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Peremptory Challenges: Edmonson v. Leesville Concrete Co. and the Batson Motion in Civil Litigation

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PEREMPTORY CHALLENGES: *EDMONSON v. LEESVILLE CONCRETE CO.* AND THE *BATSON* MOTION IN CIVIL LITIGATION

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I. INTRODUCTION

In *Batson v. Kentucky*[1] the United States Supreme Court established procedures that allow a defendant in a criminal trial to challenge a prosecutor's use of peremptory challenges to prevent members of a cognizable racial minority from serving on a petit jury.[2] The defendant may establish a prima facie violation of the Equal Protection Clause of the Fourteenth Amendment by satisfying a two-part test. The defendant must show membership in a cognizable racial group against whom the prosecutor exercised the discriminatory challenges[3] and that the facts and circumstances raise an inference that the prosecutor challenged the prospective jurors because of their race.[4] The defendant's prima facie showing constitutes what has come to be known as a *Batson* motion, which shifts to the prosecutor the burden of justifying the challenges on some nonracial grounds.[5] In *Edmonson v. Leesville Concrete Co.*[6] the United States Supreme Court reversed a Fifth Circuit Court of Appeals opinion and held that *Batson*'s equal protection analysis applies to private litigants in civil trials.[7] Prior to this

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1. 476 U.S. 79 (1986).

2. *Id.* at 96-98.

3. *Id.* at 96. The Supreme Court recently modified this requirement in Powers v. Ohio, 111 S. Ct. 1364 (1991). A defendant may now establish a prima facie equal protection violation even if the defendant is not a member of the racial minority against whom the prosecutor exercised the discriminatory challenges. *Id.* at 1373-74.

4. *Batson*, 476 U.S. at 96-97.

5. *Id.* at 97.

6. 111 S. Ct. 2077 (1991).

7. The Fifth Circuit, sitting en banc, had held that *Batson* did not apply to private litigants in civil trials. Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991); *see also* Polk v. Dixie Ins. Co., 897 F.2d 1346, 1347 (5th Cir. 1990) (citing *Edmonson* for the proposition that *Batson* does not

decision several other federal courts had addressed the applicability of the *Batson* rule to civil trials. A panel of the Eleventh Circuit Court of Appeals in *Fludd v. Dykes*[8] and a panel of the Seventh Circuit Court of Appeals in *Dunham v. Frank's Nursery & Crafts, Inc.*[9] held that *Batson* applies to private litigants in civil trials. Several other federal courts had acknowledged the issue without deciding it.[10]

Additionally, several state courts had addressed the issue. The courts of last resort in New York[11] and Hawaii[12] interpreted their state constitutions to require private defense counsel in criminal trials to justify their challenges on nondiscriminatory grounds. The South Carolina Supreme Court[13] and the Texas Court of Appeals[14] held that the Fourteenth Amendment does not require application of *Batson* to private litigants in civil trials. However, the Supreme Court of Alabama held that the Fourteenth Amendment requires application of *Batson* to private litigants in civil trials.[15]

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apply to a civil suit between solely private parties), *vacated*, 111 S. Ct. 2791 (1991).

8. 863 F.2d 822, 823 (11th Cir.), *cert. denied*, 493 U.S. 872 (1989); *see also* Barfield v. Orange County, 911 F.2d 644, 647-48 (11th Cir. 1990) (finding that the explanation for challenging jurors was not insufficient as a matter of law), *cert. denied*, 111 S. Ct. 2263 (1991).

9. 919 F.2d 1281, 1282 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991).

10. Nowlin v. General Tel. Co., No. 87-1085 (4th Cir. Dec. 19, 1989) (WL, CTA 4 database) ("We avoid addressing the question whether *Batson* might apply, and think the court [below] did not err in deciding, under the *Batson* procedure, that defense counsel had in any event offered sufficient non-discriminatory reasons for exercising the peremptory challenges here in issue."); Robinson v. Quick, Nos. 88-3298, 88-3655 (6th Cir. May 15, 1989) (WL, CTA 6 database) (holding that defendant failed to make out the prima facie case required by *Batson*), *cert. denied*, 493 U.S. 850 (1989); Jones v. Lewis, 874 F.2d 1125, 1129 (6th Cir. 1989) ("Assuming *arguendo* the correctness of appellant's argument that *Batson* applies to civil actions, we conclude that *Batson* should not be applied retroactively in this context."); Maloney v. Plunkett, 854 F.2d 152, 155 (7th Cir. 1988) ("[Whether] *Batson does* apply in all cases [is] a question we leave open; we express no view on that question . . . ."); Wilson v. Cross, 845 F.2d 163, 164-65 (8th Cir. 1988) (holding that the party which objected to the challenges failed to establish a prima facie case as required by *Batson* despite the court's "strong doubts about whether *Batson* was intended to limit the use of peremptory strikes in civil cases"); Esposito v. Buonome, 642 F. Supp. 760 (D. Conn. 1986) (holding that the party that objected to the challenges failed to establish a prima facie case as required by *Batson*).

11. People v. Kern, 554 N.E.2d 1235 (N.Y.), *cert. denied*, 111 S. Ct. 77 (1990).

12. State v. Levinson, 795 P.2d 845 (Haw. 1990).

13. Chavous v. Brown, 396 S.E.2d 98 (S.C. 1990), *vacated*, 111 S. Ct. 2791, *rev'd per curiam*, 409 S.E.2d 356 (S.C. 1991). The South Carolina Supreme Court reversed its decision in *Chavous* in light of the United States Supreme Court's opinion in *Edmonson*. 409 S.E.2d at 356-57.

14. Powers v. Palacios, 794 S.W.2d 493, 495 (Tex. Ct. App. 1990), *rev'd per curiam*, 813 S.W.2d 489 (Tex. 1991). The Texas Supreme Court reversed *Powers* in light of the United States Supreme Court's opinion in *Edmonson*. 813 S.W.2d at 490.

15. Thomas v. Diversified Contractors, Inc., 551 So. 2d 343 (Ala. 1989).

This Note considers the propriety of applying *Batson* to restrict peremptory challenges in civil litigation. First, it briefly reviews the history and purpose of peremptory challenges. It then outlines the history of modern limitations on the exercise of peremptory challenges and considers whether those limitations properly apply in civil litigation. This Note also considers whether the *Edmonson* Court's decision to apply the equal protection limitation to civil litigation was correct and the effect that decision has on private litigants' personal liability under 42 U.S.C. § 1983.[16] Finally, it outlines current state court treatment of peremptory challenges.

II. HISTORY AND PURPOSE

The use of peremptory challenges in criminal proceedings developed early in the English common law, although they were not available in civil trials. William Blackstone described the peremptory challenge as "an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all."[17]

Common-law courts originally allowed both the defendant and the King's prosecutor to use peremptory challenges. By 1305 Parliament had become displeased with the Crown's use of peremptory challenges, however, and sought to end the practice by enacting the Ordinance for Inquests.[18] That statute explicitly stated that "if they that sue for the King will challenge any of those Jurors, they shall assign of their Challenge a Cause certain."[19]

Despite this clear statutory prohibition, the common-law courts continued to view the availability of peremptory challenges to both the defendant and the King's prosecutor as essential. The courts developed a practice that allowed the King's prosecutor to ask certain jurors to stand aside without assigning any cause to the request.[20] Only if a full jury could not be assembled from the jury venire did the courts require the prosecutor to assign a cause for excusing the juror.[21]

The Ordinance for Inquests clearly expressed Parliament's desire to restrict the prosecutor's use of challenges. Although the development of the common law effectively circumvented the Ordinance for Inquests, it did not alter a primary purpose of peremptory challenges—to provide the defendant with additional protection from the

16. 42 U.S.C. § 1983 (1988).

17. 4 WILLIAM BLACKSTONE, COMMENTARIES *353.

18. An Ordinance for Inquests, 1305, 33 Edw. 4 (Eng.).

19. *Id.*

20. *See generally* JON M. VAN DYKE, JURY SELECTION PROCEDURES 148-49 (1977) (discussing the English doctrine of "standing jurors aside").

21. 4 BLACKSTONE, *supra* note 17.

power of the state. Blackstone characterized the peremptory challenge as "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous."[22] This statement, together with the Ordinance for Inquests, implies that peremptory challenges were intended to be a buffer between the defendant and the state.

American colonial courts accepted the English courts' procedure that allowed defendants to exercise peremptory challenges and prosecutors to ask jurors to stand aside. After the American Revolution the states gave defendants a statutory right to peremptorily challenge jurors and accepted as part of the received common law the prosecutor's right to request jurors to stand aside.[23]

In 1790 Congress passed legislation that gave defendants in federal courts the right to peremptory challenges.[24] Subsequently, controversy arose concerning whether prosecutors in federal courts also had the right to ask jurors to stand aside.[25] In 1827 Supreme Court Justice Joseph Story stated in dictum that the stand-aside rule had been "recognised down to the present times."[26] Nevertheless, in 1856 the Court held that federal courts were not required to recognize "standing aside" and should follow the rule applied in the state in which they sat.[27]

Gradually, the states began to authorize prosecutorial peremptory challenges by statute.[28] Many states, however, allowed the prosecutor fewer challenges than those granted to the defendant.[29] This restriction on the prosecutor's use of peremptory challenges was an apparent effort by the states to favor defendants. Once again, this gives rise to the inference that the intended use of peremptory challenges was as a buffer between the defendant and the power of the state.

As the states began to pass statutes that permitted the use of peremptory challenges by prosecutors, they also extended the use of peremptory challenges to civil litigation.[30] Currently, all fifty states pro-

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22. *Id.*

23. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 215-16 (1965), *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986); *see also* VAN DYKE, *supra* note 20, at 148 (stating that in early state court decisions the 1305 statute that allowed defendants to challenge was accepted, but the prosecution's right to challenge aroused more opposition and was less widely recognized).

24. Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119.

25. *See* VAN DYKE, *supra* note 20, at 149.

26. United States v. Marchant, 25 U.S. (12 Wheat.) 480, 483 (1827).

27. United States v. Shackleford, 59 U.S. (18 How.) 588, 590 (1856).

28. *See generally* VAN DYKE, *supra* note 20, at 148-49 (discussing some of the states).

29. For a state-by-state comparison of the number of peremptory challenges allowed to opposing parties, see WALTER E. JORDAN, JURY SELECTION 315-36 (1980).

30. *See* Swain v. Alabama, 380 U.S. 202, 217 (1965), *overruled in part by* Batson v.

vide for peremptory challenges in civil trials.[31]

The use of peremptory challenges in civil litigation is not as deeply rooted as the use of peremptory challenges in criminal proceedings. Nevertheless, as long as peremptory challenges are allowed in civil trials, their exercise need not be restricted in the same manner as in criminal trials because the parties do not need protection from the power of the state. Furthermore, the parties in civil trials are more evenly matched than the parties in criminal trials. Neither needs protection from the established power of the other. The purpose for peremptory challenges in civil proceedings is simply to obtain a jury that is likely to view one's position favorably and to avoid a jury that may be biased toward the other side. Therefore, it is more appropriate to restrict the use of peremptory challenges by the state in criminal trials than it is to restrict the use of peremptory challenges by private litigants in civil trials.

III. LIMITATIONS ON PEREMPTORY CHALLENGES

Courts have used two principal theories to limit the use of peremptory challenges by an individual litigant. First, courts have stated that juries will be impartial only if the petit jury, as well as the jury venire, is composed of a representative cross-section of the community. Second, by employing an equal protection analysis, courts have precluded the use of peremptory challenges in a racially discriminatory

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Kentucky, 476 U.S. 79 (1986).

31. ALA. R. CIV. P. 47(b); ALASKA R. CIV. P. 47(d); ARIZ. R. CIV. P. 47(a)(3); ARK. CODE ANN. § 16-33-203 (Michie 1987); CAL. CIV. PROC. CODE § 231 (West Supp. 1991); COLO. R. CIV. P. 47(h); CONN. GEN. STAT. ANN. § 51-241 (West 1985); DEL. SUPER. CT. CIV. R. 47(b); FLA. R. CIV. P. 1.431(d); GA. CODE ANN. § 15-12-125 (Michie 1990); HAW. REV. STAT. § 635-29(b) (1988); IDAHO R. CIV. P. 47(j); ILL. ANN. STAT. ch. 110, para. 2-1106 (Smith-Hurd Supp. 1990); IND. CODE ANN. § 34-1-20.5-3 (Burns 1986); IOWA R. CIV. P. 187(g); KAN. CIV. PROC. CODE ANN. § 60-247(c) (Vernon Supp. 1990); KY. R. CIV. P. 47.03; LA. CODE CIV. PROC. ANN. art. 1764 (West 1990); ME. R. CIV. P. 47(c); MD. R. CIV. P. 2-512(h); MASS. GEN. LAWS ANN. ch. 234, § 29 (West 1986); MICH. CT. R. 2.511(E); MINN. STAT. ANN. § 546.10 (West 1988); MISS. R. CIV. P. 47(c); MO. ANN. STAT. § 494.480 (Vernon Supp. 1991); MONT. R. CIV. P. 47(b); Nebraska, permitted by local court rules (*see* JORDAN, *supra* note 29, at 327); NEV. REV. STAT. ANN. § 16.040 (Michie 1986); N.H. REV. STAT. ANN. § 519:19 (1974); N.J. STAT. ANN. § 2A:78-7(a) (West Supp. 1991); N.M. STAT. ANN. § 38-5-14 (Michie Supp. 1991); N.Y. CIV. PRAC. L. & R. 4109 (Consol. Supp. 1991); N.C. GEN. STAT. § 9-19 (1991); N.D. R. CIV. P. 47(b); OHIO R. CIV. P. 47(B); OKLA. STAT. ANN. tit. 12, § 573 (West 1988); OR. R. CIV. P. 57D.(2); PA. R. CIV. P. 221; R.I. GEN. LAWS § 9-10-18 (1985); S.C. CODE ANN. § 14-7-1050 (Law. Co-op. Supp. 1990); S.D. CODIFIED LAWS ANN. § 15-14-7 (1984); TENN. CODE ANN. § 22-3-105 (1980); TEX. R. CIV. P. 233; UTAH R. CIV. P. 47(e); VT. R. CIV. P. 47(c); VA. CODE ANN. § 8.01-359(B) (Michie Supp. 1991); WASH. REV. CODE ANN. § 4.44.130 (West 1988); W. VA. CODE § 56-6-12 (1966); WIS. STAT. ANN. § 805.08(3) (West Supp. 1991); WYO. STAT. § 1-11-202 (1988).

manner.

A. Representative Cross-Section Limitation

The Supreme Court recently held in *Holland v. Illinois*[32] that the Sixth Amendment requirement that a jury venire must be composed of a representative cross-section of the community cannot be extended to the petit jury.[33] Consequently, the Sixth Amendment cannot operate to restrict the exercise of peremptory challenges in the formation of a petit jury.[34] Justice Scalia, writing for the Court, specifically stated

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32. 493 U.S. 474 (1990).

33. *Id.* at 481. Specifically, the Court stated:

> Our relatively recent cases, beginning with *Taylor v. Louisiana*, hold that a fair-cross-section venire requirement is imposed by the Sixth Amendment, which provides 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 . . . ." The fair-cross-section venire requirement is obviously not explicit in this text, but is derived from the traditional understanding of how an "impartial jury" is assembled. That traditional understanding includes a representative venire, so that the jury will be, as we have said, "drawn *from* a fair cross section of the community." But it has never included the notion that, in the process of drawing the jury, that initial representativeness cannot be diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interests . . . .

Id. at 480 (citations omitted) (quoting Taylor v. Louisiana, 419 U.S. 522, 527 (1975)).

34. *Id.* at 481. Prior to the Supreme Court's decision in *Holland*, some federal courts had extended the Sixth Amendment representative cross-section requirement to the petit jury. *See, e.g.*, McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986). The *McCray* court acknowledged that the Sixth Amendment does not confer on the defendant a constitutional right to a petit jury that actually reflects the composition of the community. *Id.* at 1128 (citing Taylor v. Louisiana, 419 U.S. 522, 538 (1975)). However, that court further stated: "We thus agree that the Sixth Amendment does not require any action to ensure that the representative character of the venire be carried over to the petit jury; we think the Amendment simply prohibits the state's systematic elimination of the possibility of such a carry-over." *Id.* at 1129.

The *McCray* court's reasoning is no longer constitutionally persuasive in light of *Holland*. However, the court derived much of that reasoning from state court opinions interpreting state constitutions. Therefore, the extension of the representative cross-section requirement to petit juries must still be considered a valid restriction on the use of peremptory challenges in some states. *See, e.g.*, People v. Wheeler, 583 P.2d 748 (Cal. 1978); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 387 N.E.2d 499 (Mass.), *cert. denied*, 444 U.S. 881 (1979); State v. Crespin, 612 P.2d 716 (N.M. Ct. App. 1980), *modified sub nom.* State v. Sandoval, 736 P.2d 501 (N.M. Ct. App. 1987).

At least three jurisdictions have employed the representative cross-section analysis to limit peremptory challenges by parties in civil trials pursuant to provisions in their state constitutions that are similar to the Sixth Amendment. *See* Holley v. J & S Sweeping Co., 192 Cal. Rptr. 74 (Ct. App. 1983); Williams v. Coppola, 549 A.2d 1092 (Conn.

that "[a] prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment."[35]

Because the Sixth Amendment does not apply to civil trials, this reasoning is merely instructive. However, if the Supreme Court has declined to allow the Sixth Amendment right to an impartial jury to restrict peremptory challenges, it is unlikely to find that the Seventh Amendment right to a jury trial can operate to restrict peremptory challenges in the civil context. Accordingly, it is appropriate to focus on the Fourteenth Amendment's Equal Protection Clause and the limitations it places on peremptory challenges.

B. Equal Protection Limitation

In 1880 the Supreme Court held in *Strauder v. West Virginia*[36] that a state violates the Equal Protection Clause whenever it acts to prevent black persons from serving on a jury. The statute at issue in *Strauder* stated specifically that " '[a]ll white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors.' "[37] From this language the Court concluded that "the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State."[38]

The Supreme Court first indicated that the Equal Protection Clause could limit the exercise of peremptory challenges in the 1965 case of *Swain v. Alabama*.[39] In *Swain* the defendant claimed on appeal that the state's prosecutor violated the equal protection principle of *Strauder* when he used his peremptory strikes to remove all six black persons who remained on the jury venire. Justice White, writing for the majority, acknowledged that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the adminis-

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Super. Ct. 1986); City of Miami v. Cornett, 463 So. 2d 399 (Fla. Dist. Ct. App. 1985).

For an exhaustive analysis of the representative cross-section requirement for an impartial jury as a limitation on peremptory challenges, see Timothy Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 TEX. TECH L. REV. 921, 930-43 (1988).

35. *Holland*, 493 U.S. at 478.

36. 100 U.S. 303 (1880).

37. *Id.* at 305 (quoting 1872-73 W. Va. Acts 102).

38. *Id.* at 310.

39. 380 U.S. 202 (1965), *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986).

tration of justice violates the Equal Protection Clause."[40] After a comprehensive review of the history and purpose of peremptory challenges, the Court concluded, however, that "we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case."[41]

The Court based this determination in part on the presumption that "the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court."[42] Despite this presumption, the Court clearly stated that discriminatory use of peremptory challenges could violate the Equal Protection Clause. Specifically, the Court stated that "when the prosecutor in a county, in case after case, whatever the circumstances . . . is responsible for the removal of Negroes . . . with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance."[43]

The *Swain* Court acknowledged that the Equal Protection Clause may restrict the use of peremptory challenges. The Court established a formidable burden of proof, however, by holding that "the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time."[44]

The rule announced in *Swain* governed prosecutors' use of peremptory challenges for over twenty years. In 1986 the Supreme Court considered *Batson v. Kentucky*.[45] According to the Court, the case required it "to reexamine that portion of *Swain v. Alabama* concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury."[46]

In *Batson* the Court compared the discriminatory use of peremptory challenges with the elements necessary to establish a prima facie equal protection violation in the selection of a jury venire. The majority relied on cases decided after *Swain* which "recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*."[47] Based on these precedents the

40. *Id.* at 203-04 (citing Gibson v. Mississippi, 162 U.S. 565 (1896); *Ex parte* Virginia, 100 U.S. 339 (1879)).

41. *Id.* at 222.

42. *Id.*

43. *Id.* at 223 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

44. *Id.* at 227.

45. 476 U.S. 79 (1986).

46. *Id.* at 82 (citation omitted).

47. *Id.* at 95 (citing Castaneda v. Partida, 430 U.S. 482 (1977); Washington v. Davis, 426 U.S. 229 (1976); Alexander v. Louisiana, 405 U.S. 625 (1972)).

Court concluded that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[48]

By drawing this analogy the Court essentially eliminated the *Swain* presumption that the prosecutor's use of peremptory challenges had no discriminatory motive. In practical effect, the Court established the opposite presumption in *Batson* by allowing a defendant "to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' "[49]

IV. THE APPLICABILITY OF *BATSON* TO CIVIL TRIALS

Since the Supreme Court's decision in *Batson v. Kentucky*, courts have struggled with the question of its applicability to civil trials. At least one federal court has declined to apply *Batson* to a civil trial based on the inherent distinctions between criminal and civil trials.[50] The judge attached significance to the fact that a criminal defendant is "haled into court against his will"[51] and observed that the *Batson* Court had placed emphasis on the "plight of the accused criminal."[52] After pointing out these distinctions, the judge stated that "[f]or these two reasons alone, I conclude that *Batson* is not controlling here."[53]

Although the distinctions between civil and criminal trials reveal strong policy considerations for treating the two situations differently, they are not dispositive for determining the applicability of *Batson*'s equal protection rule to civil trials. By its very language the Equal Protection Clause of the Fourteenth Amendment restricts only discrimination to which the state is a party.[54] As the Eighth Circuit Court of

48. *Id.* at 96.

49. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

50. Esposito v. Buonome, 642 F. Supp. 760 (D. Conn. 1986). The court's comments concerning the application of *Batson* are dictum because the judge decided the case by finding that the complaining party had failed to make out a prima facie violation of purposeful discrimination. *See id.* at 761.

51. *Id.* at 761.

52. *Id.* (citing *Batson*, 476 U.S. at 86 ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge.")).

53. *Id.*

54. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). Equal protection analysis applies to the federal government by operation of the Due Process Clause of the Fifth Amendment. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975); Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

Appeals pointed out, "The more natural reading of *Batson* is that its rule of non-discrimination applies only to governmental actors, without distinguishing criminal and civil legal proceedings."[55] Accordingly, the critical issue is whether sufficient state action exists in a civil trial to allow for operation of the Fourteenth Amendment. Because state action is a prerequisite to the application of *Batson*'s equal protection rule, it is useful to distinguish civil trials in which the state or a political subdivision is a party from civil trials in which the state is not a party.

A. Civil Litigation in Which the State is a Party

The presence of state action in the discriminatory exercise of peremptory challenges is easily found when the state is a party to a civil trial. When a governmental entity is party to a civil trial, its case is presented by a government attorney who is as much a state actor as a prosecutor in a criminal trial.

At least one United States circuit court and one district court have specifically addressed the application of *Batson* to civil trials in which the state is a party.[56] In *Reynolds v. City of Little Rock*,[57] while specifically declining to decide whether *Batson* applies to civil trials in which the state is not a party,[58] the Eighth Circuit Court of Appeals concluded that a city attorney who exercised peremptory challenges in a discriminatory manner was a governmental actor.[59] This ruling allowed scrutiny of the attorney's actions under the *Batson* rule.

Reynolds arose out of a confrontation during which members of the Little Rock Police Department shot and killed John Reeves as he advanced toward an officer. Reynolds, the administratrix of Reeves's estate, sued the city under 42 U.S.C. § 1983[60] and alleged that the po-

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55. Reynolds v. City of Little Rock, 893 F.2d 1004, 1008 (8th Cir. 1990).

56. *See id.*; Clark v. City of Bridgeport, 645 F. Supp. 890 (D. Conn. 1986) (mem.). The Sixth Circuit Court of Appeals has dealt indirectly with this issue in an unreported decision. Boykin v. Hamilton County Bd. of Educ., No. 87-4025 (6th Cir. 1989) (WL, CTA 6 database). *Boykin* involved a civil rights suit against a county school board, which is a governmental entity. Although the court did not specifically hold that the discriminatory peremptory challenges exercised by the school board's attorney constituted state action, the parties stipulated at trial that *Batson* applied to the board's attorney. Accordingly, the court decided that it need not consider "whether as a general principle *Batson* applies to all civil cases." *Id.* at *5.

57. 893 F.2d 1004 (8th Cir. 1990).

58. *Id.* at 1008 n.2. The court specifically stated, "We express no view on whether the action of the court alone, in a case involving no governmental litigants, can supply the necessary element of governmental action." *Id.*

59. *Id.* at 1008-09.

60. 42 U.S.C. § 1983 (1988).

lice officers had used excessive force and that the city had failed to enforce adequate standards to control the use of deadly force by the police. During jury selection the city attorney used peremptory challenges to remove the two black persons who remained on the jury venire.[61] When Reynolds's counsel objected, the city attorney asserted that "the City was under no obligation to justify its exercise of peremptory strikes in a civil case."[62] The court rejected this assertion and reasoned that the Fourteenth Amendment does not distinguish between civil and criminal cases.[63]

The court concluded that the controlling distinction in the application of *Batson* is the distinction "between governmental actors and private actors."[64] The court reasoned that the *Batson* Court's failure to apply its ruling to defense counsel in a criminal proceeding supported the conclusion that the distinction between private actors and state actors is the significant one rather than the distinction between criminal trials and civil trials. The court stated that the equal protection principle "does not evaporate when a government lawyer represents his client in a civil suit."[65] Finally, the *Reynolds* court rejected the city's argument that the actions of the government attorney became private simply because the police officers had been sued in both their individual and official capacities.[66]

In *Clark v. City of Bridgeport*[67] the United States District Court for the District of Connecticut reached the same conclusion as the *Reynolds* court. *Clark* dealt with consolidated civil rights suits against the city. The *Clark* court held that the city attorney's use of peremptory challenges to prevent all of the black persons in the venire from serving on the petit jury violated the Equal Protection Clause.[68] The court noted that criminal defendants make most of the challenges to the discriminatory use of peremptory challenges. Nevertheless, it ruled that this did "not foreclose the application of *Batson* and the constitutional mandate for equal protection in civil cases where, as here, there is state action involved in the exercise of peremptory challenges."[69]

The *Clark* court failed, however, to define clearly that it was not expressing an opinion on the applicability of *Batson* to civil trials in

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61. *Reynolds*, 893 F.2d at 1006.
62. *Id.*
63. *Id.* at 1008.
64. *Id.*
65. *Id.* at 1008-09.
66. *Id.* at 1009 ("The City cannot exempt itself from the Equal Protection Clause simply because its counsel also represents individuals.").
67. 645 F. Supp. 890 (D. Conn. 1986) (mem.).
68. *Id.* at 891.
69. *Id.* at 895.

which the state is not a party. The *Clark* court noted that one other court[70] had found *Swain v. Alabama*[71] " 'applicable to both criminal and civil cases, regardless of whether the peremptory challenge is made by a governmental entity or a private party.' "[72] The *Clark* court therefore implied that *Batson* could apply to private parties in civil trials. Regardless of whether the *Clark* court intended such an implication, it concluded that "there simply is no reason why the equal protection analysis now employed in *Batson* should not apply with equal force to the instant case."[73] Based on *Reynolds v. City of Little Rock* and *Clark v. City of Bridgeport*, it seems certain that when a state or political subdivision is a party to a civil trial, the actions of the state's attorney will constitute state action.

B. Civil Litigation in Which the State is Not a Party

The presence of state action in the discriminatory exercise of peremptory challenges is more difficult to establish when the state is not a party to a civil trial. This is demonstrated by the disagreement among the United States Courts of Appeals that have directly ruled on the issue[74] and by Justice O'Connor's strong dissent from the majority opinion in *Edmonson v. Leesville Concrete Co.*[75]

In *Lugar v. Edmondson Oil Co.*[76] the Supreme Court established a two-part analysis for determining whether an action is "fairly attributable to the State."[77] First, the act or deprivation complained of, including the denial of equal protection, "must be caused by the exercise of some right or privilege created by the State."[78] Second, the act must be performed by "a person who may fairly be said to be a state ac-

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70. King v. County of Nassau, 581 F. Supp. 493 (E.D.N.Y. 1984) (mem.).

71. 380 U.S. 202 (1965), *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986).

72. *Clark*, 645 F. Supp. at 895 (quoting *King*, 581 F. Supp. at 499-500). The *King* court made this statement despite its earlier finding that "it is much easier to argue that a peremptory challenge made by a governmental entity constitutes governmental action than it is to argue that a peremptory challenge made by a private party and merely accepted by a court constitutes governmental action." *King*, 581 F. Supp. at 499.

73. *Clark*, 645 F. Supp. at 895.

74. *Compare* Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991) *with* Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991); Fludd v. Dykes, 863 F.2d 822 (11th Cir.), *cert. denied*, 493 U.S. 872 (1989).

75. *See* 111 S. Ct. 2077, 2089 (1991) (O'Connor, J., dissenting).

76. 457 U.S. 922 (1982).

77. *Id.* at 937.

78. *Id.*

tor."[79] The distinction between these two principles is less apparent when the discriminatory actor is a state official than when the discriminatory actor is a private party.[80]

Before a court can find the presence of state action in a civil trial, both parts of the *Lugar* test must be met. The peremptory challenge is clearly a right created by the state.[81] Civil trials theoretically present two possible state actors. First, the trial judge, as a state official, may qualify as a discriminatory state actor. Second, the private attorney, acting jointly with the trial judge, may qualify as a discriminatory state actor.

1. The Trial Judge as Discriminatory State Actor

Initially, an action by the trial judge seems to satisfy both parts of the *Lugar* analysis. The state creates by statutory enactment the right to peremptory challenges, and the trial judge is a state official. The critical question is, however, whether the judge engages in any discriminatory conduct.

In *Fludd v. Dykes*[82] the Eleventh Circuit Court of Appeals ruled that "[i]n overruling the objection, which informed the court that the peremptory challenger may be excluding blacks from the venire on account of their race, the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes."[83] The court arrived at this conclusion by reference to *Strauder v. West Virginia*,[84] *Virginia v. Rives*,[85] and *Neal v. Delaware*.[86] From these cases the court determined that "the Supreme Court has long recognized that the discriminatory actor is the trial court."[87]

A closer examination reveals that in each of these cases the state committed some predicate act that violated the Equal Protection

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79. *Id.*

80. *Id.* As the Supreme Court explained, these two principles "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions." *Id.*

81. *See supra* text accompanying notes 28-31.

82. 863 F.2d 822 (11th Cir.), *cert. denied*, 493 U.S. 872 (1989).

83. *Id.* at 828. Interestingly, the *Fludd* court should never have reached the question of whether the *Batson* rule applies to private civil litigants. The peremptory challenges at issue in the case were exercised by the county attorney in his official capacity. Telephone interview with Robert C. Daniel, County Attorney for Richmond County, Georgia (Oct. 30, 1990). The county attorney's status as a government lawyer qualified him as a state actor.

84. *Fludd*, 863 F.2d at 825 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)).

85. *Id.* at 828 (citing Virginia v. Rives, 100 U.S. 313 (1880)).

86. *Id.* (citing Neal v. Delaware, 103 U.S. 370 (1881)).

87. *Id.*

Clause and that the error committed by the trial court was its failure to redress a pre-existing equal protection violation. This situation is distinguishable from that in which a private party exercises a peremptory challenge in a discriminatory manner and the judge simply overrules an objection to the challenge. This type of peremptory challenge is a private act that the court cannot redress because, as an entirely private act, it does not violate the Fourteenth Amendment.

Strauder v. West Virginia[88] arose out of a criminal prosecution in which a black defendant had been tried by a jury composed entirely of white males as required by a West Virginia statute.[89] The defendant petitioned for removal of his case to the federal court and also moved to quash the venire because the state had denied his constitutional right to equal protection by excluding black persons from jury service.[90] The state trial court denied all of the defendant's motions.[91]

From these facts the Supreme Court determined that the West Virginia statute "amount[ed] to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State."[92] Accordingly, the state action that violated the Equal Protection Clause was the legislative enactment of the discriminatory statute. The Supreme Court held that the state court erred when it overruled the defendant's challenge of the state act because that act already had violated his Fourteenth Amendment equal protection rights.[93] The Court did not hold that the state court's ruling itself violated the Equal Protection Clause.

In *Virginia v. Rives*[94] two black men were indicted by, and tried before, juries made up entirely of white males, despite a Virginia statute that allowed black males to serve as jurors.[95] The defendants petitioned under a civil rights removal statute for removal of their case to a federal court and alleged that the state officer responsible for assembling their juries failed to select any black men because of their race.[96] The Court ruled that if the allegations in the complaint were proved, "[the officer's] act was the act of the State, and was prohibited by the Constitutional [Fourteenth] [A]mendment."[97] The removal statute that the *Rives* defendants attempted to use provided for removal

88. 100 U.S. 303 (1880).
89. *Id.* at 305.
90. *Id.* at 304-05.
91. *Id.*
92. *Id.* at 310.
93. *Id.*
94. 100 U.S. 313 (1880).
95. *Id.* at 315.
96. *Id.* at 321.
97. *Id.*

" 'when any . . . prosecution is commenced in any State court . . . against any person who is denied or cannot enforce in the judicial tribunals of the State . . . any right secured to him by any law providing for the equal civil rights of citizens of the United States.' "[98] The Court found that this statute did not apply to the defendants.[99] Because the state officer who had allegedly denied the defendant's civil rights violated a state law, the Court reasoned that "it can hardly be said that [the defendant] is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him."[100] The Court based this conclusion on the presumption that the state court would redress the previous denial of equal protection.[101]

Although the Court stated that "[i]f the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case,"[102] it did not hold that the trial judge was the discriminatory actor. The state officer already had violated the Equal Protection Clause while selecting the jurors. Therefore, the Supreme Court reasoned that the state court's failure to redress the pre-existing equal protection violation would result in the ultimate denial of the right.[103]

Neal v. Delaware[104] involved circumstances similar to those in *Rives*. State officers responsible for selecting jurors violated the Equal Protection Clause by excluding all black persons from the jury.[105] Because "[t]he action of those officers . . . is to be deemed the act of the State,"[106] the Supreme Court ruled that "the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution."[107]

These cases stand for the proposition that when a state official acts in a discriminatory manner and violates the Equal Protection Clause, it is error for the trial court not to redress that violation. If the state does not perform the discriminatory act, however, no equal pro-

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98. *Id.* at 317 (quoting Revised Statutes of the United States, Title XIII, ch. 7, § 641 (1873-74)).

99. *Id.* at 321-23.

100. *Id.* at 321.

101. *Id.* at 321-22.

102. *Id.* at 322.

103. *Id.*

104. 103 U.S. 370 (1881).

105. *Id.* at 397. The Court made it clear that the underlying equal protection violation originated with those officials. "The showing thus made . . . that no colored citizen had ever been summoned as a juror in the courts of the State . . . presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution . . . ." *Id.*

106. *Id.*

107. *Id.*

tection violation exists for the court to redress.

Those who favor the extension of *Batson*'s holding to private civil litigants assert that the trial judge's direction to a prospective juror that the juror should step down is sufficient state action to find an equal protection violation. However, this assertion still does not identify the source of the impermissible discriminatory decision. The trial judge does not decide to discriminate when the judge directs the prospective juror to step down. Rather, the judge simply decides to carry out functions allocated to judges under the statute. The private party has made the discriminatory decision; that decision is constitutionally permissible.

A private party litigant in a civil trial does not violate any law when that litigant challenges black jurors simply because they are black. Accordingly, it is improper to say that the trial court is the discriminatory actor. The court does not facilitate the denial of a right when that denial does not violate any law. If the trial judge's action is to be considered impermissible, it must be considered in conjunction with the private party's discriminatory decision.

Not only is the court's conclusion in *Fludd v. Dykes*[108] that "the Supreme Court has long recognized that the discriminatory actor is the trial court"[109] misguided in light of the precedents cited, but that conclusion also directly contradicts statements of the Supreme Court. First, in *Swain v. Alabama*[110] the Court observed that "[t]he essential nature of the peremptory challenge is that it is one exercised . . . without being subject to the court's control."[111] Although this statement is simply a factual observation, it nonetheless specifically contradicts the *Fludd* court's contention. Furthermore, despite *Batson*'s modification of *Swain*'s evidentiary standard, the historical and factual observations in *Swain* are still valid.[112]

Second, in *Batson* the Supreme Court specifically declined to comment on whether the new rule applied to the defendant's private counsel.[113] This statement is less persuasive, however, because the question was not specifically before the Court. Nevertheless, if the Supreme Court truly believed that the trial court was the discriminatory actor in

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108. 863 F.2d 822 (11th Cir.), *cert. denied*, 493 U.S. 872 (1989).

109. *Id.* at 828.

110. 380 U.S. 202 (1965), *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986).

111. *Id.* at 220.

112. *See* Edmonson v. Leesville Concrete Co., 895 F.2d 218, 221 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991).

113. Batson v. Kentucky, 476 U.S. 79, 89 n.12 (1986) ("We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.").

the exercise of peremptory challenges, it could have announced such a rule in *Swain* or *Batson* and restricted discriminatory peremptory challenges. The Court did not announce that rule, however, and left the clear implication that the prosecutor is the state actor.

In contrast to the Eighth Circuit's decision in *Fludd v. Dykes*,[114] the Fifth Circuit determined in *Edmonson v. Leesville Concrete Co.*[115] that the trial judge could not be considered a state actor. The *Edmonson* court determined that "[i]f the judge is the actor, then . . . it follows that every aspect of every civil trial, state and federal, is constitutionalized."[116] The court further stated that this would be "a quantum procedural leap that we leave for the Supreme Court to make, should it wish to do so."[117]

2. *The Private Attorney as Discriminatory State Actor*

In *Lugar v. Edmondson Oil Co.*[118] the Supreme Court stated that determining whether state involvement with private discriminatory conduct transforms the private conduct into state action is a question of fact.[119] When a private party acts in a discriminatory manner pursuant to a right or privilege created by the state, "something more"[120] must exist for that conduct to constitute state action. The *Lugar* Court identified four tests that have been used to determine whether this "something more" is present.[121]

Of the four tests, the joint action test and the state compulsion test could plausibly be used to characterize a private litigant's peremptory challenges as state action. The other two tests do not logically apply to a peremptory challenge situation.[122] Unfortunately, Justice

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114. 863 F.2d 822 (11th Cir.), *cert. denied*, 493 U.S. 872 (1989).

115. 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991).

116. *Id.* at 222.

117. *Id.* In reversing the *Edmonson* decision, the Supreme Court failed to take this leap in the manner described by the Fifth Circuit. Instead, the Court used a combination of several state action tests to find that the private party was a state actor. *See Edmonson*, 111 S. Ct. at 2082-87.

118. 457 U.S. 922 (1982).

119. *See id.* at 939.

120. *Id.*

121. *Id.* The Court identified these as the public function test (citing Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946)), the state compulsion test (citing Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)), the nexus test (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)), and the joint action test (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978)). *Id.* The Court did not determine whether these tests are "actually different" or merely "different ways of characterizing the necessarily fact bound inquiry." *Id.*

122. The public function test allows a court to find state action when a private party

Kennedy's majority opinion in *Edmonson v. Leesville Concrete Co.*[123] misstated Supreme Court precedent and erroneously applied the public function test to a private party's peremptory challenges.[124] Justice Kennedy also applied a form of the joint action test, which is more appropriate in analyzing peremptory challenges. However, as discussed below, neither the joint action test nor the state compulsion test require a court to characterize a private litigant's peremptory challenges as state action.

a. The Joint Action Test

The joint action test allows a court to find state action when a private party and a governmental entity act together to violate the Equal Protection Clause.[125] In *Edmonson v. Leesville Concrete Co.*[126] a majority of the Fifth Circuit Court of Appeals characterized the trial court's involvement in a private party's peremptory challenges as a "merely ministerial function."[127] The court reasoned that "simply permitting the venire members cut by counsel to depart is an action so minimal in nature that one of less significance can scarcely be imagined."[128] To support this conclusion the court cited *Blum v. Yaretsky*,[129] in which the Supreme Court said that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State."[130]

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performs an act traditionally performed by a governmental entity, Terry v. Adams, 345 U.S. 461 (1953) (administering a primary election), or provides a service traditionally provided by a governmental entity, Marsh v. Alabama, 326 U.S. 501 (1946) (administering a municipality). The nexus test allows a court to find state action when a private party is closely connected with a governmental entity. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (involving a lease for space in a government-owned and government-operated parking facility).

123. 111 S. Ct 2077 (1991).

124. *Id.* at 2092-93 (O'Connor, J., dissenting). Justice Kennedy used a two-step analysis in his opinion. First, he applied an implied form of the state action test to determine that private parties accomplish peremptory challenges with " 'the overt, significant assistance of state officials.' " *Id.* at 2084 (quoting Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988)). Second, he determined that peremptory challenges are a traditional government function. *Id.* at 2085.

125. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978) (finding that because the state had not acted jointly with the private party who acquired a lien pursuant to state law, there was no state action).

126. 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991).

127. *Id.* at 221.

128. *Id.*

129. 457 U.S. 991 (1982).

130. *Id.* at 1004 (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978); Jackson

The *Yaretsky* Court further stated that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment."[131] This statement is particularly instructive because *Flagg Bros., Inc. v. Brooks*,[132] which the *Lugar* Court cited as approving the joint action test,[133] also stated that "[t]his Court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State."[134]

In contrast to the Fifth Circuit majority's characterization of peremptory challenges, the dissent in *Edmonson* argued that "the private litigant employing peremptory challenges on the basis of race has 'acted together with or obtained significant aid from state officials' in a manner sufficient to meet the second part of the *Lugar* test."[135]

The Seventh Circuit Court of Appeals followed the joint action analysis in *Dunham v. Frank's Nursery & Crafts, Inc.*[136] and relied on *Shelley v. Kraemer*[137] to find that *Batson* applied to private civil litigants. This is curious because *Shelley* is most often cited as an example of the state compulsion test.[138] A majority of the Seventh Circuit panel decided that the trial judge "exercises his authority to excuse the juror"[139] and thus assists the private party's discrimination. The dissenting judge disagreed and stated that "the acquiescence of a judge when private litigants exercise peremptory challenges is fundamentally different from the state action established in *Shelley*."[140]

Although the question is not easily resolved, the analysis of the Fifth Circuit majority in *Edmonson* more accurately describes the procedure by which peremptory challenges are carried out. The party who exercises the challenge makes the decision to discriminate. The trial court takes no part in the discriminatory decision; rather the judge simply excuses the juror. This situation seems to fall squarely within

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v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970)).

131. *Id.* at 1004-05. (citing *Flagg Bros.*, 436 U.S. at 164-65; *Jackson*, 419 U.S. at 353).

132. 436 U.S. 149 (1978).

133. Lugar v. Edmondson Oil Co., 457 U.S. 922, 927 n.6 (1982).

134. *Flagg Bros.*, 436 U.S. at 164.

135. Edmonson v. Leesville Concrete Co., 895 F.2d 218, 233 (5th Cir. 1990) (en banc) (Rubin, J., dissenting) (footnote omitted) (quoting *Lugar*, 457 U.S. at 937), *rev'd*, 111 S. Ct. 2077 (1991).

136. 919 F.2d 1281 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991).

137. 334 U.S. 1 (1948).

138. *See infra* note 145 and accompanying text.

139. *Dunham*, 919 F.2d at 1286.

140. *Id.* at 1298.

the *Blum v. Yaretsky*[141] standard. The trial court merely acquiesces in the decision of the private party and does not transform the private litigant's decision into state action.

b. The State Compulsion Test

The state compulsion test allows a court to find state action when the state compels a private party to discriminate and thereby violates the Equal Protection Clause.[142] In *Shelley v. Kraemer*[143] the Supreme Court held that judicial enforcement of a private restrictive covenant can constitute state action.[144] *Shelley* is most accurately identified as an example of the state compulsion test.[145] Despite the historical and precedential importance of *Shelley*, neither *Fludd* nor the Fifth Circuit's *Edmonson* opinion discussed the decision. *Shelley* involved a suit to enforce a restrictive covenant. The Shelleys, a black couple, bought a piece of property that was subject to a restrictive covenant intended to prevent sale of the property to black persons.[146] The Kraemers, who owned an adjacent parcel of land, sued to enforce the covenant. They asked the court to prevent the Shelleys from taking possession of the property and to divest the Shelleys of title.[147] The Shelleys won at trial, but on appeal the Missouri Supreme Court ruled for the Kraemers and ordered the trial court to expel the Shelleys from the property and to divest them of title.[148]

The United States Supreme Court reversed. The Court first reemphasized that judicial action can qualify as state action for Fourteenth Amendment purposes[149] and then held that the trial court's eviction order constituted state action and violated the Equal Protection Clause.[150] The Court noted that both parties to the transaction had willingly entered into the contract of sale and that "but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."[151] In practical effect, the state court had

141. 457 U.S. 991 (1982).
142. Adickes v. S. H. Kress & Co., 398 U.S. 144, 170-71 (1970).
143. 334 U.S. 1 (1948).
144. *Id.* at 20.
145. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 12.3, at 433 (3d ed. 1986) [hereinafter NOWAK].
146. *Shelley*, 334 U.S. at 4-5.
147. *Id.* at 6.
148. *Id.* The Shelleys were living on the property at the time of the Missouri Supreme Court's decision. *Id.*
149. *Id.* at 14-15.
150. *Id.* at 20.
151. *Id.* at 19.

compelled the sellers of the property to discriminate against the Shelleys because the Shelleys were black. This state compulsion of a discriminatory decision violated the Equal Protection Clause.[152] The Court also emphasized that the state court had not "merely abstained from action,"[153] but instead had "made available . . . the full coercive power of government to deny . . . the enjoyment of property rights."[154]

Although *Shelley* presents facts more closely analogous to the exercise of peremptory challenges by private litigants than the cases relied on by the *Fludd v. Dykes*[155] court,[156] *Shelley* is distinguishable from the exercise of peremptory challenges by private litigants. During the exercise of peremptory challenges, a court never instructs or compels the private litigant to make a discriminatory decision. The private litigant alone chooses to challenge the prospective jurors.[157] Additionally, the language of *Shelley* distinguishes the case from private litigant peremptory challenges. In *Shelley* the Supreme Court specifically condemned the trial court's "active intervention" and the fact that it used "the full coercive power of government" to expel the Shelleys from their home.[158]

Consequently, the state compulsion test, like the joint action test, requires a court to determine whether the trial court has exercised "coercive power"[159] or simply expressed "[m]ere approval of or acquiescence in"[160] the private discriminatory act. *Shelley* should not be read, however, to require a court to find that private litigant peremptory challenges violate the Equal Protection Clause. During the exercise of peremptory challenges, the trial court neither compels a private discriminatory decision, actively intervenes in that decision, nor exercises coercive power. Rather, as indicated above, the court simply acquiesces in the private litigant's decision.

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152. *See* NOWAK, *supra* note 145, at 433-34. "[T]he state court order would be a judicial command to the current owner . . . to make a racial distinction in the sale of property. Such a command, interfering with a willing seller and a willing buyer, violates the [Fourteenth] [A]mendment." *Id.*; *see also* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2090-91 (1991) (O'Connor, J., dissenting).

153. *Shelley*, 334 U.S. at 19.

154. *Id.*

155. 863 F.2d 822 (11th Cir.), *cert. denied*, 493 U.S. 872 (1989).

156. *See supra* notes 80-103 and accompanying text.

157. *See* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2091 (1991) (O'Connor, J., dissenting).

158. *Shelley*, 334 U.S. at 19.

159. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

160. *Id.*

3. Edmonson v. Leesville Concrete Co.

In *Edmonson v. Leesville Concrete Co.*[161] the United States Supreme Court held that the equal protection component of the Fifth Amendment prohibits private litigants in civil cases from exercising peremptory challenges to discriminate in federal court proceedings. The Court acknowledged that racial discrimination "violates the Constitution only when it may be attributed to state action."[162] It also acknowledged that, in addition to being a constitutional requirement, the state action doctrine " 'preserves an area of individual freedom by limiting the reach of federal law' and 'avoids imposing on the State . . . responsibility for conduct for which they cannot fairly be blamed.' "[163] Nevertheless, the Court employed two of the tests identified in *Lugar v. Edmondson Oil Co.*[164] to find state action when a private party's lawyer makes a private decision to exercise a peremptory challenge against a member of a racial minority in a civil trial.

First, without identifying it, the Court employed a form of the joint action test to find that "a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court."[165] Second, the Court employed the public function test to find that peremptory challenges involve a traditional function of the government.[166]

To arrive at the conclusion that private peremptory challenges are exercised with the "overt, significant assistance of the court,"[167] Justice Kennedy, writing for the majority, relied almost exclusively on *Tulsa Professional Collection Services, Inc. v. Pope*[168] and did not mention the *Blum v. Yaretsky*[169] standard established six years prior to *Pope*. In *Pope* the creditors of an estate claimed that the state had denied them due process of law. The creditors argued that the statute provided an unreasonably short time within which they had to make a claim against the estate after having received notice to file their claims.

The *Pope* Court considered whether the state's notification procedure constituted state action, thereby triggering the due process guarantees of the Fourteenth Amendment.[170] The Court found that

161. 111 S. Ct. 2077 (1991).
162. *Id.* at 2082 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)).
163. *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982)).
164. 457 U.S. 922 (1982).
165. *Edmonson*, 111 S. Ct. at 2084.
166. *Id.* at 2085.
167. *Id.* at 2084.
168. 485 U.S. 478 (1988).
169. 457 U.S. 991 (1982).
170. *Pope*, 485 U.S. at 486-87.

Oklahoma's notification statute involved state action because it was not self-executing. In fact, the statute directed the executrix to publish notice, and the Court reinforced that direction with an "order expressly requiring appellee to 'immediately give notice to creditors.' "[171] The Court characterized this as "overt, significant assistance of state officials" that qualified as state action. The *Edmonson* Court relied on this language to support its finding that private party peremptory challenges qualify as state action. However, a statutory mandate to perform an act, reinforced by a court order, is distinguishable from a private party's personal decision to exercise a peremptory challenge.[172]

In addition to relying on *Pope*, the majority also relied on its own analysis of peremptory challenges to find that they are exercised with the overt and significant assistance of the court. The majority pointed out that the government establishes juror qualifications, summons jurors at random from a fair cross-section of the community, defines the jury wheel and voter lists, and requires jurors to complete qualification forms.[173] The majority also pointed out that trial courts can exercise extensive control over voir dire.[174] None of these actions, however, assist the private party litigant in the exercise of peremptory challenges. A trial court simply assembles the pool of individuals against whom the private litigant may decide to direct those challenges.[175]

Finally, the majority stated that "[w]hen a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused."[176] In reality, this is the full extent of the judge's involvement with the private litigant's discriminatory decision. Unfortunately, the majority failed to consider the *Blum v. Yaretsky*[177] standard to determine whether the judge's act of excusing the juror qualifies as the exercise of "coercive power"[178] or is "[m]ere approval of or acquiescence in"[179] the act of a private party. Significantly, the dissenters did consider *Yaretsky* and concluded that "[t]he judge does little more than

171. *Id.* at 487 (quoting trial record).

172. It is significant that the author of the *Pope* opinion, Justice O'Connor, strongly disagreed with Justice Kennedy's characterization of *Pope* in *Edmonson*. *See* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2091 (1991) (O'Connor, J., dissenting).

173. *Id.* at 2084.

174. *Id.*

175. As Justice O'Connor explained: "Most of [the majority's] evidence is irrelevant to the issue at hand. . . . All of this activity, as well as the trial judge's control over *voir dire*, are merely prerequisites to the use of a peremptory challenge; they do not constitute participation *in* the challenge." *Id.* at 2090 (O'Connor, J., dissenting) (citations omitted).

176. *Id.* at 2084.

177. 457 U.S. 991 (1982).

178. *Id.* at 1004.

179. *Id.*

acquiesce in [the] decision by excusing the juror."[180]

The *Edmonson* majority also held that a private litigant's exercise of a peremptory challenge qualifies as state action because it "involves the performance of a traditional function of the government."[181] However, even if the formation of a qualified jury is a traditional government function, it does not necessarily follow that a peremptory challenge directed against an otherwise qualified juror is a traditional government function.[182] In fact, as this Note's historical overview of peremptory challenges explains, one of the original purposes behind peremptory challenges was to protect criminal defendants from the power of government.[183] Although peremptory challenges in civil trials serve a different function, they do not necessarily serve a governmental function. The government's primary interest is to seat a qualified jury, but a litigant's primary interest is to seat a jury favorable to that litigant's position, or at least one that is not biased toward the opposing party's position. In this setting the peremptory challenge serves a distinctly private function.[184]

Not only did Justice Kennedy's majority opinion in *Edmonson* misstate the facts surrounding the exercise of peremptory challenges, but as Justice O'Connor pointed out in her dissent, "the Court has misstated the law."[185] The majority relied on *Terry v. Adams*[186] to support its position that peremptory challenges are a traditional function of government.[187] In *Terry* the Supreme Court held that elections conducted by a private organization constituted state action because the organization's candidate was certain to win the local democratic primary and the democratic candidate was certain to win the general election. The only factual similarity the majority established between elections and peremptory challenges was that "the objective of jury selection proceedings is to determine representation on a governmental body."[188] However, the majority failed to recognize that the public

180. *Edmonson*, 111 S. Ct. at 2090 (O'Connor, J., dissenting).

181. *Id.* at 2085.

182. As Justice O'Connor pointed out in her dissenting opinion: "The government otherwise establishes its requirements for jury service, leaving to the private litigant the unfettered discretion to use the strike for any reason. This is not part of the government's function in establishing the requirements for jury service." *Id.* at 2092 (O'Connor, J., dissenting).

183. *See supra* text accompanying notes 17-22.

184. "Peremptory challenges are not a traditional government function; the 'tradition' is one of unguided private choice." *Edmonson*, 111 S. Ct. at 2093 (O'Connor, J., dissenting).

185. *Id.*

186. 345 U.S. 461 (1953).

187. *Edmonson*, 111 S. Ct. at 2085 (citing Terry v. Adams, 345 U.S. 461 (1953)).

188. *Id.* at 2086.

function doctrine can be used to establish state action only if the traditional government function engaged in by the private party is one that is normally carried out *exclusively* by government.[189] As Justice O'Connor stated: "Even if one could fairly characterize the use of a peremptory strike as the performance of the traditional government function of jury selection, it has never been exclusively the function of the government to select juries; peremptory strikes are older than the Republic."[190] In sum, *Edmonson* stretches the state action doctrine to the breaking point and further confuses an already unclear area of constitutional jurisprudence.[191]

V. SECTION 1983 LIABILITY UNDER *EDMONSON*

In addition to confusing state action jurisprudence, the *Edmonson* opinion exposes private attorneys and litigants[192] to liability under 42 U.S.C. § 1983.[193] It seems inconceivable that a private attorney who exercises peremptory challenges in the best interests of a client could

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189. *Id.* at 2093 (O'Connor, J., dissenting) ("In order to constitute state action under this doctrine, private conduct must not only comprise something that the government traditionally does, but something that *only* the government traditionally does.") (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)).

190. *Id.*

191. *See id.* at 2096.

192. The *Edmonson* Court did not distinguish between the acts of the client and the acts of the private attorney. Therefore, although the *Edmonson* Court found state action, it is not clear who the state actor is. The Court used the term "private litigant" throughout the opinion, but it is unclear whether the Court intended to identify a private attorney's client as a state actor. It is not difficult to imagine a client defending a § 1983 suit by claiming that the lawyer made all decisions regarding the exercise of peremptory challenges. The client may view jury selection as an issue of strategy that the lawyer has authority to resolve without the client's input. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1983) ("[T]he lawyer should assume responsibility for technical and legal tactical issues . . . ."). To establish liability for a private attorney, however, the plaintiff would have to prove that the attorney was the actor in relation to the peremptory challenges. The fact that a state licenses an attorney is not sufficient to convert the acts of the attorney into acts under color of state law. Crawford-El v. Shapiro, 877 F.2d 59 (4th Cir. 1989) (per curiam) (text in Westlaw).

193. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

later have to defend a section 1983 suit brought by the opposing party; yet this is precisely the possibility that the Court has created.

The exposure to section 1983 liability is a direct result of the Court's misconstruction of the state action doctrine because, as the Supreme Court stated in *Lugar v. Edmondson Oil Co.*,[194] "[i]f the challenged conduct . . . constitutes state action . . . then that conduct [is] also action under color of state law and will support a suit under § 1983."[195] Because the Court found state action in a private party's exercise of peremptory challenges in a civil suit in *Edmonson*, the Court also found, perhaps unwittingly, that the exercise of peremptory challenges is conduct under color of state law.

A private attorney or litigant cannot escape liability under section 1983 by asserting that the constitutional deprivation was, under the *Edmonson* analysis, a deprivation of the excluded juror's rights. The requirements of third-party standing under section 1983 are identical to those in any other type of suit.[196] The *Edmonson* Court examined the Court's reasoning in *Powers v. Ohio*,[197] which held that a defendant in a criminal case who objects to the prosecution's exercise of peremptory challenges meets the requirements for third-party standing and therefore can assert the excluded juror's rights.[198] The *Edmonson* Court analyzed each requirement and found that the reasoning of the *Powers* Court applied equally in a civil case.[199] Therefore, a private attorney or litigant can be liable to the opposing party under section 1983 for the denial of a juror's right.

Although some may view the imposition of section 1983 liability on private parties to a lawsuit who exercise peremptory challenges in a discriminatory manner as a welcome development that will curb pri-

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194. 457 U.S. 922 (1982).

195. *Id.* at 935. The Court noted, however, that the converse is not always true.

> [A]lthough we hold that conduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law, it does not follow from that that all conduct that satisfies the under-color-of-state-law requirement would satisfy the Fourteenth Amendment requirement of state action.

Id. at 935 n.18.

196. Romano v. Harrington, 664 F. Supp. 675 (E.D.N.Y. 1987) (mem.).

> [T]he Court examines the relationship between plaintiff and the person whose right he seeks to assert and determines if (1) the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue and if (2) the litigant is as effective a proponent of the right as the third party. The Court must also assess the ability of the third party to assert his own right and if there is "some genuine obstacle to such assertion."

Id. at 681 (citations omitted) (quoting Singleton v. Wulff, 428 U.S. 106, 116 (1976)).

197. 111 S. Ct. 1364 (1991).

198. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2087 (1991).

199. *Id.*

vate discrimination, this result is exactly what the state action doctrine was intended to prohibit. The Fourteenth Amendment simply does not reach private conduct. A private litigant's liability for provable damages under section 1983 for the discriminatory exercise of peremptory challenges makes no sense in light of the fact that a prosecutor in a criminal case, a true state actor, would be protected from liability because of prosecutorial immunity.[200]

Further, now that private litigants are liable under section 1983 for their exercise of peremptory challenges, there is no limit to the number of other causes of action that creative plaintiffs will develop.[201] Section 1983 is not limited to violations of the Fourteenth Amendment; rather, it covers the denial of "any rights, privileges, or immunities secured by the Constitution" or any federal statute.[202] The *Edmonson* Court's misconstruction of the law of state action has created section 1983 liability for conduct to which section 1983 was never meant to apply and has opened the door for a vast expansion of section 1983's reach into areas that the *Edmonson* Court could never have contemplated.

VI. STATE COURT TREATMENT OF THE *BATSON* RULE

Surprisingly few state courts have addressed the applicability of *Batson* to private party litigants. However, this section is included because a number of state courts of last resort have interpreted their state constitutions to protect personal liberties to a greater extent than the federal constitution, and these interpretations provide further background information about the development of Fourteenth Amend-

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200. *See* Newsome v. Daley, No. 84-C-4996, 1987 WL 9311 (N.D. Ill. Apr. 7, 1987) (mem.).

201. In the recent case of Chrissy F. v. Mississippi Department of Public Welfare, 780 F. Supp. 1104 (S.D. Miss. 1991) (mem.), a sexually abused child tried to sue her father under § 1983 based on due process grounds and the Child Abuse Prevention and Treatment Act, 42 U.S.C.A. §§ 5101-5118e (West Supp. 1991). The child asserted that her father had become a state actor under the *Edmonson* analysis because he had participated in court proceedings. *Chrissy F.*, 780 F. Supp. at 1117. In rejecting the child's argument, the court stated:

> Unlike *Edmonson*, where a private litigant actively participated in selecting those individuals who as a jury would ultimately exercise the powers and authority of the court, the facts here suggest only that [the defendant father] was given his day in court. This Court simply does not read *Edmonson* as an opening of the section 1983 door against all litigants in state court judicial proceedings merely because of their participation in lawsuits.

Id. However, the court's language leaves little doubt that it would award § 1983 damages if presented with facts similar to those in *Edmonson*. *See id.*

202. 42 U.S.C. § 1983 (1988).

ment jurisprudence as it applies to peremptory challenges.

The courts of last resort in two states, the New York Court of Appeals[203] and Hawaii Supreme Court,[204] have interpreted their state constitutions to require private defense counsel in criminal trials to justify their challenges on nondiscriminatory grounds.[205] The Alabama Supreme Court has relied on *Fludd v. Dykes* and held that the *Batson* rule applies to private litigants.[206]

In *People v. Kern*[207] the New York Court of Appeals held that the New York State Constitution prohibits private party litigants from discriminating in the exercise of peremptory challenges.[208] *Kern* involved the trial of four white teenagers who attacked three black teenagers in the Howard Beach section of New York. During the first day of jury selection, the defendants' private attorney peremptorily challenged three black persons on the jury venire. The prosecutor objected and asked the judge to require the defense counselor to justify his challenges.[209] The court first denied the *Batson* motion as premature, then reserved decision, and ultimately applied *Batson* prospectively and required the defense counselor to justify his subsequent challenges.[210] On appeal the defendants argued that neither the state nor federal constitution restrict peremptory challenges by private party litigants.[211]

The *Kern* court concluded that both the civil rights clause and the equal protection clause of the New York Constitution prohibit racially discriminatory peremptory challenges by private litigants.[212] On the critical issue of state action, the court relied on *Shelley v. Kraemer*[213]

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203. People v. Kern, 554 N.E.2d 1235 (N.Y.), *cert. denied*, 111 S. Ct. 77 (1990).

204. State v. Levinson, 795 P.2d 845 (Haw. 1990).

205. A longstanding rule of American jurisprudence protects the right of state courts to interpret their state constitutions as they see fit, provided that the interpretation does not offend the Constitution or laws of the United States. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874). Accordingly, state courts may interpret their state constitutions to afford more protection to individuals than the United States Constitution.

206. Thomas v. Diversified Contractors, Inc., 551 So. 2d 343, 344-46 (Ala. 1989). Two other state courts had examined the issue and held that the United States Constitution did not require the application of *Batson* to civil litigation. Chavous v. Brown, 396 S.E.2d 98 (S.C. 1990), *vacated*, 111 S. Ct. 2791 (1991), *rev'd per curiam*, 409 S.E.2d 356 (S.C. 1991); Powers v. Palacios, 794 S.W.2d 493 (Tex. Ct. App. 1990), *rev'd per curiam*, 813 S.W.2d 489 (Tex. 1991). In light of the Supreme Court's decision in *Edmonson*, the South Carolina Supreme Court reversed its earlier decision, 409 S.E.2d at 356-57, and the Texas Supreme Court reversed the Texas Court of Appeals, 813 S.W.2d at 490-91.

207. 554 N.E.2d 1235 (N.Y.), *cert. denied*, 111 S. Ct. 77 (1990).

208. *Id.* at 1236.

209. *Id.* at 1239.

210. *Id.*

211. *Id.* at 1240.

212. *Id.* at 1241.

213. 334 U.S. 1 (1948).

and determined that "it is the Judge, with the full coercive authority of the State, who enforces the discriminatory decision by ordering the excused juror to leave the courtroom."[214] Of course, this holding does not affect *Shelley*'s impact on Fourteenth Amendment jurisprudence because the *Kern* court specifically stated that it was interpreting the New York State Constitution.

In *State v. Levinson*[215] the Hawaii Supreme Court adopted the reasoning of *Kern* and held that the Hawaii Constitution prevents a private defense attorney from discriminating against women in the exercise of peremptory challenges.[216] The Hawaii Constitution contains a civil rights clause similar to New York's.[217] The *Levinson* court held that "the right to serve on a jury is a privilege of citizenship, guaranteed by the constitution, and . . . that right cannot be taken away for any of the prohibited bases of race, religion, sex, or ancestry."[218] The court also followed the reasoning in *Kern* that "given . . . the fact that it is the judge who must excuse the juror, the defendant's racially biased peremptory challenges were converted into State action."[219] Accordingly, the court found that the defense counselor's challenges violated the equal protection clause of the Hawaii Constitution.[220]

In *Thomas v. Diversified Contractors, Inc.*[221] the Alabama Supreme Court simply adopted the reasoning of *Fludd v. Dykes*, without analysis, and held that the Equal Protection Clause of the United States Constitution requires application of the *Batson* rule to private litigants.[222] The court declined to decide whether discriminatory peremptory challenges exercised by private litigants violate the Alabama Constitution.[223]

This review of state treatment of peremptory challenges by private litigants indicates that state courts that wish to guarantee the broad application of the *Batson* rule have a significant opportunity to do so through interpretation of their individual state constitutions. These decisions also provide a means of achieving *Edmonson*'s result without confusing Fourteenth Amendment jurisprudence. This opportunity will arise, however, only if a party who objects to discriminatory peremptory challenges includes a claim that they violate the state constitution.

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214. *Kern*, 554 N.E.2d at 1245.
215. 795 P.2d 845 (Haw. 1990).
216. *Id.* at 849-50.
217. *Id.* at 849.
218. *Id.*
219. *Id.*
220. *Id.* at 849-50.
221. 551 So. 2d 343 (Ala. 1989).
222. *Id.* at 345.
223. *Id.* at 344.

VII. CONCLUSION

The discriminatory exercise of peremptory challenges by private litigants cannot violate the Equal Protection Clause in the absence of state action. Furthermore, if a court finds that private litigant peremptory challenges constitute state action, it should be through some type of state compulsion or joint action test that transforms private discrimination into state action. In order for state action to exist under either of these tests, a court must find that the trial judge actively intervened in the discriminatory act and exerted the coercive power of the government. The Supreme Court's *Edmonson* opinion found that private litigants exercise peremptory challenges with the overt and significant assistance of the court and based its holding at least in part on these facts. However, the better-reasoned view, as expressed in Justice O'Connor's strongly worded dissent, is that the trial judge merely acquiesces in the private discriminatory decision and performs only a ministerial function of dismissing the prospective juror; therefore, state action is not present.

Unfounded discrimination is always reprehensible and this Note is not intended to justify discrimination in any form. This author believes that invidious racial discrimination is objectionable regardless of where it takes place. However, just as putting an end to discrimination is an effort to protect the personal liberties of those subject to discrimination, the jurisprudence of state action is an effort to protect the personal liberties of private individuals to believe and act as they wish. More importantly, state action is required for operation of the Fourteenth Amendment, and the doctrine should not be weakened even in an effort to accomplish a commendable goal.