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A Question of State Action: *Edmonson v. Leesville Concrete Co.*, 500 U.S. —, 111 S. Ct. 2077 (1991).

The Fourteenth Amendment right to an impartial jury is among those fundamental rights we enjoy as citizens of the United States. Although the Fourteenth Amendment speaks of impartiality, trial counsel will often utilize voir dire to select the “best” jury for their case. The process of jury selection occurs in three stages. First, the court must create a jury pool from which to form the venire.¹ Second, prospective jurors may be removed for cause by the court.² Third, both counsel may exercise challenges, either peremptory or for cause, to exclude venire members from the jury.³

The right to use a peremptory challenge is statutorily based.⁴ Historically, the peremptory challenge allows counsel to strike a prospective juror “without inquiry and without being subject to the court’s control.”⁵ The peremptory challenge thus functions not only to eliminate extremes of partiality on both sides of a litigation, but to assure the “parties that jurors will decide the case on the basis of the evidence placed before them.”⁶

A growing number of litigants have attacked the peremptory challenge for being a device for racial discrimination. In *Batson v. Kentucky*,⁷ the prosecutor used his peremptory challenges to strike all four African-American persons on the venire, leaving an all-white jury.⁸ The African-American defendant challenged the prosecutor’s use of the peremptory challenges on the ground that such use violated his rights under the Sixth and Four-

1. Robert W. Rodriguez, Comment, *Batson v. Kentucky: Equal Protection, the Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755, 756 (1988). The venire is a large group of prospective jurors who are assembled to select the final jury in a case. Eric D. Katz, Comment, *Striking the Peremptory Challenge from Civil Litigation: “Hey Batson, Stay Where You Belong!”*, 11 PACE L. REV. 357, 357 n.1 (1991).

2. Rodriguez, *supra* note 1, at 756. Venire members may be excused upon showing undue hardship or extreme inconvenience. *Id.*

3. *Id.*

4. See 28 U.S.C. § 1870 (1988); FED. R. CRIM. P. 24(b).

5. *Swain v. Alabama*, 380 U.S. 202, 220 (1965). By contrast, the challenge for cause must be approved by the court and must be based on either actual or implied bias. Lee Goldman, *Toward a Colorblind Jury Selection Process: Applying the “Batson Function” to Peremptory Challenges in Civil Trials*, 31 SANTA CLARA L. REV. 147, 149 (1990).

6. *Swain*, 380 U.S. at 219.

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

8. *Id.* at 83. Because the defendant was indicted in Kentucky, the trial court used the Kentucky Rules of Criminal Procedure to determine the number of peremptory challenges allowed to each party. *Id.* at 83 n.2.

teenth Amendments.⁹ The United States Supreme Court held that a prosecutor's use of peremptory challenges to exclude members of a defendant's race from the jury, solely on racial grounds, "raises the necessary inference of purposeful discrimination," thereby implicating the Equal Protection Clause of the Fourteenth Amendment.¹⁰

Even though *Batson* provided a clear prohibition against the racially-based use of peremptory challenges by criminal prosecutors,¹¹ it remained unclear if the *Batson* rule applied to civil cases. Applying *Batson* in the criminal context presented no problem because the prosecutor was regarded as a state actor for Fourteenth Amendment purposes. However, absent a prosecutor, the question became whether a court-dominated setting, as used by attorneys for private litigants, presented analogous state action issues in the civil context.

In *Edmonson v. Leesville Concrete Co.*,¹² the United States Supreme Court reviewed for the first time a case involving the alleged use of a race-based peremptory challenge in civil litigation between purely private parties.¹³ The Court found the state action necessary to apply the Fourteenth Amendment, thereby extending the *Batson* rule to civil cases.¹⁴

Edmonson is revolutionary insofar as it extended the meaning of "state action" to its outermost boundaries. In its quest to eliminate racial discrimination from the jury selection process, the Court applied the Fourteenth Amendment to a case involving purely civil litigants. This Note will examine the soundness of the *Edmonson* decision in light of prior Supreme Court decisions involving peremptory challenges. In addition, it will ex-

9. *Id.* at 83. As applied to the individual states through the Fourteenth Amendment, the Sixth Amendment guarantees a criminal defendant the right to a trial by an impartial jury. See U.S. CONST. amend. VI. The Fourteenth Amendment, on the other hand, provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

10. *Batson*, 476 U.S. at 96. The Court expressed no view on whether the racially-based use of peremptory challenges could violate the Sixth Amendment and relied solely on equal protection grounds. *Id.* at 93-94. However, four years later, the Court held that the Sixth Amendment does not prohibit the exclusion of cognizable groups through peremptory challenges. *Holland v. Illinois*, 493 U.S. 474, 481-83 (1990).

11. The *Batson* court did not express any view on whether its prohibition against the racially-based use of peremptory challenges should apply to the criminal defendant. *Batson*, 476 U.S. at 89 n.12.

12. 500 U.S. ___, 111 S. Ct. 2077 (1991).

13. Prior to *Edmonson*, all federal cases involved civil rights suits brought against government agents or entities. See, e.g., *Fludd v. Dykes*, 863 F.2d 822, 828 (11th Cir. 1989) (defendants were a police officer and his supervisor); *cert. denied*, 493 U.S. 872 (1989); *Maloney v. Washington*, 690 F. Supp. 687 (N.D. Ill. 1988) (defendants were the mayor and the police commissioner), *vacated sub nom.* *Maloney v. Plunkett*, 854 F.2d 152 (7th Cir. 1988).

14. *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2080.

amine cases that declined to find "state action," and it will conclude that *Edmonson's* departure from earlier case law is both radical and inconsistent.

I. STATEMENT OF CASE

Thaddeus Donald Edmonson, an African-American construction worker, was injured in a job-site accident at Fort Polk, Louisiana. Edmonson filed a negligence claim against Leesville Concrete Company in federal court, claiming that Leesville had negligently contributed to the accident.¹⁵

During voir dire,¹⁶ the defendant used peremptory challenges to exclude two of the three African American venire members from the jury.¹⁷ Based on *Batson*, Edmonson objected to the defendant's use of peremptory challenges.¹⁸ More particularly, Edmonson requested that the district court compel the defendant to state a neutral explanation for the use of the peremptory challenges. The district court denied the request, holding that *Batson* did not apply to civil cases.¹⁹

Despite a jury verdict in Edmonson's favor,²⁰ he appealed the decision to the Fifth Circuit Court of Appeals on the grounds that the defendant had used the peremptory challenges in a discriminatory fashion.²¹ A divided panel of the Fifth Circuit reversed the trial court's ruling on the issue of the peremptory challenges.²² The *Edmonson* panel found that the exercise of a peremptory challenge in civil litigation constitutes state action for Four-

15. *Edmonson v. Leesville Concrete Co.*, 500 U.S. ___, 111 S. Ct. 2077, 2079 (1991).

16. Voir dire is the procedure during which venire members are questioned by each counsel and challenged either for cause or peremptorily. David Park, Note, *Edmonson v. Leesville Concrete Company, Inc.: Can the "No State Action" Shibboleth Legitimize the Racist Use of Peremptory Challenges in Civil Actions?*, 23 J. MARSHALL L. REV. 271, 273 n.14 (1990).

17. *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2081. In civil trials in federal court, each party may exercise three peremptory challenges. 28 U.S.C. § 1870 (1988). Federal courts allow a greater number of peremptory challenges in criminal proceedings. FED. R. CRIM. P. 24(b). State statutes vary with respect to the number of peremptory challenges they allow for civil and criminal cases. See Goldman, *supra* note 5, at 150 n.11.

18. *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2081. *Batson* established a two-prong test to determine whether prosecutor's use of his or her peremptory challenges is solely motivated by racial concerns. First, the defendant must establish a prima facie case of racial discrimination. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). Once a defendant has made a prima facie case, the state must come forward with a racially-neutral explanation for challenging the prospective minority jurors. *Id.* at 97.

19. *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2081.

20. The jury rendered a verdict in favor of Edmonson, but attributed 80% of the negligence to him, reducing his total damages by 80%, from \$90,000 to \$18,000. *Id.*

21. *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1310 (5th Cir. 1988), *rev'd*, 895 F.2d 218 (5th Cir. 1990), *rev'd*, 500 U.S. ___, 111 S. Ct. 2077 (1991).

22. *Edmonson*, 860 F.2d at 1315.

teenth Amendment purposes.²³ Thus, the panel held that a racially-based use of peremptory challenges in a civil action is subject to the *Batson* Rule and the Equal Protection Clause of the Fourteenth Amendment.²⁴ The panel decision was particularly significant because it was the first to extend *Batson* to a civil case. Prior to *Edmonson*, other circuits had applied *Batson* to civil cases, but only in civil rights suits against the government.²⁵

The full Fifth Circuit Court of Appeals then ordered rehearing en banc,²⁶ but a divided en banc panel affirmed the trial court's decision, holding that no state action was present. Therefore, the Fourteenth Amendment was held to be inapplicable in this case.²⁷

The United States Supreme Court granted certiorari in October of 1990.²⁸ Recognizing that the Equal Protection Clause applies only to state action, the Court used the two-tiered analysis from *Lugar v. Edmonson Oil Co.*²⁹ to determine the state action question in *Edmonson*. First, the Court considered whether the claimed constitutional deprivation was caused by the exercise of some right or privilege created by the state.³⁰ This prong was satisfied because peremptory challenges are statutorily based.³¹ Second, the Court considered whether the defendant was a state actor.³² The Court held that this prong, although more difficult to satisfy, was also fulfilled.³³ Thus, with both prongs of the *Lugar* test satisfied, *Edmonson* has emerged as a landmark case that could easily precipitate the end of the peremptory challenge in American jurisprudence.

II. DEVELOPMENT OF THE LAW

A. *Pre-Batson History; the Swain Presumption*

The use of the peremptory challenge can be traced to common law. In England, criminal defendants were allowed to reject a maximum of thirty-

23. *Id.* at 1311-14.

24. *Id.* at 1315.

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

26. *Edmonson*, 860 F.2d at 1317. "En Banc" is defined as "in the bench." BLACK'S LAW DICTIONARY 526 (6th ed. 1990).

27. *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2081.

28. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 41 (1990) (granting certiorari).

29. 457 U.S. 922 (1982).

30. *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2082-83.

31. *Id.* at ___, 111 S. Ct. 2083. Defendant's use of his peremptory challenges was based on the provision providing: "In civil cases, each party shall be entitled to three peremptory challenges." 28 U.S.C. § 1870 (1988).

32. *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2083.

33. *Id.* at 2083-87.

five jurors, whereas the prosecutor could strike an unlimited number.³⁴ This unequal distribution prompted the Crown to change the system. In 1305, an ordinance was enacted requiring the prosecution to show cause for challenging a juror.³⁵ Eventually, English common law became the basis of the American judicial system. Although the number of peremptory challenges allowed by law has varied,³⁶ the nature of the challenge has remained largely the same—an arbitrary challenge to potential jurors, exercised without judicial interference, for which no cause need be shown.³⁷

As early as 1879, the United States Supreme Court confronted the problem of racial discrimination in the jury selection process.³⁸ However, the Court did not address the issue of racial discrimination in the use of peremptory challenges until 1965 in *Swain v. Alabama*.³⁹ In *Swain*, an African-American defendant was sentenced to death. Although eight African-Americans were on the venire, the prosecutor used peremptory challenges to strike six of them, and no African-American served on the actual petit jury.⁴⁰ The defendant challenged his conviction on the ground that African-Americans had been unconstitutionally excluded from the jury.⁴¹ The defendant made three claims: First, that African-Americans were grossly under-represented on the venire;⁴² second, that the prosecutor, using his peremptory challenges, had removed the six remaining African-Americans from the venire;⁴³ and third, that no African-American had served on a jury in that county since 1950.⁴⁴

The Court held that none of these claims violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁵ With regard to the first claim, the Court noted that a defendant is “not constitutionally entitled to demand a

34. *Swain v. Alabama*, 380 U.S. 202, 212-13 (1965).

35. *Id.* at 213. England still follows this system, except that the defendant is now limited to seven peremptory challenges. *Id.* at 213 n.12.

36. *Id.* at 214-15. For instance, an early Act of Congress provided for thirty-five peremptory challenges in trials for treason, and twenty in trials for other capital felonies. *Id.* at 214 (construing 1 Stat. 119 (1790)). Rule 24(b) of the Federal Rules of Criminal Procedure now controls the number of peremptory challenges allowed in criminal cases. See FED. R. CRIM. P. 24(b). Civil litigants are allowed to exercise three peremptory challenges. 28 U.S.C. § 1870 (1988).

37. *Swain*, 380 U.S. at 212 n.9, 220.

38. See *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1880) (holding that discrimination against African-Americans in the assembling of juries violates the Equal Protection Clause of the Fourteenth Amendment).

39. 380 U.S. 202 (1965).

40. *Id.* at 205. The two other African Americans on the venire were exempted. *Id.*

41. *Id.* at 203.

42. *Id.* at 205, 208-09.

43. *Id.* at 210-11, 222.

44. *Id.* at 209, 222, 224.

45. *Id.* at 209, 224.

proportionate number of members of his race" either on the venire or on the jury.⁴⁶ With regard to the second claim, the Court held that peremptory challenges were exempted from Fourteenth Amendment review because of the presumption that the prosecutor used the challenges "to obtain a fair and impartial jury."⁴⁷ The Court based this presumption on two factors: (1) the historic purpose of the peremptory challenge, which is to ensure a jury free from bias and the appearance of bias;⁴⁸ and (2) the very nature of the peremptory challenge, which by definition must be exercised with complete freedom and not be subject to inquiry or review.⁴⁹ With regard to the third claim, the Court held that proof that no African-Americans had served on a jury in that county since 1950 was insufficient alone to rebut the presumption of proper use by the prosecution.⁵⁰ To rebut this presumption, the Court required the defendant to prove that the prosecutor was solely responsible for the exclusion of African-Americans from previous juries.⁵¹ Because the defendant could not meet this burden of proof, his claim failed.⁵²

The *Swain* presumption was severely criticized by later decisions and commentators because of the crippling burden it placed on defendants.⁵³ In

46. *Id.* at 208.

47. *Id.* at 222. However, this presumption was rebuttable:

If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. 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 system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

Id. at 224.

48. *Id.* at 211-12, 219.

49. *Id.* at 219-20. The Court explained: "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom or it fails of its full purpose." *Id.* at 219 (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892)).

50. *Id.* at 224, 226.

51. *Id.* at 226-27. The Court stated:

[W]hen the prosecutory in a county, *in case after case*, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. In these circumstances . . . it would appear that the purposes of the peremptory challenge are being perverted.

Id. at 223-24 (emphasis added) (citations omitted).

52. *Id.* at 224, 226.

53. The *Swain* burden of proof was referred to by one court as "Mission Impossible." *McCray v. Abrams*, 750 F.2d 1113, 1120 (2d Cir. 1984), *judgment vacated*, 478 U.S. 1001 (1986).

fact, in only two cases between 1965 and 1986, both decided by the Supreme Court of Louisiana, were criminal defendants able to make a prima facie showing of systematic exclusion under the *Swain* presumption.⁵⁴ Thus, state and federal courts began to find alternatives to avoid this presumption.⁵⁵ Eventually, criticism and dissatisfaction induced change, and *Swain* was finally overruled by *Batson v. Kentucky*⁵⁶ in 1986.

B. *Batson v. Kentucky*

In *Batson*, the prosecutor used his peremptory challenges to strike all four African-Americans on the venire.⁵⁷ The defendant, a male African-American, was sentenced by an all-white jury on charges of second-degree burglary and receipt of stolen goods. At trial, the defendant moved to discharge the jury, alleging that the prosecutor's use of peremptory challenges violated his Sixth and Fourteenth Amendment rights.⁵⁸ The trial court rejected the defendant's Equal Protection Clause and Sixth Amendment claims, and on appeal, the Kentucky Supreme Court affirmed the trial

54. See *State v. Washington*, 375 So. 2d 1162 (La. 1979) (holding that the defendant had satisfied the *Swain* presumption when: (1) Three attorneys testified that the prosecutor had previously and systematically used his peremptory challenges to exclude prospective jurors who were African-American, and (2) the prosecutor did not deny the attorneys' testimonies and stated that he had excluded African-Americans from the petit jury in previous trials because they "generally voted not guilty" where you had an African-American defendant); *State v. Brown*, 371 So. 2d 751 (La. 1979) (holding that the *Swain* presumption was met where two attorneys testified that the prosecutor had systematically used his peremptory challenges to exclude black venire members from the petit jury).

55. In attempting to avoid the *Swain* presumption, the courts took three different routes. First, some courts avoided the confrontation with the Equal Protection Clause and based their decisions on the Sixth Amendment impartial jury guarantee. See, e.g., *McCray*, 750 F.2d at 1113; *People v. Wheeler*, 583 P.2d 748 (Cal. 1978). Second, other courts relied on their state constitutions to extend additional rights to the criminal defendant. See, e.g., *People v. Wheeler*, 583 P.2d 748 (Cal. 1978); *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979), cert. denied, 444 U.S. 881 (1979). Third, some federal courts relied on their inherent supervisory power. See, e.g., *United States v. Leslie*, 759 F.2d 366 (5th Cir. 1985), vacated on reh'g, 783 F.2d 541 (5th Cir. 1986) (en banc).

56. 476 U.S. 79 (1986).

57. *Batson*, 467 U.S. at 83.

58. *Id.*

court's ruling.⁵⁹ The United States Supreme Court granted certiorari⁶⁰ and reversed the lower court exclusively on equal protection grounds.⁶¹

In overruling *Swain*, the Court held that the defendant may show purposeful discrimination in jury selection based solely on the facts of the particular case.⁶² The Court noted *Swain's* emphasis on the historic role of the peremptory challenge and the need to guard its integrity by protecting it from scrutiny. However, the Court held that those concerns were outweighed by the harm that discrimination causes to the accused, the prospective juror, and the general community. The Court observed that defendants are harmed by such discrimination because their liberty is at stake, the prospective juror is harmed because discrimination determines his or her competency to serve on the jury, and the general community is harmed because such discrimination undermines confidence in the judicial system.⁶³

The *Batson* Court replaced the *Swain* presumption with a new test that allows a defendant to establish an equal protection violation based on discrimination on the facts of the case alone.⁶⁴ Following *Batson*, a defendant may establish a prima facie case of racial discrimination by demonstrating three things. First, defendants must show that they are a member of a cognizable racial group.⁶⁵ Second, the defendant must demonstrate that the prosecutor used the peremptory challenges to remove venire members of the defendant's race.⁶⁶ Third, the defendant must show that the facts and other relevant circumstances raise an inference of racial discrimination by the prosecutor.⁶⁷ Once a prima facie case is made, the burden shifts to the prosecutor who must come forward with race-neutral explanations for the peremptory challenges.⁶⁸ After considering the prosecutor's explanations

59. *Id.* at 83-84. The defendant argued that the exclusion of prospective black jurors by the prosecutor violated his Sixth and Fourteenth Amendment rights to an impartial jury drawn from a representative cross-section of the community. *Id.* at 83. The defendant also argued that the prosecutor's challenges violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*

60. *Id.* at 79.

61. *Id.* at 84. The Court refused to decide whether the prosecutor's use of peremptory challenges had violated the Sixth Amendment. *Id.* at 84 n.4. The Supreme Court resolved this issue at a later date. See *Holland v. Illinois*, 493 U.S. 474 (1990).

62. *Batson*, 476 U.S. at 96.

63. *Id.* at 87.

64. *Id.* at 96. However, *Batson* displaced, but did not eliminate the *Swain* presumption. That presumption is alive and well, available for any party who may be able to satisfy it.

65. *Id.*

66. *Id.* Recently, the Supreme Court changed this requirement and held that a criminal defendant, regardless of race, may object to a prosecutor's race-based exclusion of persons from the jury. *Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364 (1991).

67. *Batson*, 476 U.S. at 96.

68. *Id.* at 97. The Court stated:

and all other relevant circumstances, the court must rule on whether the defendant has proved purposeful discrimination.⁶⁹

C. Supreme Court Cases After Batson

The Supreme Court considered the applicability of the Sixth Amendment to the exercise of peremptory challenges in *Holland v. Illinois*.⁷⁰ In *Holland*, the Court addressed two issues: First, whether a white defendant has standing to challenge the prosecutor's exercise of peremptory challenges to exclude all African-American venire members;⁷¹ and second, whether the exclusion of those venire members violates a defendant's Sixth Amendment right to an impartial jury.⁷²

With respect to the first issue, the Court held that a white defendant does have standing under the Sixth Amendment to challenge the prosecutor's exercise of peremptory challenges to exclude African-Americans from the venire.⁷³ With respect to the second issue, however, the Court rejected the defendant's argument that "a prosecutor's use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to the 'fair possibility' of a representative jury."⁷⁴ *Holland* thus made it clear that no criminal defendant could argue a Sixth Amendment violation against a prosecutor's racially-based use of peremptory challenges.

In *Powers v. Ohio*,⁷⁵ the Court expanded the *Batson* presumption. In *Powers*, a white defendant challenged the prosecutor's peremptory removal of seven African-American venire members. The Court held that the Equal Protection Clause of the Fourteenth Amendment prohibited a prosecutor's racially-based use of peremptory challenges, even though the criminal defendant and the excluded venire members did not share the same race.⁷⁶ Today, therefore, the *Batson* presumption simply requires the excluded ve-

[T]he prosecutor's explanation need not raise to the level justifying exercise of a challenge for cause. . . . But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race.

Id.

69. *Id.* at 96-97.

70. 493 U.S. 474 (1990).

71. *Id.* at 475-76.

72. *Id.* at 476.

73. *Id.* at 477.

74. *Id.* at 478.

75. 500 U.S. ___, 111 S. Ct. 1364 (1991).

76. *Id.* at ___, 111 S. Ct. at 1370.

nire members to be members of a "cognizable" racial group, regardless of whether the defendant is member of that same racial group.

D. Reaction of Lower Courts to *Batson*

After *Batson*, lower courts were divided as to whether the *Batson* presumption, as modified, applied outside the criminal context. Because *Batson* was based on the Fourteenth Amendment's Equal Protection Clause, a violation could only occur if there were state action. Several circuits held that state action existed even in civil cases, and thus applied *Batson* in the civil context.⁷⁷ The Supreme Court of Alabama and other lower courts held likewise.⁷⁸ Other circuits, however, held that *Batson* did not apply to civil cases.⁷⁹ This division among the courts compelled the Supreme Court to grant certiorari in *Edmonson v. Leesville Concrete Co.*⁸⁰

III. *EDMONSON V. LEESVILLE CONCRETE CO.*

A. Majority Opinion

In *Edmonson v. Leesville Concrete Co.*,⁸¹ the United States Supreme Court held that a private litigant in a civil case may not use peremptory challenges to exclude jurors because of their race.⁸² Recognizing that the Equal Protection Clause only applies to action by the government, the Court focused on whether state action could be found in civil litigation.⁸³ The Court followed the two-prong test set forth in *Lugar v. Edmonson Oil Co.*⁸⁴ to decide this question.⁸⁵ First, the Court examined whether the alleged constitutional deprivation resulted from the exercise of a right or privilege created by the state.⁸⁶ The Court disposed of this prong fairly quickly, observing that a federal statute confers the right to exercise peremptory challenges.⁸⁷ The Court further noted that without such congressional authorization, the defendant "would not have been able to engage in the al-

77. See *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990); *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), cert. denied, 493 U.S. 872 (1989).

78. See *Thomas v. Diversified Contractors, Inc.*, 551 So. 2d 343 (Ala. 1989); *City of Bridgeport v. Clark*, 645 F. Supp. 890 (D. Conn. 1986).

79. See *Edmonson*, 500 U.S. ___, 111 S. Ct. 2077.

80. 500 U.S. ___, 111 S. Ct. 2077 (1991).

81. 500 U.S. ___, 111 S. Ct. 2077 (1991).

82. *Id.* at ___, 111 S. Ct. at 2080.

83. *Id.* at ___, 111 S. Ct. at 2082.

84. 457 U.S. 922 (1982).

85. *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2082.

86. *Id.* at ___, 111 S. Ct. at 2082-83.

87. *Id.* at ___, 111 S. Ct. at 2083. Defendant Leesville's peremptory challenge were authorized by 28 U.S.C. § 1870 (1988). *Id.*

leged discriminatory acts.”⁸⁸ Thus, the Court concluded that the first prong of the test was fulfilled.⁸⁹

Second, the Court considered whether the private party charged with the deprivation could be fairly described as a state actor.⁹⁰ The Court examined three factors: (1) the extent to which the private party relied on government assistance or benefits; (2) whether the private party performed a traditional government function; and (3) whether the constitutional injury was aggravated in a unique way because of government intervention.⁹¹

Applying these factors to the civil lawsuit at bar, the Court noted that the defendant Leesville had relied on government assistance in its use of peremptory challenges.⁹² Without the “overt, significant participation of the government,” the peremptory challenge system would not exist.⁹³ More specifically, the Court regarded the participation of the trial judge as “direct and indispensable” to the peremptory challenge system as a whole, since by its act of striking the venire member pursuant to a challenge, the court condones such discrimination.⁹⁴

Second, the Court observed that the defendant had performed a traditional government function.⁹⁵ The peremptory challenge was a tool used to select one of our most traditional government entities, the jury.⁹⁶ Further, the Court noted that if the government confers on a private party the power to select government officials, such as jurors, that party should “be bound by the constitutional mandate of race-neutrality.”⁹⁷

The Court concluded that the constitutional injury suffered by Edmonson was made more severe because the government allowed the discrimination to occur within the courtroom itself.⁹⁸ With all three factors satisfied,

88. *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2083. The Court stated: “Peremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury.” *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at ___, 111 S. Ct. at 2084-85.

93. *Id.* at ___, 111 S. Ct. at 2084.

94. *Id.* at ___, 111 S. Ct. at 2085. The Court explained that “[b]y enforcing a discriminatory peremptory 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.’ ” *Id.* (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961)).

95. *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2085.

96. *Id.* at ___, 111 S. Ct. at 2085-86.

97. *Id.* at ___, 111 S. Ct. at 2085.

98. *Id.* at ___, 111 S. Ct. at 2087.

the Court held that the second prong of the *Lugar* test was met.⁹⁹ Because the state action issue was resolved, the *Edmonson* court was able to extend Fourteenth Amendment protection, and the *Batson* rule, to civil cases.¹⁰⁰

B. Dissenting Opinions

1. Justice O'Connor

Justice O'Connor disagreed with the majority stating that a peremptory strike by a private party is a private, rather than a state action.¹⁰¹ In Justice O'Connor's view, the criterion to establish state action had not been satisfied. First, Justice O'Connor argued that there was no overt and significant participation by the government in the exercise of peremptory challenges.¹⁰² O'Connor regarded congressional participation in setting up the peremptory challenge system, and the judge's control over voir dire, as "merely prerequisites to the use of a peremptory challenge."¹⁰³

Justice O'Connor also disagreed that the use of peremptory challenges is a traditional government function, because a private party's reason for using such challenges is not the same as the state's reason.¹⁰⁴ Peremptory challenges, argued O'Connor, are exercised by a party, not for the selection of jurors, but for their exclusion whereas the "traditional government function" is to seat qualified jurors.¹⁰⁵ Therefore, the government and the private party seek different ends.¹⁰⁶

Finally, O'Connor stated that the use of a peremptory challenge by a private party is not state action simply because it takes place in the courtroom.¹⁰⁷ O'Connor relied on *Polk County v. Dodson*¹⁰⁸ to illustrate that a

99. *Id.* at ___, 111 S. Ct. at 2083.

100. *Id.* at ___, 111 S. Ct. at 2087-89.

101. *Id.* at ___, 111 S. Ct. at 2089 (O'Connor, J., dissenting).

102. *Id.* at ___, 111 S. Ct. at 2090-92 (O'Connor, J., dissenting).

103. *Id.* at ___, 111 S. Ct. at 2090 (O'Connor, J., dissenting). Justice O'Connor explained that the only participation by the government in the peremptory challenge system involves the judge's dismissal of the venire member once the private party has exercised his or her peremptory challenge. *Id.* (O'Connor, J., dissenting). This action by the trial judge, argued O'Connor, constitutes no significant participation by the government. *Id.* (O'Connor, J., dissenting).

104. *Id.* at ___, 111 S. Ct. at 2092 (O'Connor, J., dissenting).

105. *Id.* (O'Connor, J. dissenting).

106. *Id.* at ___, 111 S. Ct. at 2092-95 (O'Connor J., dissenting). Justice O'Connor stated:

A government attorney who uses a peremptory challenge on behalf of the client is, by definition, representing the government. The challenge thereby becomes state action. It is antithetical to the nature of our adversarial process, however, to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes.

Id. at ___, 111 S. Ct. at 2095 (O'Connor, J., dissenting).

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

108. 454 U.S. 312 (1981).

lawyer's actions in a courtroom do not become state action simply because of their location.¹⁰⁹

2. Justice Scalia

Justice Scalia's dissent was primarily based on public policy, arguing that the *Edmonson* decision could harm criminal defendants.¹¹⁰ Justice Scalia pointed out that prior to *Edmonson*, the *Batson* presumption only affected prosecutors. However, it was conceivable that *Edmonson* would prevent a minority defendant in a criminal action from challenging an all-white jury, or seating as many jurors of his own race as desired.¹¹¹ Moreover, Justice Scalia stated that the *Edmonson* rule would substantially increase the time devoted by lawyers and judges to implementing the peremptory challenge system.¹¹²

VI. ANALYSIS

Edmonson represents the last of the Supreme Court's slow steps toward eliminating racial discrimination in the use of peremptory challenges. With *Edmonson*, the Court has sent a clear and commendable message to the lower courts—racial discrimination has no place in the use of such challenges, even if the case involves purely civil litigants.

Nevertheless, the *Edmonson* rationale is troubling. In its quest to eliminate racial discrimination, the Court stretched the concept of state action to its limit. Under the *Edmonson* rationale, the judicial system and the trial judge become state actors as soon as a private litigant makes a peremptory challenge. This conclusion is simply not supported by prior Supreme Court cases that have dealt with the issue of state action. In fact, *Edmonson* may create unintended problems in future cases.

To illustrate this point, it would be a worthwhile exercise to analyze previous state action cases under the *Edmonson* framework. For instance, in *Jackson v. Metropolitan Edison Co.*,¹¹³ the Supreme Court held that the

109. *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2095 (O'Connor, J., dissenting).

110. *Id.* (Scalia, J., dissenting).

111. *Id.* (Scalia, J., dissenting). Justice Scalia said:

The concrete benefits of the Court's newly discovered constitutional rule are problematic. It will not necessarily be a net help rather than a hindrance to minority litigants in obtaining racially diverse juries. In criminal cases, [*Batson*] already prevents the prosecution from using race-based strikes. The effect of today's decision . . . will be to prevent the defendant from doing so—so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible.

Id. (emphasis added).

112. *Id.* at ___, 111 S. Ct. at 2096 (Scalia, J., dissenting).

113. 419 U.S. 345 (1974).

action of a privately owned, highly regulated utility is not necessarily state action unless the state has encouraged or commanded the action.¹¹⁴ Mere approval by a government commission of the utility's conduct is insufficient to make such conduct state action.¹¹⁵ The same result might not be obtained, however, under an *Edmonson* rationale. Just as the government's approval in *Jackson* was not state action, a trial judge who merely approves the use of a peremptory challenge by excusing the excluded member, should also not be considered a state actor. The trial judge does not "actively encourage or command" a litigant to exclude any potential juror through peremptory challenges.

Similarly, in *Rendell-Baker v. Kohn*,¹¹⁶ the Court held that the actions of a private, publicly funded, highly regulated school do not constitute state action unless the actions are compelled or influenced by the state, or unless the school performs a function which has been "traditionally the exclusive prerogative of the State."¹¹⁷ If *Kohn* were decided today, the plaintiff teachers who were dismissed could successfully argue that the school's actions constituted state action even if the government did not compel or influence its actions. Furthermore, the argument that private schools do not perform traditional government functions becomes meaningless following *Edmonson* because *Edmonson* held that the use of peremptory challenges is state action even though the challenges are not within the exclusive prerogative of the state.

In *Cuyler v. Sullivan*,¹¹⁸ the Court held that a criminal defendant who retains private counsel and a criminal defendant who has counsel appointed by the state are afforded the same constitutional protection under the Fourteenth Amendment.¹¹⁹ The Court reasoned that the mere participation of a state government in the criminal trial process constitutes state action for Fourteenth Amendment purposes.¹²⁰ Therefore, the Court concluded that the conduct of both retained and appointed counsel in a criminal trial involves state action.¹²¹

The *Edmonson* Court has apparently extended the *Cuyler* rationale. In *Cuyler*, the Court applied Fourteenth Amendment protection to defendants

114. *Id.* at 357 n.17.

115. *Id.*

116. 457 U.S. 830 (1982).

117. *Id.* at 841-42 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

118. 446 U.S. 335 (1980).

119. *Id.* at 344-45.

120. *Id.* at 344. The Court stated that "the State's conduct in a criminal trial itself implicates the State in the defendant's conviction. . . ." *Id.*

121. *Id.* at 344-45.

who had either retained or appointed counsel because a state criminal trial involves state action. However, the *Edmonson* Court found state action in a civil case simply because of the state's participation in the peremptory challenge process. In *Edmonson*, the Court expanded *Cuyler*, which had applied only in the criminal context, to any case, criminal or civil, in which there is any involvement by the state. Therefore, in light of *Edmonson*, a civil litigant with retained counsel could now argue that the *Cuyler* decision extends protection under the Fourteenth Amendment.

Finally, in *Polk County v. Dodson*,¹²² the Supreme 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 case.¹²³ The Court recognized that a public defender, represents the client and not the state.¹²⁴

In *Edmonson*, however, the Court held that an attorney's exercise of peremptory challenges on the client's behalf constitutes state action because the challenge is implicitly sanctioned by the court. In light of *Edmonson*, if *Dodson* were heard today, the Court would treat a public defender as a state actor simply because the public defender had discharged representation obligations in the courtroom. The distinction drawn in *Dodson*, between the public defender's employer (the government) and the public defender's ethical interests (the client) becomes meaningless following *Edmonson*.

Edmonson is inconsistent with prior Supreme Court decisions on the issue of state action. By avoiding the prior strict state action analyses, the Court was able to extend state action to purely private litigation. Although this result may alleviate the problem of racial discrimination in the jury selection process, it may have less desirable results in other contexts. Ultimately, the *Edmonson* Court weighed the substance of the claim (racial discrimination in the use of peremptory challenges) against the need for consistency with respect to other state action precedent, and sacrificed consistency.

V. CONCLUSION

In *Edmonson*, the Supreme Court took the final step to ensure that all citizens, regardless of race, will have an equal opportunity to sit as jurors. Although that result is laudable, the state action analysis represents a radi-

122. 454 U.S. 312 (1981).

123. *Id.* at 325.

124. *Id.* at 318-19. This holding seems to contradict the Court's holding in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), in which the Court held that the conduct of retained and appointed counsel in a criminal case constitutes state action for Fourteenth Amendment purposes. *See id.* at 342-45.

cal and inconsistent departure from earlier state action decisions. It is likely that *Edmonson* will confuse, rather than help, lower courts faced with future state action decisions. The Supreme Court must re-examine its state action framework to provide lower courts with guidance. In so doing, it must establish a workable definition for state action which is consistent with earlier precedent.

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MARQUETTE LAW REVIEW

Volume 75

Summer 1992

Number 4

PREFACE

The *Marquette Law Review* is pleased to present the following symposium on the United States Supreme Court. Although articles frequently appear that criticize or commend recent Court decisions, the articles contained in this symposium are dedicated to the institutional role of the Court—more than the merits of particular decisions or decision-making theories.

The Honorable Richard A. Posner has recently written:

Constitutional scholarship is a weak area of academic law, despite the prominence and prestige of its leading figures. Most of what passes for constitutional scholarship is heavily tendentious commentary on recent decisions by the Supreme Court. . . .

. . . .
Instead of endless debate over the soundness of recent Supreme Court decisions, I recommend disinterested research on constitutional law conceived of as a social phenomenon to be studied, not necessarily to be criticized or changed.¹

The *Marquette Law Review* has published this issue in an attempt to address Judge Posner's concerns. We have attempted to avoid commentary on recent Supreme Court decisions and have instead focused on constitutional law as a social phenomenon.

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1. Richard A. Posner, *Constitutional Scholarship: What Next?* 5 CONST. COMMENTARY 17, 18 (1988).

