

NOTES

THE ELIMINATION OF RACISM FROM JURY SELECTION: CHALLENGING THE PEREMPTORY CHALLENGE

Since the adoption of the fourteenth amendment to the United States Constitution, it has fallen largely upon the federal courts to enforce its guarantees of due process and equal protection to all persons regardless of race. Yet state and federal courts still employ a procedure, the peremptory challenge, which permits litigants to exclude citizens from participation in the justice system as jurors based upon race, gender, or even more frivolous classifications.¹

The contradictions presented by the peremptory challenge are self-evident. How can a court dedicated to justice for all permit discriminatory practices precisely designed to let private prejudices affect the outcome of a trial?

In December of 1988, the United States Court of Appeals for the Fifth Circuit ordered the reexamination of the jury selection procedures in the case of *Edmonson v. Leesville Concrete Co.* ("*Edmonson I*"), a civil suit in the United States District Court for the Western District of Louisiana.² The court of appeals declared that the trial had probably been tainted by racial discrimination in the course of jury selection.³ The court held that the defendant's use of peremptory challenges to exclude potential jurors from the trial solely on the basis of race would violate the constitutional guarantee of equal protection.⁴

¹ For an example of one of the more absurd reasons cited for challenging a juror, see, e.g., *United States v. Romero-Reyna*, 889 F.2d 559, 560 (5th Cir. 1989) (court upheld exclusion of a pipeline worker, one of six Hispanic jurors challenged by prosecutor, based on prosecutor's explanation that he always challenged jurors whose occupation begins with the letter P), *cert. denied*, 110 S. Ct. 1818 (1990).

² *Edmonson v. Leesville Concrete Co.* ("*Edmonson I*"), 860 F.2d 1308, 1315 (5th Cir. 1988), *rev'd*, 895 F.2d 218, 219 (5th Cir. 1990) ("*Edmonson II*"), *cert. granted*, 111 S. Ct. 41 (Oct. 1, 1990) (No. 89-7743).

³ *Edmonson I*, 860 F.2d at 1315.

⁴ *Id.*

With this holding, the *Edmonson I* court extended to federal civil trials the rule enunciated two years earlier by the United States Supreme Court in *Batson v. Kentucky*.⁵ In that case, the Supreme Court stated that a prosecutor's racially discriminatory use of peremptory challenges violated the equal protection clause of the fourteenth amendment.⁶ The *Edmonson I* court was the first federal court to apply the *Batson* rule to a civil trial in which neither party was a governmental entity.⁷

The decision in *Edmonson I* raises a number of questions about the nature and purpose of peremptory challenges,⁸ differing standards of fairness in civil and criminal trials,⁹ and the extent to which equal protection applies to private discrimination.¹⁰ The *Edmonson I* court's broad extension of the frontiers of the *Batson* principle¹¹

⁵ *Id.* at 1313; see *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

⁶ *Batson*, 476 U.S. at 89.

⁷ The previous federal cases were all civil rights suits brought against government agents or entities. See *Fludd v. Dykes*, 863 F.2d 822, 823 (11th Cir. 1989) (defendant was county sheriff), *cert. denied*, 110 S. Ct. 201 (1989); *Wilson v. Cross*, 845 F.2d 163, 164 (8th Cir. 1988) (defendants were police officers); *Maloney v. Washington*, 690 F. Supp. 687, 687 (N.D. Ill. 1988) (defendants were mayor and police commissioner), *vacated sub nom. Maloney v. Plunkett*, 854 F.2d 152 (7th Cir. 1988); *Clark v. City of Bridgeport*, 645 F. Supp. 890, 890 (D. Conn. 1986) (defendants were city and police officers); *Esposito v. Buonome*, 642 F. Supp. 760, 760 (D. Conn. 1986) (defendant was police officer). *Edmonson* was a personal injury suit against a private employer for an on-the-job accident. *Edmonson I*, 860 F.2d at 1309-10.

⁸ See *Edmonson I*, 860 F.2d at 1313-14.

⁹ *Id.* at 1313.

¹⁰ *Id.* at 1311-13.

¹¹ The *Batson* opinion offered little guidance to lower courts seeking to apply its holding to other facts. The Supreme Court expressed no view on such issues as the sixth amendment, aspects of the case, the use of peremptories by defense counsel, and current jury screening techniques in general. 476 U.S. at 84 n.4, 89 n.12. Further, the Court stated, "we make no attempt to instruct these [state and federal trial] courts how best to implement our holding today." *Id.* at 99 n.24.

Although in his brief in *Edmonson I* the plaintiff based his argument heavily on the seventh amendment, the court concentrated only on equal protection issues, and did not refer to the seventh amendment in its opinion. Supplemental/Reply Brief on Behalf of Plaintiff-Appellant at 6, *Edmonson I*, (No. 87-4804).

This note focuses on the *Edmonson* courts' treatment of the fourteenth amendment issues and on the presence of state action. It does not address sixth or seventh amendment issues. The seventh amendment guarantees civil litigants a trial by an impartial jury. U.S. CONST. amend. VII. The seventh amendment questions raised by these situations were never discussed by the courts involved. To the extent that sixth and seventh amendment analyses are analogous, the *Batson* Court's decision to rule on fourteenth and not sixth amendment grounds may explain in part why the seventh amendment issue has not really come up in the civil cases. See *infra* notes 89-91 and accompanying text for a discussion of the *Batson* Court's refusal to address the petitioner's sixth amendment claim in that case.

sparked a strong dissent, followed by a grant of rehearing en banc by the Fifth Circuit Court of Appeals.¹²

On rehearing, decided March 1, 1990, the en banc court reversed the decision of the panel and reinstated the verdict of the district court.¹³ The *Edmonson II* court held that no state action is present in a private party's use of peremptory challenges, and therefore the fifth and fourteenth amendments are inapplicable.¹⁴ The court also held that, in any event, such use of peremptories is neither discriminatory nor unfair.¹⁵ The court read *Batson* as applying only to the exercise of peremptories in the criminal trial of a black defendant,¹⁶ and refused to extend that holding to the civil arena.¹⁷ The United States Supreme Court has since decided to consider the case, granting Edmonson's petition for certiorari in October of 1990.¹⁸

Historically, the peremptory challenge is a jury selection procedure which essentially allows a civil or criminal litigant to exclude a limited number of persons from the jury for no stated reason.¹⁹ The history of the peremptory challenge is long, and marked by "very old credentials."²⁰ In Roman law, each party to a case could propose one hundred potential *judices*, from whom the other party was allowed to strike half, leaving a final body of one hundred to try the case.²¹ Some form of peremptory challenge has been in use in the English system since the earliest days of jury trial; at common law, criminal defendants were allowed to reject up to thirty-five

¹² *Edmonson I*, 860 F.2d at 1315-17 (Gee, J., dissenting), *reh'g en banc granted*, 860 F.2d at 1317.

¹³ *Edmonson v. Leesville Concrete Co.* ("*Edmonson II*"), 895 F.2d 218, 219, 226 (5th Cir. 1990). The trial verdict was actually in favor of the plaintiff Edmonson, but the jury also found that he was eighty percent contributorily negligent. *Edmonson I*, 860 F.2d at 1310.

¹⁴ *Edmonson II*, 895 F.2d at 219. The equal protection and due process requirements of the fourteenth amendment were made applicable to federal actions through the fifth amendment's due process clause in *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

¹⁵ *Edmonson II*, 895 F.2d at 219.

¹⁶ *Id.* at 223, 225.

¹⁷ *Id.* at 226.

¹⁸ *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 41 (Oct. 1, 1990) (No. 89-7743) (grant of certiorari and leave to proceed *in forma pauperis*).

¹⁹ BLACK'S LAW DICTIONARY 1023 (5th ed. 1979).

²⁰ *Swain v. Alabama*, 380 U.S. 202, 212 (1965). The *Swain* opinion contained a lengthy review of the history of the peremptory challenge. *Id.* at 212-19.

²¹ *Batson v. Kentucky*, 476 U.S. 79, 119 (1986) (Burger, C.J., dissenting) (quoting J. PETTINGAL, AN ENQUIRY INTO THE USE AND PRACTICE OF JURIES AMONG THE GREEKS AND ROMANS 115, 135 (1769)). *Judices* is the plural of the Latin *judex*, meaning judge or juror.

jurors, whereas the prosecutor could strike an unlimited number.²² This unequal distribution caused delays and injustices, so in 1305, an Ordinance was enacted requiring the prosecution to show cause for challenging any juror.²³ By that time, however, the peremptory challenge was so entrenched as an essential element of a jury trial that the Ordinance was adapted into the "stand-aside" practice.²⁴ Under this system, the prosecution could ask objectionable jurors to stand aside until selection was completed. If an insufficient number of jurors remained after challenges for cause and defendant's peremptory challenges had been exercised, the prosecution would then be compelled to show why the set-aside persons should still be kept off the jury.²⁵ Current English practice continues to employ this system, with the exception that the defendant is now limited to three peremptory strikes, and generally, litigants on either side rarely use them.²⁶

The English common law practice was carried over to the American colonies and eventually into federal law.²⁷ An early Act of Congress, for example, provided for thirty-five peremptories in trials for treason, and twenty in trials for other capital felonies.²⁸ In other criminal and civil trials, the parties exercised peremptory challenges as a common law right.²⁹ Over the years, the number of allowable strikes has changed,³⁰ but the nature of the peremptory challenge has remained largely the same as it was at common law—an essentially arbitrary challenge to a certain number of jurors, exercised without judicial interference, for which no cause need be shown.³¹

The current federal law of jury selection is set out in Chapter 121 of Title 28 of the United States Code: sections 1861 and 1862 of that title state that all citizens from every segment of the community have both the right and the obligation to serve as jurors, and that no one may be excluded from jury service on account of

²² *Swain*, 380 U.S. at 212-13.

²³ *Id.* at 213.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 213 n.12; Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 166 (1989).

²⁷ *Swain*, 380 U.S. at 214.

²⁸ *Id.*; 1 Stat. 119 (1790).

²⁹ *Swain*, 380 U.S. at 214 n.13.

³⁰ *Id.* at 214-15.

³¹ *Id.* at 212 n.9, 220.

race, sex, religion, national origin or economic status.³² Section 1866 of Title 28 authorizes the exclusion of jurors through the use of peremptory challenges, as provided by law.³³ That law for civil trials is set out in section 1870, which provides for a minimum of three peremptory challenges for each side.³⁴

This note examines the application of the United States Constitution's equal protection guarantees to the exercise of peremptory challenges in federal civil trials.³⁵ Since *Batson*, a progression of lower court cases have applied its rule to civil trials, culminating in the *Edmonson* decisions.³⁶ In shifting from the criminal field, where the state is prosecuting the case, to the civil realm, where the parties are often private individuals or entities, the key issue becomes whether the state action necessary to trigger fourteenth amendment

³² Section 1861 reads:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

28 U.S.C. § 1861 (1988).

Section 1862 provides: "No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status." 28 U.S.C. § 1862 (1988).

³³ 28 U.S.C. § 1866 (1988).

³⁴ 28 U.S.C. § 1870 (1988). Section 1870 states: "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.*

Rule 47(b) of the Federal Rules of Civil Procedure allows additional peremptories if the court empanels alternate jurors—one extra strike for each two alternate jurors. FED. R. CIV. P. 47(b).

For the rule on peremptory challenges in federal criminal trials, see FED. R. CRIM. P. 24.

³⁵ Although this note concentrates only on federal cases, a number of state courts have also addressed the issue of *Batson* and civil peremptories. For a discussion of the issue with thorough documentation of relevant state decisions, see generally Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 TEX. TECH L. REV. 921 (Spring 1988), and Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore*, 40 RUTGERS L. REV. 891 (Spring 1988).

³⁶ See *Edmonson v. Leesville Concrete Co.* ("*Edmonson I*"), 860 F.2d 1308, 1315 (5th Cir. 1988), *rev'd*, 895 F.2d 218, 219 (5th Cir. 1990) ("*Edmonson II*"), *cert. granted*, 111 S. Ct. 41 (Oct. 1, 1990) (No. 89-7743); *Wilson v. Cross*, 845 F.2d 163, 164-65 (8th Cir. 1988); *Maloney v. Washington*, 690 F. Supp. 687, 688 (N.D. Ill. 1988), *vacated sub nom. Maloney v. Plunkett*, 854 F.2d 152 (7th Cir. 1988); *Clark v. City of Bridgeport*, 645 F. Supp. 890, 895 (D. Conn. 1986); *Esposito v. Buonome*, 642 F. Supp. 760, 761 (D. Conn. 1986). For a further discussion of these cases, see *infra* notes 112-62 and accompanying text.

protection is present.³⁷ Thus, this note also reviews the federal case law on the nature of state action in private discrimination.³⁸

Over time, the United States Supreme Court has developed various theories and tests of state action, and has held impermissible state action to exist in a variety of quasi-private situations, including judicial enforcement of private discrimination,³⁹ significant state involvement in discrimination,⁴⁰ or discrimination conducted in cooperation with, or with aid from, the state, or pursuant to a state-created privilege.⁴¹ This note examines how the *Edmonson* cases brought together these two lines of cases—*Batson* and its progeny and the private discrimination/state action cases—to resolve the previously unaddressed problem of racial peremptories by private party civil litigants.⁴²

Section I of this note discusses the development of equal protection against racial discrimination in jury selection, from its origins in the Reconstruction era through *Batson* and its civil law progeny.⁴³ Section II examines the various theories of state action which have grown out of private discrimination cases.⁴⁴ Section III discusses the decision of the Fifth Circuit panel in *Edmonson I* as it relates to both the *Batson* rule and the state action problem.⁴⁵ Section III also addresses the treatment of those same cases and issues, leading to a different result, by the en banc court in *Edmonson II*.⁴⁶ Section IV analyzes the law regarding fourteenth amendment limits on the exercise of peremptory challenges and discusses the developing trend in that area.⁴⁷ Section V concludes that equal protection of the laws demands that peremptory challenges be used in a manner completely free of racial and ethnic discrimination, if they are to be permitted at all.

³⁷ *Edmonson I*, 860 F.2d at 1310.

³⁸ See *infra* notes 182–244 and accompanying text.

³⁹ *Shelley v. Kraemer*, 334 U.S. 1, 14, 20 (1948). For a discussion of this case, see *infra* notes 183–92 and accompanying text.

⁴⁰ *Reitman v. Mulkey*, 387 U.S. 369, 378–79 (1967); see *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). For a further discussion of these cases, see *infra* notes 201–18 and accompanying text.

⁴¹ See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). For a discussion of this case, see *infra* notes 219–29 and accompanying text.

⁴² See *infra* notes 245–332 and accompanying text.

⁴³ See *infra* notes 48–181 and accompanying text.

⁴⁴ See *infra* notes 182–244 and accompanying text.

⁴⁵ See *infra* notes 245–65 and accompanying text.

⁴⁶ See *infra* notes 266–332 and accompanying text.

⁴⁷ See *infra* notes 333–439 and accompanying text.

I. PEREMPTORY CHALLENGES AND EQUAL PROTECTION

In 1880, the United States Supreme Court laid the foundation for enforcement of equal protection in jury selection in *Strauder v. West Virginia*.⁴⁸ In *Strauder*, the Court invalidated a West Virginia statute completely barring blacks from service on juries.⁴⁹ *Strauder* was a black man who had been indicted, tried and convicted for murder by an all-white jury in a West Virginia county court.⁵⁰ At his trial, *Strauder* petitioned to remove the case to federal court, to quash the venire and to arrest the judgment, and made several other motions protesting the exclusion of blacks from the jury.⁵¹ He claimed that the statute limiting jury service to white men violated the fourteenth amendment's equal protection clause because it denied him the same privilege enjoyed by white defendants—to be tried by a jury from which one's racial peers have not been excluded.⁵² The state courts denied all of *Strauder's* motions.⁵³

On writ of error, the United States Supreme Court reversed the judgments of the West Virginia courts⁵⁴ and declared the jury statute unconstitutional.⁵⁵ Applying the newly enacted fourteenth amendment with rigor,⁵⁶ the Court stated that West Virginia's discrimination in the assembling of juries was precisely the type of act the amendment was designed to prohibit.⁵⁷ More specifically, the Court declared that the sole purpose of the Reconstruction Amendments was to protect the civil rights of blacks.⁵⁸ In order to fulfill

⁴⁸ 100 U.S. 303, 308 (1880). The *Batson* Court later remarked that *Strauder* "laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." *Batson v. Kentucky*, 476 U.S. 79, 85 (1986).

⁴⁹ *Strauder*, 100 U.S. at 310.

⁵⁰ *Id.* at 304.

⁵¹ *Id.* at 304–05.

⁵² *Id.* The West Virginia act in question stated: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." *Id.* (quoting 1872–73 W. Va. Acts 102). The exceptions essentially applied to state officials. *Id.* at 305.

⁵³ *Id.*

⁵⁴ *Id.* at 312.

⁵⁵ *Id.* at 310.

⁵⁶ *See id.* at 307, 310. The *Strauder* Court stated, "As we have said more than once, [the fourteenth amendment's] design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it." *Id.* at 310 (emphasis added).

⁵⁷ *Id.* at 308. "And how can it be maintained," the Court emphasized, "that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?" *Id.* at 309.

⁵⁸ *Id.* at 306, 310 (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)).

that purpose, the Court reasoned, the amendment must be construed liberally.⁵⁹ The Court, however, saw little need for much liberal reading in this case, holding that the West Virginia act plainly discriminated against blacks⁶⁰ by violating an ancient and essential civil right—to be tried by a jury of one's peers.⁶¹

With its broad mandate to eliminate racial discrimination in the composition of juries, *Strauder* became the first in a long line of cases upholding racial equality in procedures for the selection of jury venires.⁶² The first United States Supreme Court case to discuss the fourteenth amendment implications of peremptory challenges, however, was *Swain v. Alabama*, decided in 1965.⁶³ In *Swain*, the Court held that a prosecutor's use of peremptories to exclude all blacks from the jury of a black defendant did not violate the defendant's fourteenth amendment rights.⁶⁴ Petitioner Swain, a black man, had been tried, convicted and sentenced to death for rape by an all-white jury in the Circuit Court of Talladega County, Alabama.⁶⁵ Citing *Strauder*, Swain challenged his conviction on the ground that blacks had been unconstitutionally excluded from his jury.⁶⁶ The petitioner's claim had three prongs: first, that blacks

⁵⁹ *Strauder*, 100 U.S. at 307.

⁶⁰ *Id.* The Court asked:

What is this [the language of the fourteenth amendment] but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? . . .

That the West Virginia statute respecting juries . . . is such a discrimination ought not to be doubted.

Id. at 307-08.

⁶¹ *Id.* at 308-09. In his dissent in *Swain v. Alabama*, Justice Goldberg noted the importance which the Court at the time of *Strauder* apparently attached to jury rights. 380 U.S. 202, 230 (1965) (Goldberg, J., dissenting) (quoting *Strauder*, 100 U.S. at 308-09). This importance may be demonstrated by comparing the decision in *Strauder* with the roughly contemporaneous holdings in *Plessy v. Ferguson*, which established the doctrine of "separate but equal" in public accommodations, and *Pace v. Alabama*, which upheld a state statute prohibiting miscegenation. *Swain*, 380 U.S. at 231 (Goldberg, J., dissenting) (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Pace v. Alabama*, 106 U.S. 583 (1882)).

⁶² *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). The Court cited several cases in this line, including: *Castaneda v. Partida*, 430 U.S. 482 (1977); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Avery v. Georgia*, 345 U.S. 559 (1953); *Norris v. Alabama*, 294 U.S. 587 (1935); *Neal v. Delaware*, 103 U.S. 370 (1881). *Batson*, 476 U.S. at 84 n.3.

⁶³ 380 U.S. 202, 211-22 (1965).

⁶⁴ *Id.* at 222, 224.

⁶⁵ *Id.* at 203.

⁶⁶ *Id.*

were grossly underrepresented on the venire for the trial;⁶⁷ second, that the prosecutor, using peremptory strikes, had removed the six remaining blacks from the venire;⁶⁸ and third, that not a single black had served on a petit jury in the county since approximately 1950.⁶⁹

According to Justice White, writing for the Court,⁷⁰ none of these claims amounted to a violation of equal protection.⁷¹ With regard to the underrepresentation of blacks on the venire, the Court ruled that jury lists or venires need not precisely reflect the proportions of racial and ethnic groups in the general population, as long as the process of drawing up the jury rolls was race-neutral or non-discriminatory.⁷² In *Swain's* case, the Supreme Court held that the underrepresentation was not constitutionally significant, and that the drawing up of the jury lists, albeit imperfect, was free from actual discrimination.⁷³

On the second issue, the prosecutor's use of peremptory challenges, the Court held that the state's peremptories in any one case were insulated from fourteenth amendment review by a presumption that the prosecutor was using them solely to obtain a fair and impartial jury for that trial.⁷⁴ The Court based this presumption on

⁶⁷ *Id.* at 205-09.

⁶⁸ *Id.* at 209-22.

⁶⁹ *Id.* at 222-28.

⁷⁰ The *Swain* Court split 6-3, with Justice Goldberg writing the dissent. *Id.* at 228. Oddly, in his dissent in *Batson*, Chief Justice Burger stated that the result in *Swain* had been reached "without a single dissent. . . ." *Batson*, 476 U.S. at 112 (Burger, C.J., dissenting).

⁷¹ *Swain*, 380 U.S. at 209, 222, 224.

⁷² *Id.* at 208-09.

⁷³ *Id.* at 209. The Court stated:

The overall percentage disparity has been small, and reflects no studied attempt to include or exclude a specified number of Negroes. Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race.

Id.

⁷⁴ *Id.* at 222. Note, however, that the presumption was in theory not completely insurmountable; the Court stated:

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.

two factors: first, the historic purpose of the peremptory challenge—to ensure a jury free from bias and the appearance of bias;⁷⁵ and second, the nature of the peremptory itself, which by definition is exercised with complete freedom, for no stated reason, and is not subject to inquiry or review.⁷⁶ Such a time-honored right, the Court reasoned, could not be discarded solely on the basis of the exercise of six strikes in one trial.⁷⁷ An equal protection claim would only be colorable, the Court held, if the defendant could show that the prosecutor had used peremptories so as to pervert their purposes by systematically excluding members of the defendant's race in every case, for reasons completely unrelated to the outcome of any trial, regardless of who the parties were and what circumstances were involved.⁷⁸ Although Swain had been able to show that not one black had been seated on a trial jury in Talladega County since 1950,⁷⁹ the Court held that this proof was insufficient to rebut the presumption shielding the prosecutor's actions.⁸⁰ The claim fell short, the Court held, because Swain was unable to prove that the prosecutor alone was responsible for the exclusion of blacks from the juries of any of the previous trials.⁸¹

The *Swain* rule's "crippling"⁸² burden of proof has been described by one court as "Mission Impossible,"⁸³ and it was this aspect of the *Swain* decision which the United States Supreme Court addressed and overruled in the 1986 case of *Batson v. Kentucky*.⁸⁴ The *Batson* Court held that a black criminal defendant could make a prima facie showing of unlawful discrimination based only on the exclusion of black jurors from his or her own trial.⁸⁵

⁷⁵ *Id.* at 211–12, 219.

⁷⁶ *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)).

⁷⁷ *Id.* at 221–22. The Court stated that "[t]o subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge." *Id.*

⁷⁸ *Id.* at 223.

⁷⁹ *Id.* at 226. According to Justice Goldberg's dissent, no black had served on a jury in the county "within the memory of persons now living . . ." *Id.* at 231–32 (Goldberg, J., dissenting).

⁸⁰ *Id.* at 224, 226.

⁸¹ *Id.* at 226–27.

⁸² *Batson v. Kentucky*, 476 U.S. 79, 92 (1986).

⁸³ *McCray v. Abrams*, 750 F.2d 1113, 1120 (2d Cir. 1984), *appeal vacated*, 478 U.S. 1001 (1986). See *infra* note 91 for a discussion of *McCray*.

⁸⁴ 476 U.S. at 82, 100 n.25.

⁸⁵ *Id.* at 96.

Batson was a black man convicted in a Kentucky court for burglary and receipt of stolen property.⁸⁶ At trial, the prosecution used its peremptory challenges to strike all four blacks on the venire, thus producing an all-white jury.⁸⁷ Because the facts of the case were similar to those in *Swain*, petitioner Batson conceded that *Swain* was probably controlling on the equal protection question, and so chose not to challenge *Swain* directly.⁸⁸ Thus, Batson's argument was not based on equal protection at all, but rather on the sixth amendment. Batson contended that the prosecutor's exclusion of black jurors violated his right to trial by a jury drawn from a cross-section of the community.⁸⁹ The Supreme Court, however, in an opinion written by Justice Powell for a seven-member majority,⁹⁰ decided nonetheless to reconsider *Swain* and rule on the equal protection issue, completely passing over the sixth amendment claim.⁹¹

⁸⁶ *Id.* at 82-83.

⁸⁷ *Id.* at 83.

⁸⁸ *Id.* at 83, 84 n.4.

⁸⁹ *See id.* at 84 n.4.

⁹⁰ Justice White, who wrote the *Swain* decision, concurred in *Batson*. The continued widespread use of peremptory challenges to exclude blacks, Justice White stated, persuaded him that they should no longer be insulated from fourteenth amendment inquiry. *Id.* at 101 (White, J., concurring).

Note, however, that Justice White joined in the Court's opinion in *Holland v. Illinois* that race-based peremptories do not violate the sixth amendment. 110 S. Ct. 803, 806 (1990). See *infra* note 91 for a further discussion of *Holland*.

⁹¹ *Batson*, 476 U.S. at 84 n.4. The Court stated that it was in agreement with counsel for the respondent, Commonwealth of Kentucky, who argued that a reconsideration of *Swain* and the fourteenth amendment issue was necessary to decide the case. *Id.* In his dissent, Chief Justice Burger harshly criticized the Court for casting aside the age-old peremptory challenge and the twenty-one year old *Swain* rule on the basis of an argument the petitioner had expressly refused to advance. *Id.* at 112 (Burger, C.J., dissenting).

The Court's insistence that this was exclusively a fourteenth, and not a sixth, amendment issue is further illustrated by the fact that the Court, shortly after *Batson*, vacated the decision of the United States Court of Appeals for the Second Circuit in *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *appeal vacated*, 478 U.S. 1001 (1986). The Court of Appeals in *McCray*, on facts similar to those in *Batson*, strongly criticized the *Swain* rule, and proceeded to hold that the prosecutor's use of peremptory challenges to exclude Blacks and Hispanics for racial reasons violated the sixth amendment right to trial by an impartial jury drawn from a fair cross section of the community. *Id.* at 1131. Although this decision achieved the same result as in *Batson*, the Supreme Court nevertheless vacated the judgment and instructed the Second Circuit Court of Appeals to reconsider the case in light of the decision in *Batson*. *McCray v. Abrams*, 478 U.S. at 1001.

The Court finally reached the sixth amendment issue in *Holland v. Illinois*, 110 S. Ct. 803 (1990). The sharply divided Court held that a prosecutor's use of peremptory challenges to exclude the only two blacks on the venire did not violate a white defendant's sixth amendment rights. 110 S. Ct. at 806. The sixth amendment's requirement of a representative cross section of the community, the Court held, applies only to the group from which the

The *Batson* Court reasoned that the peremptory challenge procedure was subject to equal protection because the fourteenth amendment was meant to protect the rights of individuals throughout the course of judicial proceedings.⁹² After reaffirming the principles established in *Strauder*, the Court concluded that racially based peremptories presented wide-ranging equal protection problems.⁹³ The Court held that the state's exclusion of members of the defendant's race from the jury violated the defendant's right to be tried by a jury selected according to non-discriminatory criteria.⁹⁴ Moreover, the procedure also violated the specific holding in *Strauder* that a state may not exclude anyone from jury service on the basis of race alone.⁹⁵

The *Batson* Court further stated that the practice also denied the equal rights of the prospective jurors, because it implied that they, because of their race, were either unqualified to serve as jurors in general, or were unable to decide impartially a case involving a member of their own race.⁹⁶ The Court also perceived that the harmful effects of racial peremptories would extend to the entire judicial system and to the community as a whole.⁹⁷ For the law to tolerate discrimination in court procedures is impermissible, the Court stated, because it damages public confidence and faith in the ultimate fairness and justice of the very institutions established to prevent and punish such discrimination.⁹⁸ Further, the Court stated

jury is drawn, not to any particular jury itself. *Id.* at 807-09. The sixth amendment, the Court stated, guarantees not a representative jury, but an impartial one. *Id.* at 807. The Court added, however, that it was expressing no view on the fourteenth amendment issues of the case, and even indicated that the prosecutor's actions in the *Holland* case may have been unlawful under *Batson*. *Id.* at 810-11. Indeed, it appears that a majority of the Court at that time still supported the *Batson* rule: in addition to the four dissenters, Blackmun, Brennan, Marshall and Stevens, Justice Kennedy filed a concurring opinion in which he stated that if *Holland's* claim were based on *Batson* and the fourteenth amendment, rather than the sixth amendment, it would have merit. *Id.* at 811 (Kennedy, J., concurring). Also, Justices O'Connor and White, who were members of the majority in *Batson*, remain on the Court; Justice Brennan has since been replaced by Justice Souter.

For a discussion of the application of the sixth amendment/fair cross section analysis to peremptory challenges, see Patton, *supra* note 35, at 930-43, and Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97.

⁹² *Batson*, 476 U.S. at 88-89.

⁹³ *Id.* at 85-90.

⁹⁴ *Id.* at 85-86.

⁹⁵ *Id.* at 86 (citing *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880)).

⁹⁶ *Id.* at 86-87.

⁹⁷ *Id.* at 87.

⁹⁸ *Id.* at 87-88.

that for the justice system to sanction such "pernicious" discrimination may legitimize and even stimulate racial bigotry.⁹⁹

The *Batson* Court noted that the *Swain* decision had attempted to balance the rights of the accused against the prosecutor's historic privilege to use peremptory challenges.¹⁰⁰ The *Batson* Court stated, however, that the Constitution granted no right to peremptories.¹⁰¹ Therefore, the practice could not continue unfettered when inconsistent with the mandate of equal protection.¹⁰²

The Court then held that a defendant could establish a claim of unlawful discrimination by proving a relatively simple prima facie case.¹⁰³ The defendant first must show that he or she is a member of a cognizable racial or ethnic group.¹⁰⁴ Then the defendant must show that the prosecutor has peremptorily removed from the venire fellow members of the defendant's group.¹⁰⁵ The defendant may also introduce any other relevant circumstantial evidence, and may rely on the fact that peremptory challenges, almost by definition, permit discrimination by those who are so inclined.¹⁰⁶ Together, the Court held, these elements raise an inference that the state has impermissibly excluded jurors solely on the basis of race.¹⁰⁷ Once the defendant establishes the prima facie claim, the burden then shifts to the prosecution to prove that there was no discrimination by providing race-neutral reasons, rationally related to the outcome of the trial, for striking each of the jurors in question.¹⁰⁸

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 91.

¹⁰¹ *Id.*

¹⁰² *Id.* at 98-99.

¹⁰³ *Id.* at 96.

¹⁰⁴ *Id.* For a discussion of the concept of a "cognizable group," see Patton, *supra* note 35, at 946-59.

¹⁰⁵ *Batson*, 476 U.S. at 96.

¹⁰⁶ *Id.* at 96-97.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 97. For a discussion of the problem of rebutting the prima facie case, and the general procedural aspects of the *Batson* rule, see Patton, *supra* note 35, at 965-80.

It may be useful at this time to note the case of *King v. County of Nassau*, 581 F. Supp. 493, 494 (E.D.N.Y. 1984), an employment discrimination suit brought against a public college two years before *Batson*. When the plaintiff protested the defendants' use of peremptory challenges against the only two blacks in the jury pool, the district court ruled that *Swain* applied in civil cases to both public and private litigants and therefore peremptories would be upheld unless "the state, acting on a policy of white dominance, attempts to keep blacks off all juries . . ." *King*, 581 F. Supp. at 500 (emphasis in original). Further, the court articulated reasons why equal protection should be applied with less rigor in the peremptory challenge context: first, peremptories are not as stigmatizing as other forms of discrimination;

Thus, the key aspects of the *Batson* rule can be restated in three sentences. First, the state may not, even in individual trials, use peremptory challenges to exclude jurors based solely on race.¹⁰⁹ Second, such exclusions violate the fourteenth amendment rights of the defendant, the jurors, and the community as a whole.¹¹⁰ Third, a claimant may make out a simple prima facie case of discrimination and shift the burden to the prosecutor to demonstrate that the challenges were racially neutral.¹¹¹

Soon after the Supreme Court decided *Batson*, cases began to arise in lower federal courts seeking to apply its rule to civil trials. The first was *Esposito v. Buonome*, decided in August of 1986, just three months after *Batson*.¹¹² In *Esposito*, the United States District Court for the District of Connecticut held the *Batson* rule inapplicable to a claim by a white plaintiff in a civil trial seeking to overturn the defendant's challenges of the only two blacks on the venire.¹¹³ In its brief opinion, the *Esposito* court did not state the facts and nature of the lawsuit; the only fact relevant to the state action issue specifically stated was that the two defendants were East Haven, Connecticut, police officers, "Individually and in Their Official Capacities."¹¹⁴

The court cited two primary reasons why *Batson* should not apply to *Esposito's* civil suit.¹¹⁵ First, the *Batson* rule arose out of a criminal case, and therefore reflected the special sensitivity which

second, a peremptory strike does not significantly harm the juror; and third, the harm to the black litigant is not of the type the fourteenth amendment was meant to address. *Id.* at 502-03. It is doubtful that this decision would stand in light of *Batson* and the subsequent decisions, and for that matter, it is questionable how the *King* court's third rationale would stand up against *Strauder*. See generally *Batson*, 476 U.S. 79; see also *Strauder v. West Virginia*, 100 U.S. 303 (1880).

¹⁰⁹ *Batson*, 476 U.S. at 89.

¹¹⁰ *Id.* at 86-88.

¹¹¹ *Id.* at 96-97.

¹¹² *Esposito v. Buonome*, 642 F. Supp. 760, 761 (D. Conn. 1986). Note that Circuit Judge Thomas J. Meskill, sitting by designation, wrote this ruling; Judge Meskill had dissented in *McCray*. See *McCray v. Abrams*, 750 F.2d 1113, 1135 (Meskill, J., dissenting), *appeal vacated*, 478 U.S. 1001 (1986). See *supra* note 91 for a discussion of *McCray*.

¹¹³ *Esposito*, 642 F. Supp. at 761.

¹¹⁴ *Id.* at 760.

¹¹⁵ *Id.* at 761. The court also briefly dismissed plaintiff's argument based on *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), noting that the Supreme Court had vacated that decision. *Esposito*, 642 F. Supp. at 761. See *supra* note 91 for a discussion of *McCray*.

Plaintiff's statutory argument, based on 28 U.S.C. § 1862, which bars exclusion from federal juries on the basis of race, was also unsuccessful. *Esposito*, 642 F. Supp. at 761. The court cited 28 U.S.C. § 1866, which permits exclusions by peremptory challenge. 642 F. Supp. at 761-62. See *supra* notes 32-33 and accompanying text for a discussion of sections 1862 and 1866.

courts must show toward the rights of a criminal defendant, a factor not present in this civil case.¹¹⁶ As a second and related point, the *Esposito* court noted that the complaining party was the plaintiff, the party who chose to initiate the legal action, rather than a defendant brought to court against his or her will.¹¹⁷ The claimant's case was further weakened, the court stated, by the fact that he was unable to prove the prima facie elements set out in *Batson*, because he was not a member of a cognizable racial group and not of the same race as the excluded jurors.¹¹⁸

The *Esposito* court's dismissal of the civil *Batson* claims was followed only two months later in the same district by *Clark v. City of Bridgeport*,¹¹⁹ which adopted the *Batson* reasoning and held that the defendant city attorney's use of peremptories to exclude all blacks from the juries of three civil rights suits violated the equal protection clause.¹²⁰ The *Clark* opinion dealt with three suits, *Clark v. City of Bridgeport*, *Rizzoli v. Muniz*, and *Simmons v. Formichella*, each of which was a section 1983 civil rights action against the city of Bridgeport and members of its police force.¹²¹ The court held jury selection for all three trials on the same day, and the same Assistant City Attorney represented the defendants in all three cases.¹²² In each case, the defendants used their peremptories to exclude any and all blacks from the three juries.¹²³ Plaintiffs in each case moved to strike the juries, citing *Batson*, and the court granted all three motions in one memorandum opinion.¹²⁴

The *Clark* court reached its decision despite the fact that the plaintiff in one of the suits was white.¹²⁵ The court still overturned the exclusion of the single black from the jury in that case, stating that the racial exclusions from the other two juries made up a "totality of circumstances" sufficient to raise an inference of discrimination.¹²⁶ The court also invoked its "supervisory power" to protect the rights of the challenged juror, who, as the Supreme Court had

¹¹⁶ *Esposito*, 642 F. Supp. at 761.

¹¹⁷ *Id.* The court did not elaborate as to why a civil plaintiff might be less entitled to equal protection than a civil defendant. *See id.*

¹¹⁸ *Id.*

¹¹⁹ 645 F. Supp. 890 (D. Conn. 1986).

¹²⁰ *Id.* at 898.

¹²¹ *Id.* at 890-91.

¹²² *Id.* at 891.

¹²³ *Id.* at 891-92.

¹²⁴ *Id.*

¹²⁵ *Id.* at 892. (The title of that suit was *Rizzoli v. Muniz*.)

¹²⁶ *Clark*, 645 F. Supp. at 897.

stated in *Batson*, was also denied equal protection by the exclusion.¹²⁷ The *Clark* court took this action despite the fact that none of the challenged jurors had requested the court to protect that right.¹²⁸ The court also cited as a factor the city attorney's admission that racial bias motivated his challenges.¹²⁹ Because the discriminatory actor in this case was the city attorney, the court found sufficient state action to implicate the fourteenth amendment, and hence, the *Batson* rule.¹³⁰

No federal appeals court had considered the civil application of *Batson* until the United States Court of Appeals for the Eighth Circuit decided *Wilson v. Cross* in April of 1988.¹³¹ In holding that a white plaintiff could not make out a prima facie case of discrimination under *Batson*, the *Wilson* court expressed strong doubts that *Batson* applied to civil cases at all.¹³² Plaintiff Wilson, the owner of a roller skating rink, had filed a section 1983 suit against the local police for alleged harassment of his black patrons, thus harming his business.¹³³ Wilson lost at trial, won a partial reversal on an unrelated appeal, then lost again on remand.¹³⁴ This second appeal focused on the defendants' striking of the only two blacks on the venire.¹³⁵ The result was similar to that in *Esposito*.¹³⁶ The court expressed grave misgivings about whether the *Batson* rule could be extended to limit the use of peremptory challenges in civil trials.¹³⁷

¹²⁷ *Id.* at 894, 897. For a discussion of the court's supervisory power over peremptories, see Patton, *supra* note 35, at 943-46.

¹²⁸ *Id.* at 897. *Clark* remains the only federal case in which a peremptory challenge was disallowed in order to vindicate the rights of a juror alone. See *id.*

¹²⁹ *Id.* at 893. The court, with evident distaste, quoted at length from the city attorney's rambling statement in response to plaintiffs' motion at trial challenging his use of peremptories, in part:

[I]f I had a choice between a white juror and a black juror under the facts of these cases, I'm going to take a white juror. That's what I'm saying . . . [W]hy should I put my city and my defendants at the mercy of the people in my opinion who make the most civil rights claims, at least in my experience . . . But I've been honest with your Honor. I told you exactly why I kept those people off the jury.

Id. at 894.

¹³⁰ *Id.* at 895, 895 n.6. It is important to note, however, that the court restricted its rule to situations where the party exercising the challenges is a governmental entity. *Id.* at 896.

¹³¹ 845 F.2d 163, 164 (8th Cir. 1988).

¹³² *Id.* at 164-65. The appeal also addressed another unrelated issue. *Id.* at 165.

¹³³ *Id.* at 164.

¹³⁴ *Id.* The first appeal, *Wilson v. City of North Little Rock*, 801 F.2d 316 (8th Cir. 1986), dealt with unrelated issues.

¹³⁵ *Wilson*, 845 F.2d at 164.

¹³⁶ The *Wilson* court cited *Esposito* in a footnote. *Id.* at 164 n.2.

¹³⁷ *Id.* at 164-65 (dicta). The court did not actually rule on the applicability of *Batson*,

Even assuming that *Batson* applied, the court reasoned that the plaintiff had failed to establish his prima facie case because he was white, and therefore not a member of the same cognizable racial group as the challenged black jurors.¹³⁸

In the 1988 case of *Maloney v. Washington*,¹³⁹ the United States District Court for the Northern District of Illinois addressed the racially motivated exercise of peremptory challenges by both black and white litigants on both sides of the dispute.¹⁴⁰ The district court ruled that the constitutional mandate expressed in *Batson* applied to civil litigants as well, and imposed sanctions on both parties for their racial use of peremptories.¹⁴¹

In *Maloney*, four white Chicago police officers brought a civil rights action against the estate of the late Mayor Harold Washington and several members of his administration.¹⁴² The officers claimed that the defendants had demoted them for racial and political reasons.¹⁴³ When the case first went to trial, the plaintiffs used all their peremptory challenges on black venire-persons, while defendants used all of their strikes against whites.¹⁴⁴ Later, the court declared a mistrial for reasons unrelated to the jury selection.¹⁴⁵

Before the retrial began, the court admonished counsel for both parties and warned that it would apply the *Batson* rule during the selection of the new jury. The court would therefore require each side to justify its use of peremptories against members of the opposite race.¹⁴⁶ The court took this action on its own initiative, dispensing with the need for a prima facie case set out in *Batson*.¹⁴⁷

because the claimant was unable to present a prima facie case. *Id.* at 165. Another panel of the Eighth Circuit Court of Appeals has reiterated its "grave doubts" about the extension of *Batson* in *Swapshire v. Baer*, 865 F.2d 948, 953-54 (8th Cir. 1989). One year later, however, in *Reynolds v. City of Little Rock*, yet another Eighth Circuit panel held *Batson* applicable to civil trials. 893 F.2d 1004, 1009 (8th Cir. 1990). See *infra* note 321 and accompanying text for a discussion of the *Reynolds* case.

¹³⁸ *Wilson*, 845 F.2d at 165.

¹³⁹ 690 F. Supp. 687 (N.D. Ill. 1988), *vacated sub nom.* *Maloney v. Plunkett*, 854 F.2d 152 (7th Cir. 1988). The district court's opinion will hereinafter be referred to as *Maloney*; the appeals court decision will be referred to as *Maloney II*.

¹⁴⁰ *Maloney*, 690 F. Supp. at 688. The court devoted most of its attention, however, to plaintiffs' use of their peremptories. See *id.* at 688-89.

¹⁴¹ *Id.* at 689, 692.

¹⁴² *Id.* at 687-88.

¹⁴³ *Id.* at 688.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* The mistrial arose out of certain testimony by one of the co-defendants, police superintendent Fred Rice. The court did not elaborate on this point. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* The court stated: "[W]e refused to empanel the nine venire members because we

The litigants, however, were not deterred; plaintiffs once again struck three of four blacks, and defendants struck only whites.¹⁴⁸ The court refused to empanel the jury and ruled that in this case the statutory right to peremptory challenges must bow to the constitutional mandate of *Batson*.¹⁴⁹ The *Maloney* court concluded that *Batson* applied to peremptories by civil litigants, regardless of whether the litigants are state actors or not.¹⁵⁰ The court stated that a private party may not use a court's power to contravene the equal protection clause.¹⁵¹ Further, the *Maloney* court emphatically reiterated its refusal to tolerate discrimination in a United States courtroom.¹⁵² In the end, the court ordered that in the selection of the third jury for this case, neither party would be allowed any peremptory challenges.¹⁵³

Both parties, however, responded by filing for a writ of mandamus to compel the judge to proceed to trial with the jury they had selected.¹⁵⁴ In *Maloney v. Plunkett* ("*Maloney II*"), the United States Court of Appeals for the Seventh Circuit granted mandamus and vacated the district court's order that a new jury be selected without any peremptories allowed.¹⁵⁵ The appeals court took the unusual step of granting mandamus on interlocutory appeal for

concluded that the jury selection process had been tainted by the plaintiffs' use of their peremptory challenges to exclude members of the black race." *Id.*

¹⁴⁸ *Id.* at 688-89.

¹⁴⁹ *Id.* at 689.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 690 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)). See *infra* notes 219-29 and accompanying text for a further discussion of *Lugar*.

¹⁵² *Maloney*, 690 F. Supp. at 690. The court declared: "Discrimination in the selection of jurors in a United States District Court is anathema to a court sworn to uphold the Constitution." Further, it continued:

We will not permit our power under Article III of the Constitution to be used to sanction such discriminatory conduct. As one court recently stated. "[T]he appearance of justice is not fulfilled if the trial court acquiesces in, condones or fails to preclude attempts by the prosecuting attorney to exclude blacks from the jury solely because they are black. The trial court cannot sit idly by in such instances and become an accomplice to racial discrimination in the courtroom. Rather, it must insure that justice prevails and that the appearance of justice is demonstrated in the trial that is taking place before those in attendance."

Id. (quoting *People v. Andrews*, 172 Ill. App. 3d 394, 402, 526 N.E.2d 628, 634 (1988)).

¹⁵³ *Id.* at 688, 692. *Cf.* *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring), in which Justice Marshall writes that the only sure way to eradicate racial discrimination from jury selection is to eliminate peremptory challenges entirely.

¹⁵⁴ *Maloney v. Plunkett* ("*Maloney II*"), 854 F.2d 152, 155 (7th Cir. 1988). The district court, in its opinion issuing the original order, predicted this development. *Maloney*, 690 F. Supp. at 688.

¹⁵⁵ *Maloney II*, 854 F.2d at 155-56.

two main reasons. First, the trial judge's order plainly violated Title 28, section 1870 of the United States Code, which provides for a minimum of three peremptory challenges for each side in a civil trial.¹⁵⁶ This action, according to the court of appeals, was entirely without precedent, and the district judge was unable to provide any reason to justify it beyond his anger at the parties for their refusal to cooperate.¹⁵⁷

Second, the court of appeals stated, the trial judge's action would cause unnecessary and costly delays in the resolution of this suit.¹⁵⁸ If the order were allowed to stand, the trial court would have to repeat the jury selection process and the party who lost at trial would have a "sure-fire" appeal, necessitating yet another retrial, before yet another jury.¹⁵⁹ The court concluded that the district judge should have allowed the trial to proceed and let the losing party raise the *Batson* issue on appeal if it so desired.¹⁶⁰ In its brief opinion, the court of appeals was careful to express no opinion on the merits of the application of *Batson* to civil trials.¹⁶¹ The appeals court only criticized the trial court for the sanction it chose to impose and the timing of its action, but not necessarily for its substantive argument.¹⁶²

Fludd v. Dykes, decided by the United States Court of Appeals for the Eleventh Circuit in January of 1989, was another civil rights suit brought by a black plaintiff against local police officials.¹⁶³ In this case, the court held that the trial court had violated the black plaintiff's fifth and fourteenth amendment rights by allowing a trial from which blacks had been excluded peremptorily without a race-neutral explanation.¹⁶⁴ The plaintiff, Willie Fludd, had been shot

¹⁵⁶ *Id.* at 154, 156. See *supra* note 34 and accompanying text for a discussion of section 1870.

¹⁵⁷ *Maloney II*, 854 F.2d at 154.

¹⁵⁸ *Id.* at 155-56.

¹⁵⁹ *Id.* at 155.

¹⁶⁰ *Id.* at 155-56.

¹⁶¹ *Id.* The court stated:

Allowing Judge Plunkett's order to stand might be misunderstood by other district judges as an expression of this court's view that *Batson* does apply in all cases, a question we leave open; we express no view on that question, or on whether there might be legal grounds other than equal protection for restricting the use of peremptory challenges notwithstanding section 1870.

Id. at 155 (emphasis in original).

¹⁶² *Id.* at 155-56.

¹⁶³ 863 F.2d 822, 823 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 201 (1989).

¹⁶⁴ *Id.*, 863 F.2d at 828. For a brief review of the *Fludd* decision, see Recent Cases, *Equal Protection—Jury Selection—Eleventh Circuit Restricts the Discriminatory Use of Peremptory Challenges in Civil Litigation*, 103 HARV. L. REV. 586 (Dec. 1989).

by a deputy sheriff during the arrest of an unnamed third party. Fludd then sued the deputy as well as the sheriff, Dykes, for civil rights violations under section 1983.¹⁶⁵ When the jury was selected for trial, defendants peremptorily struck the two blacks on the venire.¹⁶⁶ Fludd, citing *Batson*, moved to require defendants to explain and justify the challenges. The trial court denied the motion.¹⁶⁷ On appeal, the Eleventh Circuit Court of Appeals held that *Batson* was applicable to the defendants.¹⁶⁸ To permit such an exercise by either the government or a private party, the *Fludd* court reasoned, would unconstitutionally harm the black litigant's chances of being tried by a jury which included his racial peers.¹⁶⁹ The court further held that the act which violated Fludd's rights was the judge's decision to deny Fludd's claim and proceed to trial with a jury chosen pursuant to racial criteria.¹⁷⁰ The constitutional harm is the same, the court declared, whether the discrimination occurs in a civil or criminal trial.¹⁷¹

The *Fludd* court devoted a section of its opinion to the question of whether there was sufficient state action behind the exercise of the peremptories to implicate the fourteenth amendment.¹⁷² The court did not, however, rely on the defendants' status as government officials to find the requisite state action.¹⁷³ Rather, the court declared that the discriminatory actor is the trial court which empanelled the jury.¹⁷⁴ Indeed, the court stated that a decision by a state entity to discriminate in the course of jury selection is harmless until the trial court overrules an objection to the discrimination. According to the *Fludd* court, by overruling such an objection and proceeding to trial, the judge himself or herself violates the equal protection clause.¹⁷⁵ In its reasoning, the *Fludd* court did not discuss

¹⁶⁵ *Id.* at 824. The court did not state to what extent, if any, Fludd was connected to the arrest, or how he came to be shot. *See id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 829.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 828.

¹⁷¹ *Id.* at 829.

¹⁷² *Id.* at 828.

¹⁷³ *See id.* The court stated: "Thus, until the trial judge overrules a party's objection to the racial composition of the venire, the law treats any previous decision on the part of a state entity to discriminate as harmless, insofar as the objecting party is concerned." *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

any modern equal protection holdings, but instead cited post-Reconstruction jury discrimination cases such as *Strauder*.¹⁷⁶

Two of the earlier peremptory challenge cases briefly addressed the state action issue as well. The district court in *Clark v. City of Bridgeport* ruled that *Batson* applied to civil cases when there is state action behind the peremptory challenges.¹⁷⁷ The *Clark* court found that the city attorney, as a government employee acting in his official capacity, was a discriminatory state actor for fourteenth amendment purposes.¹⁷⁸ In *Maloney v. Washington*, however, the district court found peremptories impermissible whether the party exercising them was a state agent or not.¹⁷⁹ The fourteenth amendment is violated, the *Maloney I* court stated, when a private party uses a court to sanction his or her discriminatory acts.¹⁸⁰ The *Edmonson* case, however, required the Fifth Circuit Court of Appeals to explore the parameters of the state action concept in depth.¹⁸¹

II. STATE ACTION AND EQUAL PROTECTION

The United States Supreme Court has written that the task of formulating a workable definition of state action in private discrimination under the fourteenth amendment is a practically impossible one; only by examining the facts and circumstances of each case can courts accurately discern state involvement in private discrimination.¹⁸²

The first Supreme Court case to hold that private discrimination could amount to an equal protection violation was *Shelley v. Kraemer*.¹⁸³ *Shelley* dealt with the fourteenth amendment implications of actions by judges and court officers.¹⁸⁴ The *Shelleys* were a

¹⁷⁶ *Id.* (quoting *Strauder v. West Virginia*, 100 U.S. 303, 312 (1880)); see Note, *The Application of Batson v. Kentucky in a Civil Trial Setting*, 42 BAYLOR L. REV. 173, 193-94 (Winter 1990) (criticizing the *Fludd* court's reliance on these older cases).

¹⁷⁷ 645 F. Supp. 890, 895 (D. Conn. 1986).

¹⁷⁸ *Id.* at 895 n.6.

¹⁷⁹ *Maloney v. Washington*, 690 F. Supp. 687, 689 (N.D. Ill. 1988), *vacated sub nom. Maloney v. Plunkett* ("*Maloney II*"), 854 F.2d 152 (7th Cir. 1988).

¹⁸⁰ *Id.* at 690. Note that *Maloney II* did not consider the correctness of this ruling, but rather the sanction the trial court applied. *Maloney II*, 854 F.2d at 155.

¹⁸¹ *Edmonson v. Leesville Concrete Co.* ("*Edmonson I*"), 860 F.2d 1308, 1310-11 (5th Cir. 1988), *rev'd*, 895 F.2d 218, 219 (5th Cir. 1990) ("*Edmonson II*"), *cert. granted*, 111 S. Ct. 41 (Oct. 1, 1990) (No. 89-7743).

¹⁸² *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (quoting *Kotch v. Pilot Comm'rs*, 330 U.S. 552, 556 (1947)).

¹⁸³ 334 U.S. 1, 20 (1948).

¹⁸⁴ *Id.* at 4, 8.

black family who purchased a home in 1945 in a mostly white neighborhood in St. Louis, Missouri. A group of neighbors sued to block the sale to Shelley and enforce a restrictive covenant placed on Shelley's deed in 1911 banning the sale or lease of the property to blacks or Asians.¹⁸⁵

The Supreme Court held that such private restrictive covenants did not, in and of themselves, violate the equal protection clause.¹⁸⁶ When, however, a state court enforces such a covenant, the court becomes a state actor denying equal protection of the laws to the objecting party.¹⁸⁷ Writing for the six-member majority,¹⁸⁸ Chief Justice Vinson stated that the principle had been long established that courts and court officers acting in their official capacities are state actors for fourteenth amendment purposes.¹⁸⁹ The Court cited some of the early jury discrimination cases, including *Strauder*, for the proposition that discrimination, whether enacted by statute or committed by a judicial officer, violated equal protection.¹⁹⁰ Judicial enforcement of the discriminatory covenants, the Court held, clearly fell in this category of state action,¹⁹¹ and, therefore, the action clearly violated the plaintiff's constitutional rights to property and equal protection of the laws.¹⁹²

Whereas *Shelley* involved a court or judicial officer as the state actor, the 1961 case of *Burton v. Wilmington Parking Authority*¹⁹³ arose from the actions of a private party contracting with a state agency.¹⁹⁴ In *Burton*, the Supreme Court upheld an equal protection claim by a black man challenging racial discrimination in a privately operated restaurant located in a publicly owned and operated parking facility.¹⁹⁵ The Wilmington Parking Authority (the "Authority"), a state

¹⁸⁵ *Id.* at 4-6.

¹⁸⁶ *Id.* at 13.

¹⁸⁷ *Id.* at 20.

¹⁸⁸ The decision was actually unanimous, as Justices Reed, Jackson and Rutledge did not participate in the case. *Id.* at 23.

¹⁸⁹ *Id.* at 14. The Court in *Shelley* catalogued a number of cases in which a court was found to be a "state actor." *Id.* at 15-18.

¹⁹⁰ *Id.* at 16. The *Strauder* Court, in addition to holding the discriminatory statute unconstitutional, also stated that "[a]ny state action" which denies equal rights is unconstitutional, and held that the trial court was in error for conducting the trial with the all-white jury. *Strauder v. West Virginia*, 100 U.S. 303, 308, 310, 312 (1880).

¹⁹¹ *Shelley*, 334 U.S. at 19.

¹⁹² *Id.* at 20.

¹⁹³ 365 U.S. 715 (1961).

¹⁹⁴ *Id.* at 716.

¹⁹⁵ *Id.* at 716-17.

agency which operated a public parking garage in Wilmington, Delaware, leased some retail space in the garage to a private restaurant operator. This coffee shop refused to serve the plaintiff, Burton, because he was black.¹⁹⁶

The Supreme Court held that by failing to ensure that the restaurant operator, as its lessee and contractor, conformed to the fourteenth amendment mandates of equality, the Authority had not only sanctioned the discrimination but had become a party to it as well.¹⁹⁷ Thus, the Court reasoned, the Authority itself had violated the equal protection mandates.¹⁹⁸ Although the Court limited its holding to the specific facts of the case,¹⁹⁹ the case remains a strong statement of the state's responsibility to ensure adherence to the Constitution even in its most remotely "public" activities.²⁰⁰

Addressing another facet of state action in 1965, the Supreme Court stated in *Reitman v. Mulkey*²⁰¹ that otherwise neutral state statutes or constitutional provisions would not be insulated from equal protection review when they served to facilitate private discrimination.²⁰² The *Reitman* decision invalidated an amendment to the California constitution, enacted by initiative in 1964, which guaranteed the right of property owners to refuse to sell or rent their real property to anyone they choose.²⁰³ Such a provision, the

¹⁹⁶ *Id.* at 716.

¹⁹⁷ *Id.* at 725. The Court declared:

[N]o state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

Id.

¹⁹⁸ *Id.* at 724-25.

¹⁹⁹ *Id.* at 726.

²⁰⁰ See, e.g., *Edmonson v. Leesville Concrete Co.* ("*Edmonson I*"), 860 F.2d 1308, 1312 (5th Cir. 1988), *rev'd*, 895 F.2d 218, 219 (5th Cir. 1990) ("*Edmonson II*"), *cert. granted*, 111 S. Ct. 41 (Oct. 1, 1990) (No. 89-7743).

²⁰¹ 387 U.S. 369 (1967).

²⁰² *Id.* at 380.

²⁰³ *Id.* at 371 (quoting CAL. CONST. art. 1, § 26, the amendment invalidated in this case). The challenged provision was sweeping:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Id. at 371 n.2 (quoting CAL. CONST. art. 1, § 26).

Court reasoned, would unconstitutionally involve the state in, and place the state's sanction on, private discrimination in housing.²⁰⁴

The *Reitman* Court emphasized the need to assess the impact of a state action in order to determine whether the state, in an apparently neutral action, had, in fact, "significantly involved itself" in private discrimination.²⁰⁵ The California amendment, the Court held, would have the effect of authorizing widespread discrimination in housing, and was therefore invalid.²⁰⁶

Seven years later, in *Moose Lodge No. 107 v. Irvis*,²⁰⁷ the Supreme Court borrowed the phrase "significant involvement" from *Reitman* and adopted it as its test for the presence of state action in private discrimination.²⁰⁸ The Court held that the state's issuance of a liquor license to the defendant Moose Lodge was not sufficiently significant state action to trigger the fourteenth amendment.²⁰⁹ Similar to *Burton v. Wilmington Parking Authority*, the *Moose Lodge* case arose when a bar denied service to the respondent, Irvis, a black man.²¹⁰ Irvis sued under section 1983, claiming that the Lodge was a state actor because the state of Pennsylvania had granted it a license to sell liquor.²¹¹

The Supreme Court rejected Irvis' argument.²¹² The state liquor regulations, the Court wrote, could in no way be construed to aid or encourage discrimination, or to make the state a participant in the Lodge's actions.²¹³ The Court took pains to distinguish *Burton*,²¹⁴ where the Wilmington Parking Authority, as lessor to and contractor with the restaurant, had a much closer relationship with

²⁰⁴ *Id.* at 378-79. In supporting its opinion, the Court reviewed a number of cases, including *Burton*, which struck down various state statutes, regulations or policies which authorized private discrimination. *Id.* at 378-80. Interestingly, the Court assiduously avoided mention of *Shelley*, which also dealt with private housing discrimination, except to note in a footnote that the trial court had relied heavily on *Shelley* in its decision. *Id.* at 373 n.4. In his concurrence, Justice Douglas discussed *Shelley* at length. *Id.* at 381 (Douglas, J., concurring).

²⁰⁵ *Id.* at 380.

²⁰⁶ *Id.* at 381.

²⁰⁷ 407 U.S. 163 (1972).

²⁰⁸ *Id.* at 173.

²⁰⁹ *Id.* at 173-77. In his original brief to the Fifth Circuit Court of Appeals, Edmonson argued that state action may arise from state licensing of attorneys. Brief for Appellant at 12, *Edmonson v. Leesville Concrete Co.* ("Edmonson I"), 860 F.2d 1308 (5th Cir. 1988) (No. 87-4804).

²¹⁰ *Moose Lodge*, 407 U.S. at 164-65.

²¹¹ *Id.* at 165.

²¹² *Id.* at 171-72.

²¹³ *Id.* at 173, 176-77.

²¹⁴ *Id.* at 172-75.

the defendant than that present in *Moose Lodge*.²¹⁵ The Court in *Moose Lodge* did, however, find potentially significant state involvement on an ancillary issue.²¹⁶ The state liquor regulations required private clubs like the Lodge strictly to adhere to their own by-laws. The Court reasoned that, because the Moose Lodge had discriminatory membership rules, for the state to require their enforcement would violate the fourteenth amendment.²¹⁷ The distinction between the two claims, the Court explained, is whether the challenged state action serves to foster or encourage discrimination. Whereas issuance of a liquor license in no way promotes discrimination, for the state to require enforcement of the Lodge's racist by-laws plainly sanctions such discrimination.²¹⁸

In 1981, the Supreme Court formulated a new two-part test for state action in *Lugar v. Edmondson Oil Co.*²¹⁹ In *Lugar*, the Court held that a private party creditor's joint participation with governmental officials in state-created attachment proceedings made the creditor a state actor under the fourteenth amendment and section 1983.²²⁰ This case arose from the defendant Edmondson Oil's successful *ex parte* petition to garnish and attach Lugar's property pending a judgment in a state court debt action.²²¹ Lugar claimed the procedures authorizing the attachment without prior notice and hearing deprived him of his property without due process of law, thereby calling into question the constitutionality of the attachment statute on its face.²²²

Drawing from a series of earlier debt-collection cases, the Supreme Court set out a two-part test to determine whether there was state action sufficient to implicate the fourteenth amendment.²²³ First, the violation must be the result of the exercise of some privilege created and granted by the state.²²⁴ Second, the party charged must be fairly cognizable as a state actor.²²⁵ The Court listed three standards by which a party may be characterized as a state actor:

²¹⁵ *Id.* at 175.

²¹⁶ *Id.* at 177. The Court described this aspect of its holding as an "exception" to its general rule. *Id.*

²¹⁷ *Id.* at 177-78.

²¹⁸ *Id.* at 176-79.

²¹⁹ 457 U.S. 922, 937 (1982).

²²⁰ *Id.* at 941.

²²¹ *Id.* at 924-25.

²²² *Id.* at 925.

²²³ *Id.* at 937, 939.

²²⁴ *Id.*

²²⁵ *Id.*

one who is a governmental official; one who has acted together with or received significant help from state officials; or one whose conduct is otherwise attributable to the state.²²⁶

To illustrate its test, the Court then applied it to the *Moose Lodge* case.²²⁷ The *Lugar* Court concluded that Irvis' claim against the Lodge failed because it did not satisfy the first part of the test—exercise of a state created privilege—because the Lodge's decision to discriminate was in no way attributable to a governmental decision or action.²²⁸ Applying the test to the instant case, the *Lugar* Court held that in initiating the statutory debt collection proceedings, the creditor was doing exactly what the law intended, and was thus acting under color of state law. Therefore, its participation in the attachment procedures made it a state actor.²²⁹

In a 1988 case, *Tulsa Professional Collection Services v. Pope*, the Supreme Court offered yet another version of the proper state action criterion.²³⁰ The Court held in this case that when a creditor's claim is denied without notice in violation of due process, the probate court's pervasive involvement in the administration of an estate constitutes state action.²³¹ The plaintiff, a collection agency, had filed a claim against a portion of Pope's estate, but the Oklahoma probate court ruled that a two-month statute of limitations had foreclosed the claim.²³² In holding that the time bar placed on the claim without sufficient notice was a denial of due process under the fourteenth amendment,²³³ the Supreme Court stated that private use of state-sanctioned remedies or procedures does not necessarily rise to the level of state action.²³⁴ The Court added, however, that overt, substantial assistance to private parties by state officials in the course of state procedures may constitute state action.²³⁵ Thus, the Court concluded, a private party's use of the probate proceedings to foreclose Tulsa's claim, without first providing adequate notice, constituted state action, because governmental officials

²²⁶ *Id.* at 937.

²²⁷ *Id.* at 937-38.

²²⁸ *Id.* at 938.

²²⁹ *Id.* at 941-42.

²³⁰ 485 U.S. 478, 487 (1988).

²³¹ *Id.*

²³² *Id.* at 482.

²³³ *Id.* at 491.

²³⁴ *Id.* at 485.

²³⁵ *Id.* at 486.

were "intimately" involved and provided obvious and significant assistance.²³⁶

In summary, the United States Supreme Court has developed a variety of holdings and theories on the state action question, varying with the facts of the cases before it.²³⁷ The *Shelley* Court held state action to exist in judicial enforcement of private discrimination.²³⁸ *Burton* held that a state's failure to prevent discrimination by those with whom it dealt closely amounted to an equal protection violation.²³⁹ *Reitman* and *Moose Lodge* produced the test of significant state involvement in private discrimination,²⁴⁰ *Moose Lodge* adding the distinction that the state action must work to foster or encourage discrimination.²⁴¹ In *Lugar*, the Court developed the two-part inquiry into state-created privilege and status as a state actor.²⁴² The holding in *Tulsa Professional Collection Services* turned on the presence of overt, substantial assistance by public officials.²⁴³ It then fell to the *Edmonson* court to synthesize these theories and formulae into a workable standard applicable to the peremptory challenge.²⁴⁴

²³⁶ *Id.* at 487.

²³⁷ See *supra* note 182 and accompanying text on the fact-specific nature of the state action holdings.

²³⁸ See *supra* notes 183-92 and accompanying text for a discussion of *Shelley v. Kraemer*.

²³⁹ See *supra* notes 193-200 and accompanying text for a discussion of *Burton*.

²⁴⁰ See *supra* notes 201-18 and accompanying text for discussions of *Reitman* and *Moose Lodge*.

²⁴¹ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-79 (1972).

²⁴² See *supra* notes 219-29 and accompanying text for a discussion of the *Lugar* case.

²⁴³ See *supra* notes 230-36 and accompanying text for a discussion of *Tulsa*.

²⁴⁴ At this time it may be useful to take note of one other frequently cited Supreme Court decision touching on the state action issue. In *Blum v. Yaretsky*, plaintiffs were nursing home patients whose medicaid benefits were under threat of termination, without notice or hearing, by a committee of private physicians and nursing home administrators acting pursuant to state and federal guidelines. 457 U.S. 991, 993-95 (1982). In holding that the committee's decisions did not constitute state action, the Court stated that the acts of a business subject to government regulations are not necessarily actions of the state. *Id.* at 1004. Rather, the Court held, there must be such a close nexus between the private action and the state that the state may be deemed responsible for it. *Id.* The Court further indicated that the state may be held responsible "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." Mere approval or acquiescence is not enough. *Id.* at 1004-05. The Court limited its own holding, however, distinguishing it from other state action cases such as *Moose Lodge*, stating that "[t]his case is obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action . . ." *Id.* at 1003.

See also *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (action of electric utility to terminate plaintiff's service not state action even though approved by state public utilities commission).

III. PEREMPTORY CHALLENGES AND STATE ACTION: *EDMONSON* V. *LEESVILLE CONCRETE CO.*

A. Edmonson I

In *Edmonson v. Leesville Concrete Co.* ("*Edmonson I*"), a three-judge panel of the United States Court of Appeals for the Fifth Circuit directly confronted the issues of discrimination in jury selection and fourteenth amendment state action, just eight months after *Tulsa* and almost simultaneously with *Fludd*.²⁴⁵ *Edmonson I* was the first post-*Batson* civil case which did not involve a state entity as one of the parties, and thus required a more searching inquiry to find the state action necessary to implicate the fourteenth amendment.²⁴⁶ The *Edmonson I* court, in an opinion written by Circuit Judge Alvin Rubin, held that a private litigant's racially motivated peremptory challenges, because they were assisted by the court's administration of jury selection, violated equal protection of the laws guaranteed by the fifth and fourteenth amendments.²⁴⁷

Edmonson I was a personal injury lawsuit brought against an employer by a black worker injured in an accident on the job.²⁴⁸ At jury selection, the defendant peremptorily struck two of the three blacks in the jury pool, prompting the first *Batson*-based motion against a private litigant.²⁴⁹ The Fifth Circuit panel held that the civil setting provided no basis for limiting a litigant's equal right to a fair trial.²⁵⁰ To confine *Batson* to criminal cases, the court reasoned, would be inconsistent with the basic principles of that case, namely,

²⁴⁵ *Edmonson v. Leesville Concrete Co.* ("*Edmonson I*"), 860 F.2d 1308, 1310 (5th Cir. 1988), *rev'd*, 895 F.2d 218, 219 (5th Cir. 1990) ("*Edmonson II*"), *cert. granted*, 111 S. Ct. 41 (Oct. 1, 1990) (No. 89-7743). *Edmonson I* was decided on December 5, 1988, with rehearing ordered on January 23, 1989; *Fludd* was decided on January 17, 1989.

²⁴⁶ See *supra* note 7 and accompanying text for a summary of the parties involved in the other civil cases.

²⁴⁷ *Edmonson I*, 860 F.2d at 1314, 1315. Because this is a federal case, the fourteenth amendment does not apply. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), which incorporated equal protection into the fifth amendment's due process clause, so that the same standards of equality that apply to the states would apply to the federal government as well. See *id.* at 499-500. Also, the Court in *Thiel v. Southern Pacific Co.* stated that the federal right to an impartial jury applied in civil as well as criminal trials. 328 U.S. 217, 220 (1946).

²⁴⁸ *Edmonson I*, 860 F.2d at 1309-10. 28 U.S.C. § 1331 supplied the basis for federal jurisdiction. The injury occurred on a job site at Fort Polk, Louisiana, a federal enclave (defendant company was a government contractor). *Id.* at 1310 n.2.

²⁴⁹ *Id.* at 1310. In contrast to the *Edmonson* case, the court's action against both parties in *Maloney* was apparently taken on its own initiative. See *supra* note 147 and accompanying text on the *sua sponte* nature of the *Maloney* court's action.

²⁵⁰ *Edmonson I*, 860 F.2d at 1313-14.

that the use or toleration of race-based peremptory challenges by the state violates equal protection.²⁵¹ The court also cited *Palmore v. Sidoti*, a 1984 United States Supreme Court case which invalidated a Florida state court decision denying a white woman custody of her child because she was living with a black man, to support the principle that the state cannot give effect to private prejudices.²⁵²

The *Edmonson I* court spent considerable effort in its handling of the state action issue, namely, identifying the governmental action which denied the claimant equal protection in a case involving two private parties.²⁵³ In addressing this question, the court thoroughly reviewed the state action cases, and then simply stated that the case involved more governmental action than was deemed sufficient to establish state action in *Shelley*, *Lugar*, *Tulsa* and *Burton*.²⁵⁴ Further, the *Edmonson I* court stated, the government is "intimately involved" in the entire jury selection process, including peremptory challenges, because the government summons the jurors, administers the jury selection process, including voir dire and peremptories, excuses the challenged jurors and empanels the jury.²⁵⁵ Moreover, the peremptory challenges are exercised pursuant to a federal statute, used in the course of a judicial proceeding, in a facility operated by the government, and are presided over and given effect by a judge who is obviously a governmental official.²⁵⁶ The state actor, the court held, was the trial court and the judge—the agency and officer who administer the peremptory challenge procedure and give it the sanction and approval of the government institution dedicated to justice.²⁵⁷

The court's reasoning and conclusions in *Edmonson I* provoked a sharp dissent.²⁵⁸ Circuit Judge Thomas Gee's dissenting opinion called the court's holding "unfortunate" and "misguided."²⁵⁹ He

²⁵¹ *Id.* at 1314.

²⁵² *Id.* (citing *Palmore v. Sidoti*, 466 U.S. 429, 431, 433 (1984)).

²⁵³ *Id.* at 1310. The court obviously concentrated its efforts on the state action question; in treating the *Batson* issue, it merely reviewed, without comment, the decisions in *Wilson*, *Esposito*, and *Clark*, and only cited *Maloney* in a footnote. *Id.* at 1314, 1314 n.31.

²⁵⁴ *Id.* at 1312.

²⁵⁵ *Id.*

²⁵⁶ *Id.* The court concluded: "The government is inevitably and inextricably involved as an actor in the process by which a federal judge, robed in black, seated in a panelled courtroom, in front of an American flag, says to a juror, 'Ms. X, you are excused.'" *Id.* at 1313.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 1315 (Gee, J., dissenting).

²⁵⁹ *Id.*

criticized both *Batson* and *Edmonson I* for undermining the venerable institution of the peremptory challenge, and generally for having "leapt halfway across a logical chasm and come to rest in midair."²⁶⁰ He asserted that the *Batson* and *Edmonson I* decisions had made this leap by attempting to place limits on peremptory challenges, which are by definition intended to be used for any reason, good, bad or indifferent.²⁶¹ Judge Gee applied the two-part state action test from *Lugar*,²⁶² and argued that the second part of the test had not been satisfied: a private litigant exercising peremptory challenges could not reasonably be considered a state actor.²⁶³ Further, the dissent reasoned, the court could not be considered the state actor, because the function it performs is "merely ministerial."²⁶⁴ The dissent was not in vain; less than a month after the decision was issued, the Fifth Circuit Court of Appeals granted rehearing of the case en banc.²⁶⁵

B. *Edmonson II*

When the en banc court issued its new decision in March of 1990, both Judge Gee and Judge Rubin again authored the opinions; this time, however, Judge Gee wrote for the court and Judge Rubin dissented.²⁶⁶ The *Edmonson II* court restored the trial verdict and held that the Supreme Court's rule in *Batson v. Kentucky* could not be extended to compel private litigants in a federal civil trial to explain their use of peremptory challenges.²⁶⁷ The *Edmonson II* court based its decision on two factors: first, that no state action was involved; and second, that a challenge based on the suspicion that a juror may tend to favor a litigant of the same race harms neither the juror nor the integrity of the judicial system.²⁶⁸

Judge Gee first discussed the history of the peremptory challenge, relying almost completely on Justice White's opinion in *Swain*

²⁶⁰ *Id.* at 1315-16 (Gee, J., dissenting).

²⁶¹ *Id.* at 1316-17 (Gee, J., dissenting).

²⁶² *Id.* at 1315 (Gee, J., dissenting). See *supra* notes 219-29 and accompanying text for a discussion of *Lugar*.

²⁶³ *Edmonson I*, 860 F.2d at 1315-16 (Gee, J., dissenting).

²⁶⁴ *Id.* at 1316 (Gee, J., dissenting).

²⁶⁵ *Id.* at 1317.

²⁶⁶ *Edmonson v. Leesville Concrete Co. ("Edmonson II")*, 895 F.2d 218, 218 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 41 (Oct. 1, 1990) (No. 89-7743).

²⁶⁷ *Id.* at 218-19.

²⁶⁸ *Id.* at 219.

v. Alabama.²⁶⁹ Judge Gee summarized the state of the law of peremptory challenges after *Swain*: litigants could freely exercise peremptories for any reason or no reason, but when a prosecutor uses his strikes systematically to exclude blacks from all juries because of race, there may be a violation of the equal protection clause.²⁷⁰ The *Edmonson II* court then turned to the *Batson* decision, characterizing it as a reaffirmation of the *Swain* holding.²⁷¹ According to the *Edmonson II* court, *Batson* only lightened the excessive evidentiary burden prescribed by *Swain* for black criminal defendants to prove unlawful discrimination.²⁷²

Judge Gee then restated the narrower issue which the *Edmonson II* court needed to address: whether a private litigant's use of peremptory challenges is state action to which constitutional restrictions apply.²⁷³ To determine the presence of state action, the court employed the two-part test devised by the United States Supreme Court in *Lugar v. Edmondson Oil*.²⁷⁴ The first part of the *Lugar* test is whether the alleged violation resulted from the exercise of a state-created right or privilege.²⁷⁵ Peremptory challenges amply satisfy this requirement, Judge Gee held.²⁷⁶ But, the court concluded, *Edmonson*'s claim fell short on the second half of the *Lugar* test, namely, whether the person charged may fairly be characterized as a state actor.²⁷⁷ The only two potential state actors present in the *Edmonson* case were the trial judge and the defense attorney who actually exercised the strikes, and the *Edmonson II* court discussed each of them in turn.²⁷⁸

Judge Gee dismissed the argument that the trial judge was the state actor, noting that the idea was inconsistent with the very nature of peremptories, which by definition are not subject to the court's

²⁶⁹ *Id.* at 219-20. See *supra* notes 63-81 and accompanying text for a discussion of Justice White's opinion in *Swain*. In discussing the history of the peremptory, Judge Gee basically outlined and paraphrased the *Swain* opinion. *Edmonson II*, 895 F.2d at 219-20.

²⁷⁰ *Id.* at 220.

²⁷¹ *Id.*

²⁷² *Id.* at 220-21.

²⁷³ *Id.* at 221.

²⁷⁴ *Id.*; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 939 (1981). See *supra* notes 219-29 and accompanying text for a discussion of *Lugar*. Note also that this echoes Judge Gee's argument in his *Edmonson I* dissent. *Edmonson v. Leesville Concrete Co.* ("*Edmonson I*"), 860 F.2d 1308, 1315 (1988) (Gee, J., dissenting).

²⁷⁵ *Edmonson II*, 895 F.2d at 221; *Lugar*, 457 U.S. at 937, 939.

²⁷⁶ *Edmonson II*, 895 F.2d at 221.

²⁷⁷ *Id.*; *Lugar*, 457 U.S. at 937, 939.

²⁷⁸ *Edmonson II*, 895 F.2d at 221-22.

control.²⁷⁹ Reiterating the arguments he advanced in his *Edmonson I* dissent, Judge Gee stated that the court's function in overseeing peremptory challenges was "merely ministerial" and constitutionally insignificant.²⁸⁰ The court simply stands aside while the litigants exclude various jurors for whatever reasons.²⁸¹ According to Judge Gee, to raise such a minor procedural action, and consequently everything a judge does in managing a trial, to constitutional significance was a job for the Supreme Court, not the Fifth Circuit Court of Appeals.²⁸²

The other possible state actor in the *Edmonson* case was the defense attorney who exercised the strikes, but the *Edmonson II* court found it inconceivable that a private party's private counsel could ever be considered a state actor.²⁸³ The court relied on the 1981 United States Supreme Court decision in *Polk County v. Dodson*, which held that a government-paid public defender was not a state actor and therefore not liable to her client under section 1983.²⁸⁴ An attorney for a private party serves that party's interests alone, and not those of the state, the *Edmonson II* court reasoned.²⁸⁵ Further, if any state interest is present in civil litigation, the court held, it is significantly lower than in a criminal case; thus, private counsel in a civil trial cannot be said to be advancing any real governmental interest.²⁸⁶

Holding no state actor present, the court then turned to issues of logic and policy.²⁸⁷ The court emphasized the overriding goal that trials should be fair, both in reality and in the perception of the participants and the community.²⁸⁸ The court repeated that this has been the historic purpose and effect of the peremptory challenge, by which litigants can disqualify any jurors they suspect may be biased, for any reason.²⁸⁹ Because the challenge has been apparently successful in this respect for centuries, the court refused to

²⁷⁹ *Id.* at 221.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 222.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*; *Polk County v. Dodson*, 454 U.S. 312 (1981).

²⁸⁵ *Edmonson II*, 895 F.2d at 222.

²⁸⁶ *Id.* Note that two judges concurred in this first part of the opinion only. *Id.* at 226 (Politz, J., concurring).

²⁸⁷ *Id.* at 222. Because the determination as to state action was dispositive of the case, this discussion was largely gratuitous.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 223.

tamper with it now, particularly by destroying its most fundamental aspect and requiring an explanation for its use.²⁹⁰

Further, given the lack of any real state action or interest in a civil trial, the court reiterated, it would be unwise to extend the very narrow rule of *Batson*, which only changed the evidentiary burden placed on a criminal defendant in *Swain*, to the civil sphere.²⁹¹ The *Swain* decision, Judge Gee wrote in *Edmonson II*, could not support the plaintiff's argument here that a private litigant must give reasons for any strikes exercised against black venire-persons.²⁹² The *Edmonson II* court reasoned that the line of cases beginning with *Strauder* established that the United States Constitution prohibits the exclusion of blacks from criminal juries on racial grounds, because such exclusions demean the black jurors.²⁹³ But civil peremptories exercised because an attorney fears a juror may tend to favor a party of the same race are very plainly not demeaning, the court concluded.²⁹⁴

The *Strauder-Swain-Batson* reasoning does not apply in civil cases, the *Edmonson II* court held, citing three distinctions: first, the lack of state action which could be seen as official discrimination; second, the diminished importance of the jury in civil trials because the stakes are lower; and third, the partisan role of the civil advocate, as opposed to that of the prosecutor, whose objective is justice and truth.²⁹⁵ The court asserted that the state cannot be held in any way responsible for the actions of a civil advocate, however "obtuse" they may be.²⁹⁶ Finally, the court noted that peremptory challenges act as a social leveller. Because jurors of all races and classes are subject to possibly unfair exclusion by peremptory challenge, the challenge ultimately ensures equal treatment for all.²⁹⁷ Thus, the *Edmonson II* court concluded, regardless of what the Supreme Court

²⁹⁰ *Id.*

²⁹¹ *Id.* See *infra* notes 418-20 and accompanying text for an analysis of Judge Gee's narrow reading of *Batson*.

²⁹² *Edmonson II*, 895 F.2d at 224. Note how the court relies on *Swain*, rather than *Batson*.

²⁹³ *Id.* at 224.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 225-26. The court explained:

For the prosecutor's aim is justice. He wins when justice is done and—although it is surely not the outcome he envisions—when it becomes apparent during the trial of a criminal case, a la the celebrated fictional career of Perry Mason, that the accused is innocent of the crime of which he stands charged, the prosecutor has not "lost."

Id.

²⁹⁶ *Id.* at 226.

²⁹⁷ *Id.*

may say about peremptory challenges in criminal trials, the Fifth Circuit Court of Appeals would not place limits on them in the civil context.²⁹⁸

Judge Rubin, in essence writing in defense of his decision in *Edmonson I*, submitted a long, spirited and extensively documented dissent, in which he was joined by Judge Wisdom, his colleague on the *Edmonson I* panel.²⁹⁹ Judge Rubin stated that nothing in the language or spirit of the fourteenth amendment justified limiting its protections to criminal trials.³⁰⁰

First, application of the *Batson* rule to civil trials would not cause procedural difficulties because only when a claimant could prove *Batson's* prima facie elements would an attorney be required to explain his or her peremptories, in a simple, easily administered procedure.³⁰¹ The dissent then considered the question of whether state action was present in the defense's use of peremptory challenges, discussing a number of the state action cases cited in the *Edmonson I* decision, particularly *Lugar*.³⁰² Judge Rubin acknowledged that action pursuant to some statute with nothing more did not itself satisfy the second prong of the *Lugar* test.³⁰³ The "something more" needed to constitute state action depends on the circumstances of the case, and in this case, Judge Rubin reasoned that the active role of the trial judge in supervising jury selection provided that something.³⁰⁴ Judge Rubin further likened the racially based peremptories in this case to the discrimination by a government lessee in *Burton v. Wilmington Parking Authority*,³⁰⁵ held unconstitutional because the state government lent its "power, property and prestige" to ostensibly private discrimination.³⁰⁶ Moreover, like the provision struck down in *Reitman v. Mulkey* for granting state authorization to housing discrimination,³⁰⁷ the law permitting per-

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 227-38 (Rubin, J., dissenting). Judge Rubin's opinion contained 123 footnotes.

³⁰⁰ *Id.* at 227 (Rubin, J., dissenting).

³⁰¹ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 98-99 (1986).

³⁰² *Edmonson II*, 895 F.2d at 229-33 (Rubin, J., dissenting); *Edmonson I*, 860 F.2d at 1311-12.

³⁰³ *Edmonson II*, 895 F.2d at 229 (Rubin, J., dissenting).

³⁰⁴ *Id.* at 232-33 (Rubin, J., dissenting).

³⁰⁵ 365 U.S. 715 (1961). See *supra* notes 193-200 and accompanying text for a discussion of the *Burton* case.

³⁰⁶ *Edmonson II*, 895 F.2d at 230 (Rubin, J., dissenting) (citing *Burton*, 365 U.S. at 725).

³⁰⁷ *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967). See *supra* notes 201-06 and accompanying text for a discussion of *Reitman*.

emptory challenges gives parties complete discretion to discriminate against whomever they please.³⁰⁸

In addition, the *Edmonson II* dissent distinguished the cases relied on by the majority,³⁰⁹ particularly *Polk County v. Dodson*.³¹⁰ *Polk County*, Judge Rubin contended, did not address the issue of fourteenth amendment state action.³¹¹ That a public defender does not act under color of state law for purposes of a malpractice action under section 1983 does not mean that a litigant cannot be a state actor when exercising peremptory strikes through an extensive state-created and administered procedure.³¹² The trial court, Judge Rubin insisted, plays a central, active role in the jury selection process; a role mandated in part by the federal policy of eliminating discrimination from the jury system.³¹³ Two authorities, according to the dissent, determine the number and manner of peremptory challenges in a federal trial: the federal statute and the discretion of the trial judge.³¹⁴ Judge Rubin argued that it is the judge who gives effect to the challenges; peremptories have no effect unless and until the court excuses the challenged juror.³¹⁵ The intimate involvement of the judge presiding over jury selection satisfies the second part of the *Lugar* test, the dissent concluded.³¹⁶ This discrimination was particularly disturbing to Judge Rubin because the law has given this role to the judge precisely to prevent infection of the system by private prejudices of all types.³¹⁷

³⁰⁸ *Edmonson II*, 895 F.2d at 230 (Rubin, J., dissenting).

³⁰⁹ The court also mentions two other cases in a footnote: *Blum v. Yaretsky*, 457 U.S. 991 (1982) and *Evans v. Abney*, 396 U.S. 435 (1970). *Edmonson II*, 895 F.2d at 221 n.8. Neither case, according to the dissent, was on point. *Id.* at 230 (Rubin, J., dissenting). See *supra* note 244 for a discussion of the *Blum* case. The *Evans* decision upheld a Georgia court's invalidation of a racially restrictive trust, and so did not face the issue of state action promoting private discrimination. *Evans*, 396 U.S. at 439; *Edmonson II*, 895 F.2d at 230 (Rubin, J., dissenting).

³¹⁰ *Edmonson II*, 895 F.2d at 230-31 (Rubin, J., dissenting); *Polk County v. Dodson*, 454 U.S. 312 (1981).

³¹¹ *Edmonson II*, 895 F.2d at 231 (Rubin, J., dissenting).

³¹² *Id.*

³¹³ *Id.* at 231-32 (Rubin, J., dissenting).

³¹⁴ *Id.* at 232 (Rubin, J., dissenting). See *supra* notes 32-34 and accompanying text for a discussion of the statutes authorizing peremptory challenges in federal trials.

³¹⁵ *Edmonson II*, 895 F.2d at 233 (Rubin, J., dissenting).

³¹⁶ *Id.*

³¹⁷ *Id.* The dissent stated: "By carrying out his duties in a way that permits peremptory challenges based on race, the rust of the judge's approval of discrimination rubs off onto society, corroding the national character by giving private prejudice the imprimatur of state approval." *Id.*

Although there are certainly substantive differences between criminal and civil trials, Judge Rubin repeated his opening assertion that nothing in the fourteenth amendment justifies limiting it, or *Batson*, to the criminal sphere.³¹⁸ The *Batson* case, he reasoned, should not be read so narrowly as only to apply to evidentiary burdens on black criminal defendants. Rather, *Batson* was the latest progression in the effort begun in *Strauder* to eradicate discrimination from the jury system.³¹⁹

Judge Rubin found support for the extension of this effort to the civil arena in *Fludd v. Dykes*³²⁰ and a recent Eighth Circuit Court of Appeals decision, *Reynolds v. City of Little Rock*, which forbade a city attorney's exclusion of two black jurors in a civil rights case over the police shooting of a black man.³²¹ But Judge Rubin found the strongest support for his argument in *Batson* itself, which stated that discrimination in jury selection harms not only the black defendant but also the excluded jurors and the entire community as well.³²² If the harm is not limited to the criminal defendant, Judge Rubin reasoned, nor should the remedy be so limited.³²³ The rights of citizens summoned for jury service should not be different depending on the type of trial they sit on, the dissent argued.³²⁴ Further, Judge Rubin asserted that the seventh amendment indicates that the government interest in fair civil litigation is much

³¹⁸ *Id.*

³¹⁹ *Id.* at 233-35 (Rubin, J., dissenting).

³²⁰ *Id.* at 234 (Rubin, J., dissenting). See *supra* notes 163-76 and accompanying text for a discussion of *Fludd*.

³²¹ 893 F.2d 1004 (8th Cir. 1990). Decided in January of 1990, the *Reynolds* case was brought on behalf of the estate of a mentally disturbed black man who was fatally shot by eight Little Rock police officers after he waved a pocket knife at one of them. 893 F.2d at 1005. At trial, the city attorney peremptorily struck the only two blacks on the venire; when plaintiffs moved for an explanation, the city attorney refused. *Id.* at 1006, 1008. The trial court upheld the defendant's actions, but the Eighth Circuit Court of Appeals reversed, holding that under *Batson*, a government litigant must give racially neutral reasons for the strikes, if the plaintiff can establish a prima facie case of discrimination. *Id.* at 1009. The *Batson* decision, the Eighth Circuit reasoned, was based on the fourteenth amendment, not the sixth, and therefore was not restricted to criminal cases. *Id.* at 1008. Any other differences between criminal and civil trials were immaterial for equal protection purposes, while the community had a strong interest in assuring that no one is excluded from the justice system and that all trials are free from even the appearance of discrimination. *Id.* at 1009. The *Reynolds* court expressly declined to address the question of peremptories by private litigants. *Id.*

³²² *Edmonson II*, 895 F.2d at 235 (Rubin, J., dissenting); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

³²³ See *Edmonson II*, 895 F.2d at 236 (Rubin, J., dissenting).

³²⁴ *Id.*

stronger than the *Edmonson II* majority would acknowledge.³²⁵ Civil trials make up a majority of the activity of the federal judiciary, Judge Rubin noted, and the government itself is often directly or indirectly involved; as such, the government interest cannot be minimized.³²⁶ Moreover, the dissent continued, when the government is a litigant, the court would be unable to sustain the civil-criminal distinction set up by the majority without expressly permitting discrimination by an agency of the state.³²⁷

Judge Rubin concluded his dissent with a ringing declaration that neither the history nor usefulness of peremptory challenges can justify the evil of denying citizens the right to participate in the justice system solely because of their race.³²⁸ When a citizen alleges discrimination in the courtroom, he declared, it is the court's solemn duty to eliminate it; a person's rights with respect to the court system should never be dependent upon his or her race.³²⁹

Judge Rubin's dissent notwithstanding, the *Edmonson II* decision firmly established the rule on peremptory challenges in the Fifth Circuit.³³⁰ The *Batson* rule requiring explanations of race-based challenges is strictly limited to prosecutors in criminal trials.³³¹ The exercise of peremptories in any manner by civil litigants does not

³²⁵ *Id.*

³²⁶ *Id.* at 236-37 (Rubin, J., dissenting).

³²⁷ *Id.* at 237 (Rubin, J., dissenting).

³²⁸ *Id.* at 238 (Rubin, J., dissenting).

³²⁹ *Id.* at 237-38 (Rubin, J., dissenting). Judge Rubin concluded:

We must take another step toward the goal of eradicating racial prejudice by eliminating the shameful practice of permitting a federal statute to be employed in a trial in a federal courtroom as a weapon of discrimination. I regret that the majority cannot yet see that to permit a person to be rejected from a jury solely because of the color of his skin rejects the promise upon which this nation's independence was based and the guarantee that the Fourteenth Amendment provides: that all persons are created equal. In God's sight. In human right. And in regard to service on a federal jury.

Id.

³³⁰ Since *Edmonson II*, the Fifth Circuit Court of Appeals has again considered the issue of race-based peremptories in civil trials, and has reiterated its *Edmonson II* holding. *Polk v. Dixie Insurance Co.*, decided in April of 1990, one month after *Edmonson II*, was an action against an auto insurer by a black policy holder brought in the United States District Court for the Northern District of Mississippi. 897 F.2d 1346, 1347 (5th Cir. 1990). When the defendant insurance company used two peremptory challenges to strike the only two Blacks in the venire, plaintiff, relying on *Batson*, moved the trial court to require a racially neutral explanation. The court quickly denied the motion, "the Government not being involved in this case." *Id.* Plaintiff appealed on this and other grounds. The Court of Appeals rejected Polk's *Batson* claim in one paragraph, citing *Edmonson II* as dispositive. *Id.*

³³¹ *Edmonson II*, 895 F.2d at 226.

implicate the Constitution and is therefore, by definition, immune from court review.³³²

IV. PEREMPTORY CHALLENGES ARE STATE ACTION

In light of the Fifth Circuit Court of Appeals' decision to rehear the *Edmonson* case, and the ensuing reversal, a close analysis of the panel's holding and reasoning becomes useful to determine why it failed to withstand re-examination. The *Edmonson* case is important because it would have represented the significant next step in the progression of two lines of cases.³³³ Because the *Edmonson I* holding was, in a sense, the furthest possible extension of the *Batson* rule, the outcome of the rehearing was bound to attract the attention of the Supreme Court, which had left it to the lower courts to implement the *Batson* holding and define its contours.³³⁴ Indeed, on the first day of the October 1990 term, the Court granted *Edmonson's* petition for certiorari.³³⁵

Edmonson I could be characterized as potentially the furthest possible extension of the *Batson* rule because of the significant state action issues it presented. Therefore, it must also be examined in light of the Supreme Court holdings on state action in private discrimination, as well as the state action discussions in *Fludd v. Dykes*, *Clark v. City of Bridgeport*, and even, to a lesser extent, *Maloney v. Washington*.³³⁶ Specific application of these precedents to the *Edmonson* case will yield a better sense of the strengths and weaknesses

³³² *Id.* at 222-23. Note that the court did not consider the common situation in which the government is a civil litigant, *id.* at 222 n.10, which was the case in all the previous civil peremptory challenge suits. See *supra* note 7.

³³³ In a related development, the Ninth Circuit Court of Appeals has recently held that peremptory challenges based on gender violate the fifth amendment due process clause, whether exercised by the prosecution or defense in a federal criminal trial. *United States v. DeGross*, 59 U.S.L.W. 2204, 2204 (9th Cir. Sept. 10, 1990). In that trial for immigration law violations, the prosecution attempted to strike all female jurors, the defense only males. The trial court required gender-neutral explanations for the strikes and disallowed one such challenge. The Court of Appeals upheld the district court's actions, citing *Batson* and relying heavily on its arguments. *Id.* The *DeGross* court then extended *Batson* to challenges made by the defense, reasoning that the constitutional harm was the same no matter which side misused the peremptories. *Id.* The defense's strikes were state action because defendant was exercising a state-created privilege in the course of a state proceeding, with the help of government officials, and they were validated by a judge. *Id.* *Accord*, *New York v. Irizarri*, 59 U.S.L.W. 2204 (N.Y. App. Div. Sept. 18, 1990).

³³⁴ *Batson v. Kentucky*, 476 U.S. 79, 99 n.24 (1986).

³³⁵ *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 41 (Oct. 1, 1990) (No. 89-7743) (grant of certiorari and leave to proceed *in forma pauperis*).

³³⁶ See *supra* notes 172-80 and accompanying text for a summary of the state action discussions in those cases.

of both of the decisions of the Fifth Circuit Court of Appeals in that case, and will, moreover, provide guidance regarding the trend in the law of private discrimination.

The *Edmonson I* court did not provide a very detailed or thorough rationale for extending *Batson* to the civil arena. Its review of the case law on peremptory challenges was only cursory, and in fact only recited, without discussion, the results in *Wilson*, *Esposito* and *Clark*, largely ignoring *Maloney*.³³⁷ The *Edmonson I* court, however, may not have found the question of extending *Batson* very difficult. The *Batson* Court itself presaged the outcome by basing its holding solely on the fourteenth amendment rather than on the sixth amendment.³³⁸ The sixth amendment, by its terms, is limited to the rights of criminal defendants; the fourteenth amendment guarantees to *all* citizens equal protection and due process of law in all their dealings with government.³³⁹

Prior to *Edmonson I*, four federal cases dealt with the application of *Batson* to civil trials.³⁴⁰ The respective weight of these decisions can be debated. A relevant distinction is that while the two cases supporting the extension of *Batson* were district court cases, the more influential courts of appeals had fairly consistently gone the other way:³⁴¹ the Eighth Circuit Court of Appeals decided *Wilson*,³⁴²

³³⁷ See *supra* note 253 on the *Edmonson I* court's treatment of those cases; *Edmonson I*, 860 F.2d at 1314 & n.31. The *Edmonson I* court could not rely much on *Maloney* for the obvious reason that that decision had been vacated in *Maloney II* (*Maloney v. Plunkett*, 854 F.2d 152 (7th Cir. 1988)). See *supra* notes 154-62 and accompanying text for a discussion of *Maloney II*.

³³⁸ *Batson*, 476 U.S. at 84 n.4. But see *id.* at 112 (Burger, C.J., dissenting).

³³⁹ The sixth amendment reads, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI.

³⁴⁰ See *supra* note 7 and accompanying text for a list of the cases decided prior to *Edmonson*. Note that *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 201 (1989) and *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990), had not yet been decided. See *supra* note 245 and accompanying text on the chronology of the *Fludd* and *Edmonson* decisions. See *supra* note 321 and accompanying text for a discussion of the *Reynolds* case.

³⁴¹ As mentioned above, two circuits have since decided in favor of extending *Batson*: *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990) and *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989). See *supra* notes 163-76 for a discussion of *Fludd*. See *supra* note 321 and accompanying text for a discussion of *Reynolds*. The dissent in *Edmonson II* noted that two other circuits, in unpublished decisions, had declined to address the issue. *Edmonson II*, 895 F.2d at 235, n.92. (Rubin, J., dissenting). Those cases are: *Nowlin v. General Tel. Co.*, 892 F.2d 1041 (4th Cir. 1989); *Robinson v. Quick*, 875 F.2d 867 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 149 (1990); and *Boykin v. Hamilton County Bd. of Educ.*, 869 F.2d 1488 (6th Cir. 1989). The Fifth Circuit Court of Appeals has since reiterated its position, in *Polk v. Dixie Ins. Co.*, 897 F.2d 1346, 1347 (5th Cir. 1990); see *supra* note 330 for a discussion of *Polk*.

³⁴² See *supra* notes 131-38 and accompanying text for a discussion of *Wilson*.

a Second Circuit judge wrote *Esposito*,³⁴³ and the Seventh Circuit Court of Appeals vacated the *Maloney* ruling.³⁴⁴

Maloney II, however, expressly declined to state any view on the merits of extending *Batson* and held only that the trial judge could not take away the litigants' statutory right to peremptory challenges.³⁴⁵ *Esposito* and *Wilson* were both short opinions which summarily dismissed *Batson*-based claims.³⁴⁶ *Esposito* squarely held that the *Batson* reasoning was limited to the criminal context;³⁴⁷ the *Wilson* court only expressed in dicta its strong doubts about the civil application of *Batson*.³⁴⁸ A factor in both the *Esposito* and *Wilson* cases, however, was the weakness of both claims on the facts—both plaintiffs, because they were white, were unable to establish the prima facie case set out in *Batson*,³⁴⁹ which required the claimant to prove he was a member of the same cognizable racial group as the excluded jurors.³⁵⁰

To support its decision to extend the *Batson* rule, the *Edmonson I* court was able to look to *Clark* and, to a much lesser extent, *Maloney*, both remarkably bold rulings. *Clark* was the first decision to expand the *Batson* rule to civil cases, and it did so despite the fact that one of the claimants was white.³⁵¹ The *Clark* court justified that action by citing the rights of the excluded jurors, who had themselves made no complaint.³⁵² *Maloney*, in some ways, went even further—apparently too far, according to the Seventh Circuit Court of Appeals.³⁵³

³⁴³ See *supra* note 112 on the authorship of *Esposito*.

³⁴⁴ *Maloney v. Plunkett* ("*Maloney II*"), 854 F.2d 152, 156 (7th Cir. 1988). See *supra* notes 154–62 and accompanying text for a discussion of *Maloney II*.

³⁴⁵ See *supra* notes 161–62 and accompanying text for a discussion of the limits of the *Maloney II* holding.

³⁴⁶ *Esposito v. Buonomo*, 642 F. Supp. 760 (D. Conn. 1986), was only three pages long. See *supra* notes 112–18 and accompanying text for a discussion of *Esposito*. The opinion in *Wilson v. Cross*, 845 F.2d 163 (8th Cir. 1988), was also only three pages long. See *supra* notes 131–38 and accompanying text for a discussion of *Wilson*.

³⁴⁷ *Esposito*, 642 F. Supp. at 761.

³⁴⁸ See *supra* note 137 and accompanying text on the limits of the *Wilson* decision.

³⁴⁹ *Esposito*, 642 F. Supp. at 761; *Wilson*, 845 F.2d at 165. See *supra* notes 118 and 138 and accompanying text with regard to the race of the plaintiffs in these cases.

³⁵⁰ *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

³⁵¹ See *supra* notes 125–26 and accompanying text for a discussion of the *Clark* court's treatment of the white plaintiff.

³⁵² See *supra* notes 127–28 and accompanying text on the *Clark* court's protection of the jurors' rights over those of the litigant.

³⁵³ *Maloney v. Plunkett* ("*Maloney II*"), 854 F.2d 152, 154 (7th Cir. 1988). See *supra* notes 154–62 and accompanying text for a discussion of *Maloney II*.

Nonetheless, the *Edmonson* court could still look to the forceful substantive arguments advanced by the *Maloney* court for guidance, if not for precedent. In *Maloney*, the trial court, on its own motion, had imposed the *Batson* rule on both sides of a civil trial, including the private party plaintiff, ruling that equal protection limited peremptories by civil litigants whether they were public officials or not.³⁵⁴ The *Maloney* court dispensed with the need for a party to establish a *prima facie* case of discrimination and required both sides to justify their racial peremptories, finally denying the parties the right to use any peremptory challenges at all.³⁵⁵ Obviously, the *Edmonson I* court could not have taken such bold steps, but it did cite the *Maloney* case in support of the fundamental principle that bigotry has no place in a federal courtroom regardless of the criminal or civil nature of the trial.³⁵⁶

Clark and *Maloney* both were forceful, active opinions, when compared to *Esposito's* brief treatment of the issue,³⁵⁷ and to *Wilson* and *Maloney II*, both of which expressed no opinion on the merits.³⁵⁸ Thus, the *Edmonson I* court did not really break much new ground with its holding, but the decision is still significant because it was the first case in which the issues of racial peremptories by purely private litigants were squarely presented. It was also the first time a federal court of appeals held that *Batson* could be applied to civil trials.³⁵⁹ The *Edmonson* court had a stronger factual basis for its holding that private parties may not use peremptory challenges to exclude blacks from a jury than did *Maloney* and, later, *Fludd*.³⁶⁰ Such statements in *Maloney* are of doubtful reliability in light of *Maloney II*, and in *Fludd* they can only have the force of dicta at best, because it was unnecessary for the court to reach that question in that case.³⁶¹

³⁵⁴ *Maloney v. Washington*, 690 F. Supp. 687, 689 (N.D. Ill. 1988), *vacated sub nom. Maloney v. Plunkett* ("*Maloney II*"), 854 F.2d 152 (7th Cir. 1988).

³⁵⁵ *Maloney*, 690 F. Supp. at 688, 692.

³⁵⁶ *Edmonson v. Leesville Concrete Co.* ("*Edmonson I*"), 860 F.2d 1308, 1314 n.31 (5th Cir. 1988), *rev'd*, 895 F.2d 218, 219 (5th Cir. 1990) ("*Edmonson II*"), *cert. granted*, 111 S. Ct. 41 (Oct. 1, 1990) (No. 89-7743).

³⁵⁷ See *supra* note 346 and accompanying text on the brevity of the *Esposito* opinion.

³⁵⁸ See *Wilson v. Cross*, 845 F.2d 163, 165 (8th Cir. 1988) and *Maloney v. Plunkett* ("*Maloney II*"), 854 F.2d 152, 155 (7th Cir. 1988).

³⁵⁹ *Fludd* and *Reynolds* had yet to be decided at that time; see *supra* notes 340-41 and accompanying text.

³⁶⁰ The defendants in both of those cases were governmental officials, not private parties.

³⁶¹ The *Fludd* decision nevertheless provides significant appellate level support for the civil application of *Batson* to private parties (although not significant enough to persuade the Fifth Circuit Court of Appeals). In addition to stating that peremptories by either the state

In *Edmonson I*, the court reviewed a broad collection of Supreme Court state action cases, but missed a significant opportunity to strengthen its holding by neglecting to analyze and apply those cases more closely to the facts before it. Instead, the court did little more than assert that a judge cannot allow racial discrimination in a court of law.³⁶² The court did not provide sufficient specific case law to support its holdings that state action was present and that the trial judge was the state actor.³⁶³ The court's conclusory statement weakens the decision because the importance of satisfying this threshold requirement cannot be underestimated; only by proving sufficient state action can the fourteenth amendment be implicated, and only then can *Batson* be considered. Had the *Edmonson I* court applied the language of each of the various state action cases it discussed to the facts before it, the outcome of the case would not have changed, but the court's opinion would have been much less vulnerable to attack upon rehearing.³⁶⁴

or a private party were subject to equal protection, the *Fludd* court provided more detailed reasoning on the question of state action. Drawing from *Strauder* and other early jury discrimination cases, the *Fludd* court held that state action arose in the role of the trial judge in supervising jury selection. See *supra* notes 163-76 and accompanying text for a discussion of *Fludd*.

The *Reynolds* decision is also helpful for its statement that the differences between criminal and civil trials are irrelevant to the fourteenth amendment. Its value is limited, however, inasmuch as the court there expressly declined to address the question of peremptory challenges exercised by private parties. See *supra* note 321 and accompanying text for a discussion of *Reynolds*.

³⁶² *Edmonson I*, 860 F.2d at 1312-13.

³⁶³ See *id.* at 1312-13, 1312 n.23, 1313 n.24. There are only two citations in this portion of the court's opinion: one to a New York state case, *People v. Gary M.*, 138 Misc.2d 1081, 526 N.Y.S.2d 986 (1988), and one to Tocqueville's *DEMOCRACY IN AMERICA*.

³⁶⁴ For a critique of the conclusions and state action analysis in *Edmonson I* as well as *Fludd v. Dykes*, see Note, *supra* note 176, at 185, in which the author argues that governmental "causation, encouragement, or specific authorization" is necessary to create state action covered by the fourteenth amendment. The author analogizes the private attorney to a corporation in a highly regulated business, which the Supreme Court has never held to be, *per se*, a state actor. *Id.* at 187 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)). Governmental action here, the Note argues, is only passive toleration and mere acquiescence, whereas actual official participation in the decision to discriminate is necessary to establish state action. *Id.* at 187, 189, 192.

The author places too much emphasis, however, on cause. The Supreme Court has held that the government may not, by legislative or judicial action, give effect to private prejudices. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 431, 433 (1984) (see *supra* note 252 and accompanying text on the *Edmonson I* court's reliance on *Palmore*); *Reitman v. Mulkey*, 387 U.S. 369, 378-79, (1967) (see *supra* notes 201-06 and accompanying text for a discussion of *Reitman*); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (see *supra* notes 183-92 and accompanying text for a discussion of *Shelley*). Further, by repeatedly analogizing the peremptory challenge issue to commercial disputes involving property rights, the Note overlooks the fact that the *Edmonson* case involves fundamental civil rights and issues of racial discrimination, which

First, *Shelley v. Kraemer* would have significantly bolstered the *Edmonson I* holding, because it held state action to exist in court enforcement of private discrimination.³⁶⁵ *Shelley* provided the *Edmonson I* panel with a simple but fairly potent argument. *Shelley* held that actions of courts and court officers are "state actions" for the purposes of the fourteenth amendment, and that such actions cannot be used to advance or enforce racial discrimination.³⁶⁶ The *Edmonson I* court eloquently argued that the court's administration of peremptory challenges constitutes "action" and that such action bore the sanction of the government.³⁶⁷ It made the obvious connection to show that the trial court, by excusing the challenged jurors and empanelling those selected, gave effect to private discrimination by the litigant who exercised the racially motivated challenge.³⁶⁸ Still, the court failed to support these arguments by specifically citing the case in which they originated.³⁶⁹

Even if the *Edmonson I* court were to fail in its efforts to establish that a court's role in presiding over jury selection is a sufficiently active one, it could have relied on *Burton v. Wilmington Parking Authority* for the proposition that the government may not acquiesce in private discrimination in which it is even indirectly involved.³⁷⁰ *Burton* declared that the state has a positive responsibility to ensure that, in its dealings with private parties, those parties must adhere to the Constitution.³⁷¹ This responsibility is particularly grave in the context of judicial proceedings, in contrast to commercial leases,³⁷²

require heightened judicial scrutiny and increased vigilance against violations. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 307-09 (1880) (see *supra* notes 48-61 and accompanying text for a discussion of *Strauder*); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (courts must employ strict scrutiny when examining classifications based on race).

³⁶⁵ *Shelley*, 334 U.S. at 20. See *supra* notes 183-92 and accompanying text for a discussion of *Shelley*.

³⁶⁶ *Id.*

³⁶⁷ *Edmonson I*, 860 F.2d at 1312-13.

³⁶⁸ *Id.* The court left implicit in its argument the assumption that the race-based challenges were invidious discrimination of the sort the fourteenth amendment was meant to stop. See *id.* The dissent, however, argued that there was little or no racism involved. *Id.* at 1316 (Gee, J., dissenting). Cf. *supra* note 108, for a discussion of *King v. County of Nassau*, 581 F. Supp. 493, 502-03 (E.D.N.Y. 1984) (holding that the harm was beyond the scope of the fourteenth amendment protections).

³⁶⁹ This is perhaps a reflection of the courts' apparent reluctance to rely on *Shelley* as precedent. See, e.g., *supra* note 204 for a discussion of the *Reitman* court's avoidance of *Shelley* as precedent.

³⁷⁰ See *supra* notes 197-200 and accompanying text for a discussion of the *Burton* holding.

³⁷¹ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961).

³⁷² See, e.g., *supra* note 152 and accompanying text on the gravity with which the *Maloney* court treated the judicial setting.

because the courts are the single institution of government charged with enforcing the basic civil rights of citizens and dedicated, by definition, to justice, both in process and in result. A court's passive acceptance of racially based peremptories is clearly a more serious abdication of that responsibility than the Wilmington Parking Authority's contract with a segregationist restaurant operator.³⁷³ Thus, the *Edmonson I* court could have relied on the *Burton* affirmative responsibility argument alone to justify the extension of *Batson* to all trials.

The *Edmonson I* panel's characterization of the court's participation in peremptory challenges certainly satisfies the "significant involvement" test enunciated in *Reitman v. Mulkey*³⁷⁴ and *Moose Lodge No. 107 v. Irvis*.³⁷⁵ Statutory authorization, judicial administration, and a state forum for the exercise of peremptory challenges clearly constitute significant state involvement in the procedure.³⁷⁶ In *Moose Lodge*, the state's issuance of a liquor license to a club which excluded blacks did not involve the state in the lodge's segregationist policies. It only gave the lodge the right to sell alcohol, not the right or opportunity to discriminate.³⁷⁷ The peremptory challenge procedure, however, by definition fosters and encourages discrimination, which *Moose Lodge* held impermissible.³⁷⁸ The law challenged in *Reitman v. Mulkey* would have authorized private discrimination in housing as a matter of state constitutional right.³⁷⁹ Like the property owners in *Reitman*, litigants have been authorized by the peremptory challenge law to use their absolute discretion to discriminate against whomever they wish.³⁸⁰ Moreover, the discrimination in the *Edmonson* case touches the justice system, where it is least tolerable.³⁸¹

³⁷³ See *supra* notes 193-200 and accompanying text for a discussion of *Burton*. The state action analysis in *Fludd* seems to run along the same lines: "[T]he refusal of the State court to redress the wrong . . . was a denial of a right secured . . . by the Constitution and laws of the United States." *Fludd v. Dykes*, 863 F.2d 822, 828 (11th Cir. 1989) (quoting *Ex Parte Virginia*, 100 U.S. 339, 347 (1879)).

³⁷⁴ 387 U.S. 369 (1967); see *supra* notes 201-06 and accompanying text for a discussion of *Reitman*.

³⁷⁵ 407 U.S. 163 (1972); see *supra* notes 207-18 and accompanying text for a discussion of *Moose Lodge*.

³⁷⁶ See *Edmonson v. Leesville Concrete Co.* ("*Edmonson I*"), 860 F.2d 1308, 1312-13 (5th Cir. 1988), *rev'd*, 895 F.2d 218, 219 (5th Cir. 1990) ("*Edmonson II*"), *cert. granted*, 111 S. Ct. 41 (Oct. 1, 1990) (No. 89-7743).

³⁷⁷ See *supra* notes 209-18 and accompanying text for a discussion of the *Moose Lodge* holding.

³⁷⁸ *Moose Lodge*, 407 U.S. at 176-79.

³⁷⁹ See *supra* note 206 and accompanying text on the legal effect of the California amendment invalidated in *Reitman*.

³⁸⁰ See *Edmonson II*, 895 F.2d at 230 (Rubin, J., dissenting).

³⁸¹ See, e.g., *Maloney v. Washington*, 690 F. Supp. 687, 690 (N.D. Ill. 1988).

Having concluded that the court provided significant assistance to litigants in their efforts to discriminate,³⁸² the *Edmonson I* court could have made better use of the holding in *Tulsa Professional Collection Services v. Pope*.³⁸³ *Tulsa* is similar to the *Edmonson* case because, as a probate proceeding, it also involves court oversight and administration of a legal procedure driven mainly by private parties.³⁸⁴ *Tulsa* held that a private party could not use state probate procedures, and the aid of state officials, to deny a property claim without due process.³⁸⁵ The *Tulsa* rule, then, would require the court to determine whether judicial administration of jury selection is overt, substantial assistance of state officials to private parties making use of state procedures. Peremptory challenges have no effect until the judge excuses the challenged jurors and empanels the selected jurors.³⁸⁶ Further, jury commissioners compile the lists of people who comprise the venires from which litigants choose their juries.³⁸⁷ Court clerks assist in the administration of the process.³⁸⁸ As the *Edmonson I* opinion stated, the government is not merely an observer, but a significant participant in the discrimination; the only thing the government does not do is make the actual decision to discriminate.³⁸⁹

The *Edmonson I* court never explicitly applied the two-part test of state action from *Lugar v. Edmondson Oil Co.*,³⁹⁰ the test which would ultimately prove decisive on rehearing.³⁹¹ *Lugar* provides the clearest and perhaps most difficult test of state action: first, the violation must arise from the exercise of a state-created privilege; and second, the party charged with the violation must be fairly characterized as a state actor.³⁹² In both his *Edmonson* opinions, Judge Gee asserted that civil peremptories did not meet the *Lugar*

³⁸² *Edmonson I*, 860 F.2d at 1312-13.

³⁸³ 485 U.S. 478 (1988).

³⁸⁴ See *supra* notes 230-36 and accompanying text for a discussion of the *Tulsa* case.

³⁸⁵ *Tulsa*, 485 U.S. at 486-87.

³⁸⁶ *Edmonson I*, 860 F.2d at 1312.

³⁸⁷ See, e.g., *Swain v. Alabama*, 380 U.S. 202, 206-07 (1965).

³⁸⁸ *Edmonson II*, 895 F.2d at 232 (Rubin, J., dissenting).

³⁸⁹ *Edmonson I*, 860 F.2d at 1312 (quoting *People v. Gary M.*, 138 Misc. 2d 1081, 1089, 526 N.Y.S.2d 986, 994 (1988)).

³⁹⁰ 457 U.S. 922 (1982). See *supra* notes 219-29 and accompanying text for a discussion of the *Lugar* case. The *Edmonson I* court recited the terms of the *Lugar* test but did not apply them specifically. *Edmonson I*, 860 F.2d at 1311, 1312.

³⁹¹ Judge Gee relied on the *Lugar* test as dispositive both in his dissent in *Edmonson I*, 860 F.2d at 1315-16, and in his opinion for the en banc court in *Edmonson II*, 895 F.2d at 221-22.

³⁹² See *supra* notes 223-26 and accompanying text for a discussion of the two parts of the *Lugar* test.

requirements.³⁹³ The *Maloney* court, however, cited *Lugar* in support of its activist ruling.³⁹⁴ Even Judge Gee conceded that the first prong of the test is easily satisfied: the exercise of peremptory strikes in a civil trial is certainly a privilege derived from state authority.³⁹⁵ The second prong, whether the actor may fairly be called a state actor, is the more difficult hurdle. The *Lugar* court listed three factors to be considered in making this determination: whether the actor is a government official; whether the actor had worked together with or had obtained significant aid from government officials; or whether the conduct is otherwise attributable to the state.³⁹⁶

As applied by Judge Gee in his *Edmonson I* dissent, the *Lugar* test would seem to require that some private party be found to be a state actor.³⁹⁷ This is not necessary, however, in cases where there is actual significant state participation in the challenged action. Nevertheless, applying the test to a private litigant can still yield a positive result. The private litigant who excludes jurors on the basis of race is plainly covered by the second category of state actor delineated in *Lugar*—the private party acting with significant aid from the state. The attorneys act pursuant to federal statute. As members of the bar, they are considered officers of the court. In conducting jury selection, they use procedures and facilities provided by the government. Finally, the judge officiates over and validates the entire process.³⁹⁸ This kind of official assistance easily makes the attorney a state actor, just as it did the *ex parte* claimant in *Lugar*,³⁹⁹ thus satisfying the second part of the *Lugar* test and subjecting his or her actions to the fourteenth amendment.

Beyond the direct application of the criteria in these cases, the court in *Edmonson I* could also have made an argument applying *Reitman* by analogy. Just as in *Reitman*, where the California amend-

³⁹³ *Edmonson I*, 860 F.2d at 1315 (Gee, J., dissenting); see also *Edmonson II*, 895 F.2d at 221–22.

³⁹⁴ *Maloney v. Washington*, 690 F. Supp. 687, 690 (N.D. Ill. 1988), *vacated sub nom. Maloney v. Plunkett*, 854 F.2d 152 (7th Cir. 1988). See *supra* note 151 and accompanying text on the *Maloney* court's use of *Lugar*.

³⁹⁵ *Edmonson I*, 860 F.2d at 1315 (Gee, J., dissenting); see also *Edmonson II*, 895 F.2d at 221.

³⁹⁶ *Lugar*, 457 U.S. 922, 937 (1982). See *supra* notes 219–29 and accompanying text for a discussion of the *Lugar* decision.

³⁹⁷ See *Edmonson I*, 860 F.2d at 1315–16 (Gee, J., dissenting). Judge Gee summarily dismissed the possibility of the trial judge being the state actor, saying his function is “merely ministerial.” *Id.* at 1316.

³⁹⁸ For further discussion of the concept of a litigant's attorney as state actor, being a private party performing a public function, see Note, *supra* note 35, at 949–57.

³⁹⁹ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941–42 (1982).

ment, through neutral language, acted to authorize or permit private discrimination, *Edmonson* also involves a facially neutral law which all too often serves to permit invidious racial discrimination. As the *Batson* court stated, peremptory challenges permit "those to discriminate who are of a mind to discriminate."⁴⁰⁰ The *Reitman* analogy, however, would only be valid if the claimant, like those in *Reitman*, were making a facial challenge to the constitutionality of the entire peremptory challenge practice and the statute which authorizes them. This argument, however, would call for the much more far-reaching result of eliminating peremptories entirely.⁴⁰¹ This is, of course, a highly unlikely development; the peremptory challenge remains a venerable institution in trial practice.⁴⁰²

Judge Gee's dissent in *Edmonson I* basically raised two issues: application of the *Lugar* test and the logical inconsistency of requiring explanations for peremptory challenges.⁴⁰³ He would make these same arguments again, successfully, in his opinion for the en banc court in *Edmonson II*.⁴⁰⁴ Expanding on the position he took in dissent, Judge Gee stated in *Edmonson II* that the judge could not be a state actor because the court's function was merely administrative,⁴⁰⁵ and that private attorneys could not be state actors because they serve their clients' private partisan interests, not the state's.⁴⁰⁶

Judge Gee raises some strong arguments. He points out the inconsistency in identifying the court as a state actor in the peremptory challenge process when, by definition, the challenges are

⁴⁰⁰ *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

⁴⁰¹ The Court has considered this step. Justice Marshall, concurring in *Batson*, wrote: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." 476 U.S. at 102-103 (Marshall, J., concurring).

⁴⁰² See, e.g., *Batson*, 476 U.S. at 118-22 (Burger, C.J., dissenting). The possible demise of the peremptory challenge, Judge Gee wrote in his *Edmonson I* dissent, may be the ultimate result of the *Batson* rule. *Edmonson I*, 860 F.2d at 1317 (Gee, J., dissenting); see also *Edmonson II*, 895 F.2d at 221 n.6. Judge Gee argued that the hybrid challenge created by *Batson* and *Edmonson I*, for which some cause must be given sometimes, is logically and practically flawed and cannot long survive. *Id.* For a discussion of the issue which shares both Judge Gee's dissatisfaction with the procedural and logical problems created by *Batson*, as well as Justice Marshall's conviction that peremptories are ultimately incompatible with the fourteenth amendment, see Alschuler, *supra* note 26, at 166.

⁴⁰³ *Edmonson I*, 860 F.2d at 1315, 1316-17 (Gee, J., dissenting). See *supra* notes 258-65 and accompanying text for a discussion of Judge Gee's dissent in *Edmonson I*.

⁴⁰⁴ *Edmonson II*, 895 F.2d at 211-22, 226.

⁴⁰⁵ *Id.* at 221-22.

⁴⁰⁶ *Id.* at 222.

not subject to the court's control.⁴⁰⁷ Further, reasoning that the effect of the extension of *Batson* would be to "constitutionalize" every minor procedural decision a judge makes, he states that such a step was one better taken by the Supreme Court, not a court of appeals.⁴⁰⁸ He further supports his holding that a private attorney cannot be a state actor by citing *Polk County v. Dodson*, which held that a public defender, although paid by the state, is not a state actor for section 1983 purposes.⁴⁰⁹

But the court's analysis in *Edmonson II* is fraught with a variety of weaknesses which may leave it open to challenge before the Supreme Court. To begin with, the divide-and-conquer treatment of the *Lugar* question, looking first at the judge, then the attorney, fails to consider the three factors suggested in *Lugar* for deciding that question.⁴¹⁰ In particular, Judge Gee ignores the second factor—action by a private party together with, or with substantial assistance from, the state—which specifically contemplates that combined public/private action may have constitutional significance.⁴¹¹ Perhaps neither the judge⁴¹² nor the attorney by themselves may violate the fourteenth amendment, but certainly together they act to bar citizens from jury service solely because of their race, which the Supreme Court, since *Strauder*, has said they may not do.

Judge Gee devoted the bulk of his opinion to the history and policy of peremptory challenges, and it is in these areas that his argument is most deficient. He relies heavily on the *Swain* decision throughout his opinion.⁴¹³ This reliance is premised on an overly broad reading of that case, and an extremely narrow interpretation of *Batson*. Judge Gee lists as a major conclusion of the *Swain* decision

⁴⁰⁷ *Id.* at 221.

⁴⁰⁸ *Id.* at 222.

⁴⁰⁹ *Edmonson II*, 895 F.2d at 222 (citing *Polk County v. Dodson*, 454 U.S. 312, 325 (1981)).

⁴¹⁰ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

⁴¹¹ See *supra* notes 398–99 and accompanying text on the application of this factor of the *Lugar* test.

⁴¹² Judge Rubin's argument that the court's role in and of itself is significant and active enough to constitute state action seems more persuasive. See *Edmonson I*, 860 F.2d at 1312–13; see also *Edmonson II*, 895 F.2d at 229–30 (Rubin, J., dissenting). The majority's "merely ministerial" argument begs the question why administrative state action is less state action than policy-oriented state action. See *supra* notes 365–99 for a discussion of how court administration of the jury selection process constitutes state action.

⁴¹³ See, e.g., *Edmonson II*, 895 F.2d at 224, where the court declared: "[W]e do not believe that the considerations underlying *Swain* or the reasoning upon which it rests support such a proposition as this [that civil litigants may be called upon to explain their peremptory challenges]."

that the fourteenth amendment can provide relief when peremptories are used generally to disqualify blacks, but he does not give a citation to *Swain* supporting that proposition.⁴¹⁴ This is simply because *Swain* contained no such holding; at most, Justice White stated in the *Swain* opinion that the fourteenth amendment "takes on added significance" in cases of systematic discrimination.⁴¹⁵ The *Edmonson II* court's repeated characterizations of *Swain* as based on a principle that discriminatory peremptories violate the fourteenth amendment rights of defendants and jurors,⁴¹⁶ are at best dubious when the *Swain* court showed so little solicitude to the defendant's equal protection claim.⁴¹⁷

Further, according to the *Edmonson II* majority, the *Batson* decision merely reaffirmed *Swain*, departing from that holding only to the extent that it revised the evidentiary burden placed on claimants.⁴¹⁸ Such a reading ignores the spirit of the *Batson* opinion⁴¹⁹ and is belied by the statement of Justice White, author of *Swain*, concurring in *Batson*: "The Court overturns the principal holding in *Swain v. Alabama* . . ." ⁴²⁰ As the dissent pointed out, Judge Gee's reliance on *Polk County v. Dodson* is also misplaced.⁴²¹ That case had nothing to do with private discrimination or state action under the fourteenth amendment; rather, it addressed whether the actions of a public defender in representing her client were under color of law for purposes of determining her liability for malpractice under section 1983.⁴²²

⁴¹⁴ See *id.* at 220.

⁴¹⁵ *Swain v. Alabama*, 380 U.S. 202, 223 (1965). But see *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

⁴¹⁶ *Edmonson II*, 895 F.2d at 220, 223-24.

⁴¹⁷ The *Swain* Court denied a claim of systematic discrimination despite a showing that not a single Black had served on any jury in the county for at least fifteen years. See *supra* notes 79-81 for a discussion of this aspect of the *Swain* decision.

⁴¹⁸ *Edmonson II*, 895 F.2d at 220-23.

⁴¹⁹ *Batson*, 476 U.S. at 99. The Court stated:

The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Id.

⁴²⁰ *Id.* at 100 (White, J., concurring).

⁴²¹ *Edmonson II*, 895 F.2d at 231 (Rubin, J., dissenting).

⁴²² *Id.*

In addition to an inaccurate reading of the case law, the *Edmonson II* court's reasoning is also problematic. Judge Gee states that striking a juror out of fear that the juror may tend to favor a member of the same race is permissible because it is not demeaning to the juror.⁴²³ But to exclude a juror out of suspicion that the juror, because of race, will be unable impartially to decide a case clearly demeans that juror's abilities,⁴²⁴ and was expressly forbidden in *Batson*.⁴²⁵

Later, in his state action analysis, Judge Gee reasons that the judge cannot be responsible for any discrimination because all he or she does is "stand aside" while the private attorney discriminates, and therefore the fault, if any, must lie with the system which allows such challenges.⁴²⁶ In addition to raising the question why a judge sworn to uphold the Constitution should stand aside to permit private discrimination, the statement lays bare the fact that unfettered peremptory challenges are inherently discriminatory⁴²⁷ and ultimately cannot co-exist with the equal protection clause.⁴²⁸

Finally, Judge Gee places significant reliance on the long history of the challenge,⁴²⁹ and states that the ultimate fairness of the

⁴²³ *Id.* at 219, 221 n.6, 224.

⁴²⁴ *See, e.g., Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting), in which Justice Rehnquist admitted: "Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken."

⁴²⁵ *Id.* at 89. The *Edmonson II* court gives three hypothetical examples of peremptory challenges exercised against Blacks which are not racially demeaning. 895 F.2d at 224. The first is a striking black airline pilot in an unrelated suit against another airline. This example is inapposite because the strike would not be based on race, but on commercial affiliations. The second is a black juror in a contract action against a known Ku Klux Klansman. But this example is also imperfect because this juror may well be excused for cause because of the very real possibility of bias. In any event, these two strikes are admittedly not racially degrading. The third example, however, is the situation in the instant case: striking a black juror out of fear that he or she may favor one's opponent because of race. Judge Gee states conclusorily that it is "very plain indeed" that this strike is also innocuous. But while the first two strikes are based on realistic possibilities of bias not necessarily related to race, the third is based solely on the belief that the black juror is incapable of impartially considering a case made against a member of his own race. This race-based attribution, which white lawyers almost never make about white jurors, unquestionably demeans the judgment and integrity of the black juror.

⁴²⁶ *Edmonson II*, 895 F.2d at 222, 226.

⁴²⁷ In frequently quoted language, the *Batson* Court declared, "there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

⁴²⁸ *See id.* at 102-08 (Marshall, J., concurring).

⁴²⁹ *Edmonson II*, 895 F.2d at 223. Judge Gee states that "at all events, a procedural device of such great age and broad acceptance as the civil peremptory challenge should require

challenge comes from the fact that all jurors are subject to it.⁴³⁰ But such arguments, essentially justifying the practice because everyone has always done it, and that it works both ways, cannot sustain a practice shown to violate fundamental civil rights.⁴³¹ Peremptory challenges are at most a common law and statutory right,⁴³² and such rights must bow to constitutional rights.

Judge Rubin, dissenting in *Edmonson II*, wrote the opinion he should have initially written, convincingly responding to each of the arguments raised by the majority. The dissent effectively refutes the minor arguments based on history, utility and procedural convenience, mainly because such factors can be of little consequence when balanced against basic civil rights.⁴³³ More importantly, Judge Rubin advances a strong state action analysis, discussing in detail how the trial court's administration of peremptory challenges satisfies the *Lugar* test, and applying with greater specificity other state action cases, namely *Burton* and *Reitman*.⁴³⁴ Judge Rubin further points out how the majority misinterprets *Swain*, *Batson* and *Polk County*.⁴³⁵ He is able this time around to cite federal appellate level support for the extension of *Batson* to civil cases.⁴³⁶

The greatest strength of Judge Rubin's opinion, however, is its foundation in the language and spirit of the fourteenth amendment. His arguments are inspired by his conviction that the equal protection clause simply cannot permit the exclusion of United States citizens from jury service solely on the basis of their race.⁴³⁷ This consistency with the guiding principles of the Reconstruction Amendments makes Judge Rubin's arguments substantially more persuasive than the majority's drawing of fine distinctions regarding

little defense: clearly, for a long time, and in jurisdiction after jurisdiction, it has been found to serve useful purposes." *Id.*

⁴³⁰ *Id.* at 226. Judge Gee here echoes the argument made by then Justice Rehnquist in his dissent in *Batson*. See *Batson*, 476 U.S. at 137-38 (Rehnquist, J., dissenting).

⁴³¹ *Edmonson II*, 895 F.2d at 237-38 (Rubin, J., dissenting).

⁴³² See *supra* notes 19-34 for a discussion of the origins and history of the peremptory challenge.

⁴³³ *Id.* at 227-28, 237-38 (Rubin, J., dissenting).

⁴³⁴ *Id.* at 229-33 (Rubin, J., dissenting). This is in contrast to his rather conclusory statements in *Edmonson I*. See *supra* notes 254 and 362-64 and accompanying text for a discussion of the *Edmonson I* court's handling of the state action cases.

⁴³⁵ *Edmonson II*, 895 F.2d at 231, 233-35 (Rubin, J., dissenting). See *supra* notes 404-22 for an analysis of the majority's reading of those cases.

⁴³⁶ *Edmonson II*, 895 F.2d at 235 (Rubin, J., dissenting). Judge Rubin did not have the benefit of the *Fludd* and *Reynolds* decisions when writing his opinion in *Edmonson I*.

⁴³⁷ See, e.g., *Edmonson II*, 895 F.2d at 235, 238 (Rubin, J., dissenting).

evidentiary burdens, the role of the civil jury and the ministerial function of the civil judge.

The *Edmonson* decisions by themselves demonstrate the sharp division in the federal judiciary over the extension of *Batson* to civil trials. The recent decisions in *Fludd v. Dykes* and *Reynolds v. City of Little Rock* now create a direct conflict in the circuits,⁴³⁸ which the Supreme Court will now address when it hears the *Edmonson* case.⁴³⁹ In *Clark*, *Fludd* and *Reynolds*, the lower federal courts have taken the Supreme Court's lead in *Batson* and extended equal protection against racism in jury selection almost as far as possible without eliminating peremptories entirely. In all events, the principle of *Batson* that peremptory challenges are subject to the restrictions of the fourteenth amendment is already so firmly established, there would appear to be little room for turning back.

V. CONCLUSION

The ultimate fate of peremptory challenges notwithstanding, an examination of the case law from *Strauder* to the *Edmonson* decisions, informed not only by a commitment to racial equality but also by a sense of the importance of preserving the legitimacy of the nation's judicial system, leads to the conclusion that peremptory challenges cannot be used to discriminate on racial or ethnic grounds in a criminal or civil trial.⁴⁴⁰ *Edmonson II* notwithstanding,

⁴³⁸ To summarize the conflict in the circuits, the Court of Appeals for the Eleventh Circuit has held in favor of extending *Batson* to civil trials. *Fludd v. Dykes*, 863 F.2d 822, 823 (11th Cir.), *cert. denied*, 110 S. Ct. 201 (1989). The Fifth Circuit Court of Appeals has now held against the extension of *Batson*. *Polk v. Dixie Ins. Co.*, 897 F.2d 1346, 1347 (5th Cir. 1990); *Edmonson II*, 895 F.2d at 219. Panels in the Eighth Circuit have reached opposite conclusions: *Reynolds v. City of Little Rock*, 893 F.2d 1004, 1004 (8th Cir. 1990); *Swapshire v. Baer*, 865 F.2d 948, 953-54 (8th Cir. 1989); *Wilson v. Cross*, 845 F.2d 163, 164 (8th Cir. 1988). The Courts of Appeals for the Fourth, Sixth and Seventh Circuits have expressly declined to address the issue. *See Nowlin v. General Tel. Co.*, 892 F.2d 1041 (4th Cir. 1989) (unpublished opinion); *Robinson v. Quick*, 875 F.2d 867 (6th Cir. 1989) (unpublished opinion), *cert. denied*, 110 S. Ct. 149 (1990); *Boykin v. Hamilton County Bd. of Educ.*, 869 F.2d 1488 (6th Cir. 1989) (unpublished opinion); *Maloney v. Plunkett ("Maloney II")*, 854 F.2d 152 (7th Cir. 1988).

⁴³⁹ Although the Supreme Court's decision in *Holland v. Illinois*, 110 S. Ct. 803 (1990), that the sixth amendment does not prohibit racially motivated peremptories may indicate that the Court has grown less receptive to such claims since *Batson*, a majority of the Justices apparently still support the *Batson* rule. Five members of the *Batson* majority are still on the Court, and Justice Kennedy indicated the position had merit in his *Holland* concurrence. *Id.* at 811 (Kennedy, J., concurring). See *supra* note 91 for a discussion of the *Holland* case and the status of the *Batson* majority.

⁴⁴⁰ For a contrary conclusion, see Note, *supra* note 176, at 194-95. See *supra* note 364 for a further discussion of the arguments in that Note.

the development of the case law has shown a fairly consistent broadening of the fourteenth amendment protections guaranteed to those involved in the judicial process, as well as a concomitant narrowing of the ability of private actors legally to discriminate in all areas—housing, public accommodations, jury selection. Thus, when private parties enter the courthouse, they should do so with the knowledge that the state cannot aid them in giving effect to private biases in derogation of the other party's rights to equal protection and due process. Because *Edmonson II* does not uphold this principle, it cannot claim to be consistent with *Strauder* and its progeny.

The importance of equal rights for all races cannot be disputed. Another concern, however, is the need to preserve complete fairness and justice in the nation's courts, in theory, in perception, and in practice. This concern is equally compelling because it implicates the nation's ability to ensure that equality. Even the slightest appearance of invidious discrimination in a court of law cannot be permitted. To follow *Edmonson II* and tolerate such discrimination would damage public confidence and faith in the judicial system and the justice meted out by that system.

These concerns for equal rights and the ultimate fairness and justice in our courts are the backbone of the equal protection and due process clauses of the fourteenth amendment. The reasoning and spirit behind the holdings protecting racial equality in jury composition arise from these concerns. In *Batson* and its progeny through *Edmonson*, the countervailing value to be outweighed was the historic privilege of the peremptory challenge. The challenge itself was originally designed to serve many of the same values. Yet, equal protection and due process are constitutional values, whereas peremptory challenges carry only the weight of statutes and common law. When these bodies of law come into conflict, the Constitution must always prevail, and that in itself should be sufficient to dispose of the question the peremptory challenge cases have posed. In a court sworn to uphold equal protection of the laws, the very idea of a peremptory challenge is suspect, but the court must at least, as recognized in *Batson* and *Edmonson I*, guarantee that they are exercised in a manner and with an effect which is completely free of invidious discrimination.

ROBERT M. O'CONNELL