racially biased use of peremptory challenges damages the public's confidence in the fairness of the judicial system.[178] The dissent, agreeing that discrimination in a courtroom was "particularly abhorrent," nevertheless argued that the state was not responsible for every inequitable act.[179] While the majority emphasized fairness in the justice system, the dissent downplayed the court's role in the battle for equality and non-discrimination by referring to the courtroom as "a forum established by the government for the resolution of dispute."[180]

The dissent's reasoning on this point fails to consider fully the effect of perceived unfairness resulting from the exclusion of potential jurors based on their race. When the venire members are excused after the peremptory strikes, they most likely do not know why they were excused or who was responsible for their discharge.[181] "In such cases, the 'inference is inescapable to both the excluded jurors and the public' that the state is responsible for the jurors' exclusion."[182] Whether the law recognizes judicial acquiescence as state action, much of the public perceives it as having judicial approval.[183] Thus, in the public's eye, the court is inextricably involved in the private use of peremptory challenges. As a result, the effect of the strike on venire members and the public at large helps to attribute state action to private litigants' use of peremptory challenges.

Such a perceived relationship between the court and the private litigant in the use of peremptory challenges can constitute a "symbiotic relationship,"[184] as articulated by the Court in *Burton v. Wilmington Parking Authority*.[185] In *Burton*, a restaurant leased its space from a state parking facility.[186] Even though the government did not encourage the restaurant's private discriminatory practice, the Court found a sufficient presence of state authority in the landlord-tenant relationship and the

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177. *See Edmonson*, 111 S. Ct. at 2087.

178. *See id.*

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

180. *Id.*

181. *See generally* Goldman, *supra* note 13, at 187-88 (stating that in some jurisdictions challenges are made and ruled upon outside the presence of the jury).

182. *Id.* at 165 (quoting People v. Kern, 554 N.E.2d 1235, 1245 (N.Y.), *cert. denied*, 111 S. Ct. 77 (1990)). "Though in some cases counsels' questions during the voir dire may suggest which litigant chooses to challenge the excluded juror." *Id.*

183. *Id.*

184. *See* Goldman, *supra* note 13, at 168.

185. 365 U.S. 715 (1961).

186. *Id.* at 716.

location of the restaurant to find state action.[187] The same can be said of the relationship between the court and the private litigant in the courtroom, in which the private use of peremptory challenges is carried out within the legal system.

Therefore, even though the serious harm inflicted on the excluded jurors and the public may not be enough to attribute state action to the private parties who discriminate based on race, it adds weight to the cumulative effects that would finally warrant a finding of state action.

E. *State Action as a Result of Aggregate Effect?: A Balancing Approach*

Although this comment shows some of the flaws in the majority's reasoning in *Edmonson*, it supports the finding of state action in a private attorney's use of peremptory challenges. It advocates a balancing approach, however, that stresses the totality of circumstances. The Supreme Court already used this approach in *Burton* when it tried to ascertain state involvement in the private act by "sifting facts and weighing circumstances."[188]

Under this balancing approach, the Court should not evaluate each factor in the abstract or isolated from the others. For example, it would be a mistake to stress only the special character of peremptory challenges as an enclave preserved for private choice, without giving due regard to the whole jury-selection process.

Therefore, although peremptory challenges are a distinctive part of the jury-selection process, the Court should weigh the following factors: (1) the courts' administration of the jury-selection process; (2) the delegation to the private attorneys of the power to choose an impartial jury through exercising peremptory challenges; (3) the perception of the courts' involvement in and enforcement of private discrimination through the use of peremptory challenges; and (4) the harm to the public, litigants, and the excluded potential jurors resulting from discriminatory use of peremptory challenges. Standing alone, none of the factors elevate a private party's use of peremptory challenges to state action. But, these factors in the aggregate justify a finding of state action.

VI. CONCLUSION: THE FUTURE OF PEREMPTORY CHALLENGES

Supreme Court decisions, from *Strauder v. West Virginia*[189] through *Edmonson*, show not only the Court's commitment to racial equality, but

187. *See id.* at 720-26.

188. *Id.* at 722; *see supra* notes 40-42 and accompanying text.

189. 100 U.S. 303 (1879).

more importantly, the difficulty in achieving the goal of racial equality.[190] It is still hard to predict whether the Court's decision in *Edmonson*, though admirable, actually will eliminate such bias from the justice system. Justice Scalia argued in his separate dissent that limiting the use of peremptory challenges would have negative consequences because it would burden not only the court system but the minority litigants as well.[191] Justice Scalia's opinion thus raises several concerns about the future of peremptory challenges in the jury-selection process.[192]

It is likely that *Edmonson* will increase the number of appeals in which the racial-challenge objections have been denied.[193] The resulting burden on the court system can be justified, however, given the fundamental rights that may be infringed in the misuse of peremptory challenges,[194] the damage done to potential black jurors and litigants,[195] and the need to preserve the fairness of the judicial system.[196] In any event, the Court's decision may not provide the best way to eliminate racial discrimination in the jury-selection process. Extending *Batson* to civil trials entails the difficult challenge of determining when a prima facie case of discrimination exists in the use of peremptory challenges.[197] Just as a prosecutor can easily assert "neutral"

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190. *See, e.g.*, Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2081 (1991); Batson v. Kentucky, 476 U.S. 79, 84 (1986) (holding that the prosecution's use of peremptory challenges to exclude blacks from serving on juries in criminal cases is unconstitutional); Swain v. Alabama, 380 U.S. 202, 208-09 (1965) (holding that a jury pool that does not accurately reflect the percentages of groups in a community is not per se violative of the Constitution).

191. *See Edmonson*, 111 S. Ct. at 2095-96 (Scalia, J., dissenting).

192. *See id.* at 2095 (noting that peremptory challenges are sometimes used to assure racially diverse juries, instead of preventing them).

193. Shortly after the *Batson* decision, hundreds of appeals were filed. *See* William Pizzi, Batson v. Kentucky*: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 155 (noting that the Court's decision in *Batson* greatly contributes to the expenses—both in time and money—of the American criminal justice system and that the Court's decision "open[s] up a new vista of delicate hearings and fascinating legal issues that will occupy courts for years to come").

194. *See* E. Vaughn Dunnigan, Note, *Discrimination by the Defense: Peremptory Challenges After* Batson v. Kentucky, 88 COLUM. L. REV. 355, 363 (1988).

195. *See id.* at 359.

196. *See id.* at 368.

197. *See* Jonathan B. Mintz, Note, Batson v. Kentucky*: A Half Step in the Right Direction*, 72 CORNELL L. REV. 1026, 1036-38 (1987) (noting that a prosecutor can so easily rebut a prima facie case that the Court's equal protection guarantees are illusory).

reasons for his or her strikes,[198] counsel in civil actions can also come up with a facially neutral explanation for his or her use of peremptory challenges.[199] Moreover, "the trial courts are ill equipped to second-guess those reasons."[200]

The difficulty in detecting discrimination and deterring the discriminatory use of peremptory challenges led Justice Marshall to advocate complete abolition of peremptory challenges.[201] This position has been supported by scholars and commentators,[202] some of whom also have argued that the use of peremptory challenges is not essential to an impartial jury and a fair trial.[203]

The use of peremptory challenges is not guaranteed by the Constitution;[204] hence, it can be eliminated or fundamentally reformed to curtail discriminatory use.[205] Moreover, because litigants can still strike prospective jurors for cause,[206] eliminating peremptory challenges would not significantly affect private litigants' rights to choose a jury. Meanwhile, the post-*Edmonson* requirement that upon objection, an

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198. *See Batson*, 476 U.S. at 106 (Marshall, J., concurring).

199. *See* Meek, *supra* note 4, at 211.

200. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

201. *See id.* at 108.

202. *See, e.g.*, VAN DYKE, *supra* note 2, at 167-69 (noting that "[t]his idea is offered cautiously because good reasons exist for giving the defense peremptories"); Alschuler, *supra* note 5, at 199-211 (arguing that peremptory challenges are unconstitutional); Sean Chapman, Comment, Batson v. Kentucky*: A Significant Step Toward Eliminating Discrimination in the Jury Selection Process*, 29 ARIZ. L. REV. 697, 702 (1987) (asserting that peremptory challenges should be eliminated because they maintain "the possibility of discrimination in the jury selection process"); Dunnigan, *supra* note 194, at 365-68 (arguing in favor of limiting the defendant's and prosecution's peremptory challenges); Mintz, *supra* note 197, at 1026 (urging the elimination of peremptory challenges to "make the constitutional safeguards of potential minority jurors and minority defendants . . . a workable reality").

203. *See, e.g.*, Alschuler, *supra* note 5, at 203 (arguing that use of peremptory challenges by attorneys was not accurate in eliminating jurors who would disfavor their position); Hans Zeisel & Shari S. Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court*, 30 STAN. L. REV. 491, 513-18 (1978) (discussing an experiment conducted by the authors, which showed little correlation between prospective jurors eliminated through peremptory challenges and those prospective jurors voting against the attorney who made the challenge).

204. Stilson v. United States, 250 U.S. 583, 586 (1919) (finding that "there is nothing in the Constitution . . . which requires Congress [or the States] to grant peremptory challenges").

205. Katz, *supra* note 13, at 403-08.

206. *Id.* at 407.

attorney should provide a race-neutral explanation for his or her use of peremptory challenges has blurred the distinction between challenges for cause and peremptory challenges.[207]

Notably, the restriction on the use of peremptory challenges will affect the minority litigant's use of them to strike potential jurors to assemble a favorable jury. It is worth the price, however, for minority attorneys to give up peremptory challenges so as to eliminate the harm done by the discriminatory challenges in the jury-selection process.[208] Discrimination still exists in the jury process in both the criminal and civil contexts,[209] and the harm done by the discriminatory use of peremptory challenges is as severe in civil actions as in criminal proceedings.[210] Even the dissenting Justices in *Edmonson* recognized the existence of discrimination as well as the harm caused by the discriminatory use of peremptory challenges.[211]

The *Edmonson* decision represents the general tendency of Supreme Court decisions to consistently broaden the scope of the Fourteenth Amendment protection guaranteed to those involved in the judicial process.[212] One year after *Edmonson*, the Supreme Court took a further step to prohibit a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges in *Georgia v. McCollum*.[213] As a result, no litigant, governmental or private, may peremptorily challenge a prospective juror based on race in either civil or criminal cases.

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207. *See* Patton, *supra* note 13, at 935.

208. *See Batson*, 476 U.S. at 108 (Marshall, J., concurring).

209. *See* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2082 (1991).

210. *See id.*

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

212. *See id.* at 2081-82 (majority opinion); *see* Colbert, *supra* note 2, at 94-98.

213. 112 S. Ct. 2348, 2354-57 (1992). Justice Blackmun delivered the Court's opinion, joined by Chief Justice Rehnquist, Justice White, Justice Stevens, Justice Kennedy, and Justice Souter. *Id.* at 2351. Chief Justice Rehnquist and Justice Thomas concurred. *Id.* at 2359 (Rehnquist, C.J., concurring), 2359 (Thomas, J., concurring). Justice O'Connor and Justice Scalia dissented. *Id.* at 2361, (O'Connor, J., dissenting), 2364 (Scalia, J., dissenting).