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David Park

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## **EDMONSON v. LEESVILLE CONCRETE COMPANY, INC.\*: CAN THE "NO STATE ACTION" SHIBBOLETH LEGITIMIZE THE RACIST USE OF PEREMPTORY CHALLENGES IN CIVIL ACTIONS?**

The Supreme Court held in *Batson v. Kentucky*<sup>1</sup> that the equal protection clause<sup>2</sup> forbids the prosecution's use of racially-based peremptory challenges<sup>3</sup> in criminal trials to intentionally exclude from the petit jury<sup>4</sup> venirepersons<sup>5</sup> of the same race as the defendant.<sup>6</sup> In

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\* 860 F.2d 1308 (5th Cir. 1988), *reh'g en banc granted*, 860 F.2d 1317 (5th Cir. 1989).

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

2. See U.S. CONST. amend. XIV, § 1. The equal protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." *Id.* The equal protection clause requires that individuals receive equal treatment from government; it protects individuals from governmental classifications which are arbitrary or premised on unlawful criteria. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 525 (3d abr. ed. 1986) [hereinafter NOWAK].

3. Peremptory challenges were historically a method of excluding potential jurors without any requirement that a reason be given. See, e.g., J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 145 (1977). This is in contrast to the challenge for cause, which is exercisable only on the basis of proving bias on the part of the prospective juror. *Id.* at 139. The Supreme Court noted that "[w]hile challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." *Swain v. Alabama*, 380 U.S. 202, 220 (1965), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79, 100 n.25 (1986).

Commentators have sharply criticized the peremptory challenge because of its amenability to misuse on racial grounds. See generally Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 286-87 (1968) (peremptory nature of the challenge is at odds with fair jury selection); Note, *Peremptory Challenge - Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157, 165 (1967) (equal protection requires limitations on the use of peremptory challenges); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1174-75 (1966) (arguing that the *Swain* Court's deference to the peremptory challenge allowed racial discrimination to continue).

4. The petit jury is the "ordinary jury for the trial of a civil or criminal action; so called to distinguish it from the grand jury." BLACK'S LAW DICTIONARY 768 (5th ed. 1979).

5. The venire is "the list of jurors summoned to serve as jurors for a particular term." BLACK'S LAW DICTIONARY 1395 (5th ed. 1979). The prospective jurors making up the venire are susceptible to exclusion from the petit jury by challenge for cause or by peremptory challenge. See J. VAN DYKE, *supra* note 3, at 139.

6. See *Batson*, 476 U.S. at 97. For a discussion of the implementation of the *Batson* holding in the criminal context, see Recent Development, *Illinois Courts Struggle to Evaluate Race-Neutral Explanations for Peremptory Challenges Under Batson v. Kentucky*, 22 J. MARSHALL L. REV. 235 (1988).

*Edmonson v. Leesville Concrete Co., Inc.*,<sup>7</sup> the United States Court of Appeals for the Fifth Circuit addressed the issue of whether the equal protection holding of *Batson*<sup>8</sup> extends to prohibit the use of peremptory challenges on the basis of race in federal civil actions.<sup>9</sup>

7. 860 F.2d 1308 (5th Cir. 1988), *reh'g en banc granted*, 860 F.2d 1317 (5th Cir. 1989).

8. 476 U.S. at 93-98. The *Batson* Court held that a criminal defendant could make out a prima facie case of purposeful discrimination in the choice of the petit jury based solely on the prosecutor's use of peremptory challenges in the defendant's case. *Id.* at 96. Prior to *Batson*, the Court had stated the rule regarding the establishment of a prima facie case of discrimination in the prosecution's use of peremptory challenges in *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled*, *Batson v. Kentucky*, 476 U.S. 79, 100 n.25 (1986). In *Swain*, the Court held that in order to raise a prima facie case, the defendant had to show the prosecution's "systematic use" of racially-based peremptory challenges over time. *Swain*, 380 U.S. at 227. Numerous commentators have noted that the evidentiary burden imposed by *Swain* was formidable. See, e.g., J. Van Dyke, *supra* note 3, at 156 (*Swain* burden practically insurmountable); Note, *Batson v. Kentucky: A Half Step In the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1031 (1987) (only two successful objections under *Swain* in twenty-one years); Note, *The Use of Peremptory Challenges to Exclude Blacks from Petit Juries in Civil Actions: The Case for Striking Peremptory Strikes*, 4 REV. LITIGATION 175, 182 n.31 (1984) (extensive list of cases in which defendants failed to meet *Swain* burden) [hereinafter *The Case for Striking Peremptory Strikes*].

The *Batson* decision overruled *Swain* in regard to the evidentiary burden required to raise a prima facie case of discrimination in the prosecution's use of peremptory challenges. *Batson*, 476 U.S. at 92-93, 100 n.25. Since *Batson*, the defendant may raise a prima facie case if he can show that he is a member of a "cognizable racial group", the prosecutor has excluded members of the defendant's race from the petit jury, and the facts and circumstances raise an inference that peremptory challenges were used to exclude potential jurors from the petit jury on the basis of race. *Id.* at 96. When the trial court concludes, after considering "all relevant circumstances," that a prima facie showing has been made, the burden shifts to the state to "come forward with a neutral explanation" for its use of peremptory challenges. *Id.* at 96-97. For a discussion of the procedure mandated under *Batson*, see Comment, *Batson v. Kentucky: Jury Discrimination and the Peremptory Challenge For Cause*, 20 CREIGHTON L. REV. 221, 240-45 (1986).

The holding of *Batson* is an extension of the line of jury discrimination cases beginning with *Strauder v. West Virginia*, 100 U.S. 303 (1880). See *Batson*, 476 U.S. at 84-85 (*Strauder* decision foundational to the Court's work in assuring fair venire selection). In *Batson*, the Court extended the *Strauder* prohibition against the exclusion of people from the venire on racial grounds to include a prohibition against the use of racially-based peremptory challenges to exclude venirepersons from the petit jury. *Id.* at 97.

Mr. Justice Powell stated in *Batson* that the use of racially-based peremptory challenges by the state to strike venirepersons was a violation of equal protection in the same sense as the racially motivated exclusion of blacks from the jury lists completely. *Id.* See generally Note, *Batson v. Kentucky: The New and Improved Peremptory Challenge*, 38 HASTINGS L.J. 1195, 1207 (1987) (discriminatory use of peremptory challenges violates equal protection in the same way as discriminatory venire selection).

9. *Edmonson*, 860 F.2d at 1309. Although the applicability of equal protection to federal governmental action is not explicit in the fourteenth amendment, the Supreme Court has held that the fifth amendment implies a similar restraint on federal action. See *Washington v. Davis*, 426 U.S. 229, 240 (1976). See also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that the duty of the federal government not to discriminate is no less than that imposed on the states); *United States v. Hawes*, 529

The *Edmonson* court held that a civil litigant's exercise of statutorily granted<sup>10</sup> peremptory challenges involves state action<sup>11</sup> sufficient to invoke the constraints of the equal protection clause.<sup>12</sup>

The *Edmonson* case began when Thaddeus Edmonson was injured at a construction site and brought a negligence action against Leesville Concrete Company in federal district court.<sup>13</sup> During voir dire,<sup>14</sup> Leesville used two of its three peremptory challenges to exclude two of the three black venirepersons from the jury.<sup>15</sup> Edmonson, a black male, objected to Leesville's use of its peremptory challenges on the basis of *Batson v. Kentucky*,<sup>16</sup> and asked the district court to compel Leesville to state a neutral explanation for its removal of the black venirepersons.<sup>17</sup> The district court denied this

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F.2d 472, 477 (5th Cir. 1976) (federal government subject to equal protection concepts via the fifth amendment).

10. Litigants in civil actions in the federal courts are allowed three peremptory challenges by statute. See 28 U.S.C. § 1870 (1982).

11. The fourteenth amendment applies only to actions of the states. See Civil Rights Cases, 109 U.S. 3, 11 (1883) ("[i]ndividual invasion of individual rights is not the subject-matter of the amendment."). The term "state action" will be used in this note to refer to action by either the states or the federal government for equal protection purposes.

12. See *Edmonson*, 860 F.2d at 1314.

13. *Id.* at 1309-10. The accident occurred while Edmonson was in the employ of Tanner Heavy Equipment Company. Brief of Defendant - Appellee at 3, *Edmonson*, 860 F.2d 1317 (No. 87-4804). Edmonson alleged that he was injured when a truck driver employed by the defendant Leesville negligently allowed a cement truck to roll into him, pinning him between the truck and another machine. *Id.*

The accident occurred on the grounds of Fort Polk, Louisiana, a federal enclave. *Edmonson*, 860 F.2d at 1309. Jurisdiction was thus based on exclusive federal legislative jurisdiction. See 28 U.S.C. § 1331 (1982). See generally Altieri, *Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation*, 72 MIL. L. REV. 55 (1976) (general discussion of federal enclave jurisdiction in civil actions).

14. "Voir dire," generally translated as "to speak the truth," is the procedure during which venirepersons are questioned and challenged either for cause or peremptorily. See J. VAN DYKE, *supra* note 3, at 139-40.

15. Supplemental Brief of Plaintiff - Appellant at 3-4, *Edmonson*, 860 F.2d 1317 (No. 87-4804). Leesville used its remaining peremptory challenge to excuse a white venire member, and Edmonson used all three of his peremptory challenges to excuse venirepersons who were white. *Edmonson*, 860 F.2d at 1310.

16. 476 U.S. 79 (1986). For a discussion of the procedure required under *Batson*, see *supra* note 8.

17. *Edmonson*, 860 F.2d at 1310. There were four white venirepersons who acknowledged personal or social relationships with plaintiff Edmonson's counsel or his counsel's partners during voir dire. Supplemental Brief of Plaintiff - Appellant at 3-4, *Edmonson*, 860 F.2d 1317 (No. 87-4804). Only one of these white venirepersons was challenged peremptorily. *Id.* at 4. However, two of the three black venirepersons were removed by peremptory challenges; the only information gathered on them was name and occupation. *Id.* at 3-4.

Alternatively, Leesville maintained in its brief that one black venireperson was challenged because he was elderly and inattentive during voir dire; the other black prospective juror, a laboratory technician, was ostensibly excluded because he was likely to lack objectivity about the defendant's medical evidence. Supplemental Brief of Defendant - Appellee at 4, *Edmonson*, 860 F.2d 1317 (No. 87-4804).

request on the basis that *Batson* did not apply to civil actions.<sup>18</sup> The jury thus impaneled<sup>19</sup> returned a verdict for Edmonson, but held him 80% contributorily negligent.<sup>20</sup>

On appeal to the Fifth Circuit Court of Appeals, Edmonson sought a new trial on the basis of Leesville's alleged racially-discriminatory use of its peremptory challenges.<sup>21</sup> In a case of first impression, the *Edmonson* court specifically addressed the applicability of *Batson v. Kentucky*<sup>22</sup> to civil cases involving private litigants in federal court.<sup>23</sup> The *Edmonson* panel found that a private litigant's ex-

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18. *Edmonson*, 860 F.2d at 1310. In denying Edmonson's motion to compel Leesville to state a neutral explanation for its exercise of peremptory challenges, the trial judge stated: "The plaintiff certainly did not challenge any of the black jurors. He challenged nothing but white jurors. The defendant challenged two of the three black jurors and a white juror. The court finds there is no discrimination, no violation of the law in the selection procedure." Record Excerpts at 61, *Edmonson*, 860 F.2d 1317 (No. 87-4804).

19. The jury consisted of eleven white jurors and one black juror. *Edmonson*, 860 F.2d at 1310.

20. *Id.* The jury therefore reduced Edmonson's total damages by 80%, from \$90,000 to \$18,000. *Id.*

21. *Id.*

22. 476 U.S. 79 (1986). For a discussion of the *Batson* case, see *supra* note 8.

23. *Edmonson*, 860 F.2d at 1309. At the time *Edmonson* was decided, three federal courts had considered the application of *Batson* to civil cases, but none had decided the issue of its applicability when both parties are private litigants. See *Wilson v. Cross*, 845 F.2d 163, 164-65 (8th Cir. 1988) ("strong doubts" that *Batson* applies to civil cases, but issue not decided because excluded jurors were not of same race as complainant); *Clark v. City of Bridgeport*, 645 F. Supp. 890, 896 (D. Conn. 1986) (*Batson* applies to civil cases where peremptory challenges are exercised by City Attorney acting in official capacity); *Esposito v. Buonome*, 642 F. Supp. 760, 761 (D. Conn. 1986) (in dicta court indicated that *Batson* did not apply to civil cases, but complainant was not of the same race as the excluded jurors). See generally Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 TEX. TECH L. REV. 921, 925-30 (1988) (discussing the possible extension of *Batson* to federal civil cases); Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore: A Further Look at Limitations on the Peremptory Challenge*, 40 RUTGERS L. REV. 891, 939-46 (1988) (same).

Since *Edmonson*, four federal courts of appeal have considered the extension of *Batson* to civil cases without deciding the issue definitively. See *Reynolds v. City of Little Rock*, No. 88-2540 (8th Cir. Jan. 12, 1990) (WESTLAW No. 1270) (*Batson* applies to conduct of governmental litigants in civil cases); *Robinson v. Quick*, Nos. 88-3298, 88-3655 (6th Cir. May 15, 1989) (unpublished decision, text in WESTLAW) (applicability of *Batson* in civil cases remains undecided), *cert. denied*, 110 S. Ct. 149 (1989); *Boykin v. Hamilton County Bd. of Educ.*, No. 87-4025 (6th Cir. Feb. 21, 1989) (unpublished decision, text in WESTLAW) (court declined to decide the issue because parties stipulated *Batson* was applicable); *Swapshire v. Baer*, 865 F.2d 948, 953-54 (8th Cir. 1989) (court expressed "strong doubts" as to general applicability of *Batson* in civil cases).

However, the Court of Appeals for the Eleventh Circuit held that *Batson* was applicable to civil proceedings. See *Fludd v. Dykes*, 863 F.2d 822, 829 (11th Cir.), *reh'g en banc denied*, 873 F.2d 300 (11th Cir.), *cert. denied*, 110 S. Ct. 201 (1989). In *Fludd*, a black plaintiff brought a civil rights action under 42 U.S.C. § 1983 (1982). *Fludd*, 863 F.2d at 824. When the white defendants used peremptory challenges to remove the only two blacks on the venire, plaintiff objected under *Batson*. *Id.* at 823. The trial court overruled the plaintiff's *Batson* objection, and the jury returned a verdict for the defendants. *Id.* The *Fludd* court held that *Batson* was applicable to

ercise of peremptory challenges constitutes state action<sup>24</sup> for equal protection purposes.<sup>25</sup> Thus, the court held that a private litigant's use of peremptory challenges based on race in a civil action violates the equal protection clause.<sup>26</sup>

The *Edmonson* court began its analysis by noting that the threshold question was whether a private litigant's exercise of racially-based peremptory challenges constitutes state action.<sup>27</sup> The *Edmonson* court cited<sup>28</sup> the state action test outlined in *Lugar v. Edmondson Oil Co.*,<sup>29</sup> in order to give structure to what the Supreme Court has called a "necessarily fact-bound inquiry."<sup>30</sup> In *Lugar*, the Court advanced a two-step analysis: first, the action complained of must be based on a "right or privilege created by the State"; and second, the private actor must have either held an official position or acted jointly with state officials such that the court may fairly label him a "state actor."<sup>31</sup>

In determining whether a private litigant's exercise of peremptory challenges satisfies the first prong of the *Lugar* state action test, the *Edmonson* court observed that a federal statute confers the right to exercise peremptory challenges.<sup>32</sup> With the first prong of the *Lugar* test satisfied, the *Edmonson* court turned to the joint participation of the trial court with the litigant in the exercise of peremptory challenges.<sup>33</sup> The court held that a private litigant's exercise of peremptory challenges satisfied the second prong of the *Lugar* test because the state participates in the peremptory challenge when the presiding judge excuses the challenged venireperson.<sup>34</sup> Accordingly,

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civil trials and remanded the case for a determination as to whether the defendants had used racially-based peremptory challenges. *Id.* at 829. See generally Note, *Restrictions on Peremptory Challenge Extended to Civil Cases: Fludd v. Dykes*, 11 U. ARK. LITTLE ROCK L. J. 717 (1989) (detailed discussion of the *Fludd* case); Recent Case, 103 HARV. L. REV. 586, 586-91 (1989) (same).

24. For a definition of state action, see *supra* note 11.

25. *Edmonson*, 860 F.2d at 1312.

26. *Id.* at 1314.

27. *Id.* at 1310.

28. *Id.* at 1311.

29. 457 U.S. 922 (1982). *Lugar* involved the claim that a private party's attachment of a debtor's property with the aid of state officials violated due process. *Id.* at 925. The Court held that a private party's "joint participation" with state officials under the attachment statute was state action for fourteenth amendment purposes. *Id.* at 941.

30. *Id.* at 939.

31. *Id.* at 937.

32. *Edmonson*, 860 F.2d at 1312. The statute granting peremptory challenges states that "[i]n civil cases, each party shall be entitled to three peremptory challenges." See 28 U.S.C. § 1870 (1982). There is no constitutional right to exercise peremptory challenges. See *Stilson v. United States*, 250 U.S. 583, 586 (1919). See also *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (affirming that no constitutional right to peremptory challenges exists).

33. See *Edmonson*, 860 F.2d at 1312.

34. *Id.*

the *Edmonson* court held that a private litigant's exercise of a peremptory challenge is a decision to invoke the court's assistance under a federal statute; therefore the exercise of the challenge is state action subject to constitutional restraint.<sup>35</sup>

In holding that a private litigant's exercise of peremptory challenges is state action, the *Edmonson* court analogized<sup>36</sup> this case to the Supreme Court's holdings in *Lugar v. Edmondson Oil Co.*<sup>37</sup> and *Tulsa Professional Collection Services v. Pope.*<sup>38</sup> In *Lugar* and *Tulsa*, the United States Supreme Court held that a private party's use of government procedures with significant governmental assistance involves that party in state action.<sup>39</sup> Similarly, the *Edmonson* court noted that peremptory challenges involve significant governmental assistance in that the effectiveness of a peremptory challenge depends upon the cooperation of the trial judge in excusing the challenged venireperson.<sup>40</sup> On this basis, the *Edmonson* court held that a private litigant's exercise of peremptory challenges constitutes state action for equal protection purposes.<sup>41</sup>

Based on the conclusion that a private litigant's discriminatory use of peremptory challenges in civil actions is state action, the *Edmonson* court determined that the application of *Batson v. Kentucky*<sup>42</sup> in the civil context was inescapable.<sup>43</sup> The *Edmonson* court

35. *Id.*

36. *Id.*

37. 457 U.S. 922 (1982). For a discussion of the facts of *Lugar*, see *supra* note 29.

38. 108 S. Ct. 1340 (1988). In *Tulsa*, the Court determined that a state probate court's involvement with the activation of a nonclaim statute was state action for due process purposes. *Id.* at 1345. The *Tulsa* Court reasoned that state action was present because the nonclaim statute was not self-executing; rather, it required the involvement of the probate court throughout the procedure. *Id.*

39. See, e.g., *Tulsa*, 108 S. Ct. at 1345 ("when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."); *Lugar*, 457 U.S. at 941 ("private party's joint participation with state officials . . . is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment.");

40. *Edmonson*, 860 F.2d at 1312. The *Edmonson* court also referred to the holdings in *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (judicial enforcement of restrictive covenants based on race is state action), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) (discrimination by a lessee of state property is state action), as examples in which the Supreme Court held governmental action which was less significant than in *Edmonson* to be state action. See *Edmonson*, 860 F.2d at 1312.

In addition, the *Edmonson* court argued that interpreting the peremptory challenge statute to allow racial discrimination would mean that the court had done implicitly what it could not do explicitly. *Id.* See also *Reitman v. Mulkey*, 387 U.S. 369 (1967) (amendment to state constitution which implicitly sanctioned discrimination held unconstitutional). See generally Black, *Foreword: 'State Action,' Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69 (1967) (discussion of the *Reitman* case and the state action doctrine in general).

41. *Edmonson*, 860 F.2d at 1312.

42. 476 U.S. 79 (1986). For a discussion of the *Batson* case, see *supra* note 8.

noted that despite the differences between criminal and civil proceedings, the basic principle of *Batson*<sup>44</sup> is *not* limited to the government's involvement in criminal actions.<sup>45</sup> Accordingly, the *Edmonson* panel held that the Supreme Court's equal protection analysis in *Batson*<sup>46</sup> applies to the use of peremptory challenges in civil actions.<sup>47</sup>

In holding that the *Batson* restrictions on the exercise of peremptory challenges<sup>48</sup> apply to private litigants in civil trials, the *Edmonson* court emphasized that racism has no place in the federal courtroom at any time.<sup>49</sup> The court observed that litigants inject racial prejudice into civil as well as criminal trials.<sup>50</sup> Rather than condone this improper conduct, the *Edmonson* court held that a private litigant's exercise of peremptory challenges on the basis of race violated the equal protection clause.<sup>51</sup>

However, the court implicitly went further than simply applying *Batson* to this case. The *Edmonson* court based its holding as much on the excluded juror's right to be free from discrimination as it did on the litigant's right not to have members of his or her race excluded from the jury.<sup>52</sup> Thus the *Edmonson* decision broadens the *Batson* holding by focusing on the rights of the excluded jurors to be free from racial discrimination, regardless of whether the party raising the objection is of the same race as the excluded juror.<sup>53</sup>

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43. See *Edmonson*, 860 F.2d at 1313-15.

44. 476 U.S. 79 (1986). For a discussion of the *Batson* case, see *supra* note 8. The *Edmonson* court stated that the central principle in *Batson* was that "the state's use, toleration, and approval of peremptory challenges based on race violates the equal protection clause." *Edmonson*, 860 F.2d at 1314.

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

46. For a discussion of the holding in *Batson*, see *supra* note 8.

47. *Edmonson*, 860 F.2d at 1314.

48. For a discussion of the procedure *Batson* mandates when a prosecutor uses peremptory challenges based on race, see *supra* note 8.

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

50. *Id.* at 1313.

51. *Id.* at 1314. After determining that the equal protection clause prohibits racially-based peremptory challenges in civil trials, the *Edmonson* court remanded the case for determination of whether the plaintiff had established a prima facie case of racial discrimination based on Leesville's use of peremptory challenges. *Id.* at 1315. The *Edmonson* court noted that the plaintiff had established the necessary facts under *Batson* to require that the trial court determine whether a prima facie case of discrimination existed. *Id.* For a discussion of the prima facie case requirements under *Batson*, see *supra* note 8.

52. See *Edmonson*, 860 F.2d at 1314. The *Edmonson* court held that after an objection is made, the court must see that the "guarantee of equal protection against all racial prejudice is enforced." *Id.* (emphasis added).

53. The *Edmonson* court stated the effect that its ruling had on the exercise of the peremptory challenge in broad terms: "The peremptory challenge . . . may be exercised for no reason at all, or for any reason, however capricious or whimsical, save to violate the Fourteenth Amendment: it may not be exercised to exclude a prospective juror because of race." *Id.* at 1314-15. For a discussion of the problem of who has standing to object in this situation, see *infra* notes 83-91 and accompanying text.



The *Edmonson* court justifiably concluded that the Supreme Court's mandate in *Batson v. Kentucky*<sup>54</sup> is applicable to civil trials. This decision is correct for three reasons. First, a private litigant's exercise of peremptory challenges with judicial assistance is state action. Second, the extension of *Batson* to civil cases is unavoidable because the government cannot allow itself to become involved in invidious discrimination. Finally, the *Edmonson* decision protects the rights of the excluded jurors by completely prohibiting racially-based peremptory challenges, regardless of the race of the objecting party.

The *Edmonson* court correctly decided that a private litigant's racist exercise of peremptory challenges is state action for equal protection purposes.<sup>55</sup> In so deciding, the court justifiably stressed both the statutory origin of the peremptory challenge<sup>56</sup> and the trial judge's affirmative act in giving it effect.<sup>57</sup> When a private party exercises a state-created right requiring the affirmative assistance of government officials, that action is not so "purely private" as to fall outside the reach of the fourteenth amendment.<sup>58</sup>

The argument that a private litigant's exercise of peremptory challenges is not state action is based on the desire to maintain the "arbitrary and capricious"<sup>59</sup> nature of the peremptory challenge rather than on a principled view of the state action doctrine.<sup>60</sup> In

54. 476 U.S. 79 (1986). For a discussion of the *Batson* case, see *supra* note 8.

55. See *Edmonson*, 860 F.2d at 1313.

56. *Id.* For a discussion of the statutory basis of peremptory challenges, see *supra* note 32 and accompanying text.

57. *Edmonson*, 860 F.2d at 1312.

58. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) (state so involved with a lessee of government property that it could not disclaim the lessee's acts as merely private).

An example from *Edmonson* is instructive here. In his dissenting opinion, Judge Gee argued that state action was not present in a private litigant's exercise of peremptory challenges based on *Polk County v. Dodson*, 454 U.S. 312 (1981). *Edmonson*, 860 F.2d at 1315-16 (Gee, J., dissenting). Judge Gee argued that if a state-employed public defender is not a state actor, then "it seems clear that privately-retained counsel is not." *Id.* The problem here is that the decision in *Polk County* was based on the necessary independence of a public defender from her government employer; the state action inquiry turned on the nature of her professional responsibilities rather than on whether her employer was a public or private entity. See *Polk County*, 454 U.S. at 321. Thus in Judge Gee's dissent in *Edmonson*, the fact that counsel is "privately-retained" is confused with the question of whether that counsel has involved himself with state action. Compare *Lugar*, 457 U.S. at 937 (significant aid to private party from state officials may trigger state action) with *Polk County*, 454 U.S. at 322 (no state action because public defender is functionally free of government control).

59. 4 W. BLACKSTONE, COMMENTARIES \*353.

60. A state action question essentially identical to that in *Edmonson* arises when a criminal defense attorney misuses peremptory challenges on racial grounds. Cf. *Batson*, 476 U.S. at 89 n.12 (expressing no opinion as to constitutional restraints on defense counsel's exercise of peremptory challenges). Commentators who have argued that a defense attorney's exercise of peremptory challenges is not state action

*Shelley v. Kraemer*,<sup>61</sup> the Supreme Court held that judicial compulsion of private discrimination through enforcement of a restrictive racial covenant was state action.<sup>62</sup> Similarly, in *Lugar v. Edmondson Oil Co.*,<sup>63</sup> the Supreme Court held that the exercise of a state-created right with the aid of government officials constituted state action.<sup>64</sup> Under these precedents, the exercise of a statutorily-granted peremptory challenge which requires judicial enforcement cannot fit into the "no state action" category.<sup>65</sup>

A recent decision in the Eleventh Circuit, *Fludd v. Dykes*,<sup>66</sup> clarified this state action question by holding that the trial judge, in

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tend to emphasize that a criminal defendant is the opponent of the state, as if this fact negated the joint participation of the defense attorney with the court in exercising the peremptory challenge. See, e.g., Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 820 (1989) (criminal defendant's use of peremptory challenges not state action because of adversarial relationship with state); Note, *Defendant's Discriminatory Use of the Peremptory Challenge After Batson v. Kentucky*, 62 ST. JOHN'S L. REV. 46, 57 (1987) (no state action when criminal defendant exercises discriminatory peremptory challenges because defendant acts in opposition to the state). This emphasis simply misses the point. The focus of the state action inquiry here is the actual exercise of the challenge in conjunction with the court; the identity of the litigant's opponent is irrelevant. That a criminal defendant opposes the state adds nothing to the question of whether his counsel's actions, taken with judicial assistance, are state action. See *Lugar*, 457 U.S. at 922, 937 (aid to private party from state official may trigger state action).

Several state courts have held that, in a criminal trial, defense counsel's exercise of peremptory challenges with judicial assistance constitutes state action for equal protection purposes. See *People v. Kern*, 149 A.D.2d 187, 235, 545 N.Y.S.2d 4, 34 (App. Div.) (defense counsel's exercise of peremptory challenges on the basis of race violates equal protection), *leave to appeal granted*, 74 N.Y.2d 812, 545 N.E.2d 884, 546 N.Y.S.2d 570 (1989); *People v. Muriale*, 138 Misc. 2d 1056, 1062, 526 N.Y.S.2d 367, 371 (Sup. Ct. 1988) (state officials' participation in defense counsel's exercise of peremptory challenges satisfies state action requirement); *People v. Gary M.*, 138 Misc. 2d 1081, 1089-90, 526 N.Y.S.2d 986, 994 (Sup. Ct. 1988) (same); *People v. Davis*, 142 Misc. 2d 881, 888, 537 N.Y.S.2d 430, 434 (Sup. Ct. 1988) (same). See generally Note, *Discrimination By the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 358-61 (1988) (arguing that defense counsel's exercise of peremptory challenges is state action). But see *Holtzman v. Supreme Court*, 139 Misc. 2d 109, 118, 526 N.Y.S.2d 892, 898 (Sup. Ct. 1988) (defense counsel's exercise of peremptory challenges not state action). See generally Goldwasser, *supra*, at 811-20 (arguing that defense counsel's exercise of peremptory challenges is not state action).

61. 334 U.S. 1 (1948).

62. *Id.* at 20.

63. 457 U.S. 922 (1982).

64. *Id.* at 941.

65. A Connecticut state judge expressed a similar opinion in *Williams v. Coppola*, 41 Conn. Supp. 48, 50 n.2, 549 A.2d 1092, 1093 n.2 (Super. Ct. 1986). In *Williams*, the court prohibited a private litigant's exercise of racially-based peremptory challenges on state constitutional grounds. *Id.* at 61, 549 A.2d at 1098. However, the court stated in dicta that "if any case would cry out for giving full meaning to *Shelley v. Kraemer* . . . it would be a case that raises these issues." *Id.* at 50 n.2, 549 A.2d at 1093 n.2.

66. 863 F.2d 822 (11th Cir.), *reh'g en banc denied*, 873 F.2d 300 (11th Cir.), *cert. denied*, 110 S. Ct. 201 (1989).

ruling on peremptory challenges, constituted the requisite state actor for equal protection purposes.<sup>67</sup> The *Fludd* decision demonstrates that a private litigant's use of peremptory challenges involves state action because of the court's involvement in the peremptory challenge process.<sup>68</sup> If the nature of the court's involvement in jury selection was merely that of a disinterested third party, then a private litigant's use of peremptory challenges would not constitute state action.<sup>69</sup> However, because the state's role in the peremptory challenge process is that of an actor, it is the state's duty to see that discrimination is not injected into jury selection through its own acts.<sup>70</sup>

In this sense the *Edmonson* decision puts this state action question in its proper form: May the state, through an affirmative act, enforce a private party's decision to use a statutory right to discriminate on the basis of race during jury selection?<sup>71</sup> To state the question is to have the answer. The objecting litigant and the excluded juror are both denied equal protection at the moment the trial judge excuses the improperly challenged venireperson.<sup>72</sup> This is an unconstitutional act by the state; the lawful alternative to this act is for the trial judge to refuse to enforce the racially-based peremptory challenge.<sup>73</sup> Thus, the *Edmonson* court correctly concluded that the state action requirement was satisfied in view of the court's involvement in the exercise of peremptory challenges.<sup>74</sup>

Given that a private litigant's exercise of peremptory challenges involves state action, the logical conclusion is that *Batson v. Kentucky*<sup>75</sup> applies in civil as well as in criminal proceedings.<sup>76</sup> The con-

67. *Fludd* was a civil case factually similar to *Edmonson*; for a statement of the facts in *Fludd*, see *supra* note 23. In *Fludd*, the court held that *Batson* applied to civil cases on the basis of the trial judge's responsibility to prevent racial discrimination in the courtroom. See *Fludd*, 863 F.2d at 828.

68. See *Fludd*, 863 F.2d at 828.

69. *Id.* Cf. *Edmonson*, 860 F.2d at 1312 (trial judge's action gives effect to peremptory challenges).

70. See, e.g., *Edmonson*, 860 F.2d at 1312-13.

71. *Id.*

72. *Id.* One commentator has acknowledged the problem of the court's involvement in racially-based peremptory challenges via its excusing of the prospective juror. See Goldwasser, *supra* note 60, at 816. However, the writer dismissed the court's involvement with peremptory challenges as merely "ministerial." *Id.* at 819. This is, of course, an absurd idea. A court's action in excusing the challenged venireperson is clearly an official act giving effect to a private decision to discriminate. See *Fludd*, 863 F.2d at 824.

73. See *Fludd*, 863 F.2d at 828. See also Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 495 (1962) (arguing that discrimination which may be outlawed may be refused enforcement).

74. See *Edmonson*, 860 F.2d at 1313.

75. 476 U.S. 79 (1986). For a discussion of the *Batson* case, see *supra* note 8.

76. See *Edmonson*, 860 F.2d at 1314. One commentator has argued that the importance of the "unfettered" use of the peremptory challenge to the civil litigant outweighs the danger of its misuse on racial grounds. See Note, *Vitiating of Peremp-*

stitutional prohibition against racial discrimination is not limited to governmental action in criminal trials.<sup>77</sup> As the Supreme Court observed in *Batson*, unrestricted peremptory challenges allow "those to discriminate who are of a mind to discriminate."<sup>78</sup> The occurrence of discriminatory peremptory challenges in a civil rather than criminal setting does not change the nature of the injury to the constitutional rights of the litigant<sup>79</sup> or the excluded venireperson.<sup>80</sup> If the courts allow racially-based peremptory challenges in civil actions, then the state will have directly involved itself in invidious discrimination.<sup>81</sup> The *Edmonson* court correctly applied the *Batson* rule to prevent racial discrimination via the litigant's misuse of peremptory challenges in civil actions.<sup>82</sup>

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*tory Challenge in Civil Actions: Clark v. City of Bridgeport*, 61 ST. JOHN'S L. REV. 155, 163 (1986). The argument is that the less serious nature of the issues involved in civil litigation warrants the use of the evidentiary burden outlined in *Swain v. Alabama*, 380 U.S. 202, 227 (1965), *overruled*, *Batson v. Kentucky*, 476 U.S. 79, 100 n.25 (1986), rather than the *Batson* rule. See Note, *supra*, at 165. This suggestion is not well reasoned. If criminal defendants found the *Swain* burden virtually insurmountable, then a civil litigant's opportunity to prove a private attorney's systematic misuse of peremptory challenges over time is non-existent. For a discussion of the evidentiary burden outlined in *Swain*, see *supra* note 8. Moreover, there is no de minimis concept which applies to racial discrimination in violation of the equal protection clause; to justify a racial classification, the state's purpose must "outweigh the basic values of the [fourteenth] amendment." See NOWAK, *supra* note 2, at 555-56.

Two state courts have specifically relied on *Batson* to prohibit the use of peremptory challenges based on race in civil actions. See *Thomas v. Diversified Contractors, Inc.*, 551 So. 2d 343, 345 (Ala. 1989) (standards enunciated in *Batson* apply to civil actions); *Chavous v. Brown*, 385 S.E.2d 206, 209 (S.C. Ct. App. 1989) (same). In addition, a number of state courts have prohibited racially-based peremptory challenges on the basis of state constitutional law. See *Holley v. J & S Sweeping Co.*, 143 Cal. App. 3d 588, 593, 192 Cal. Rptr. 74, 77 (1983) (state equivalent of seventh amendment bars racially-based peremptory challenges in civil actions); *Williams v. Coppola*, 41 Conn. Supp. 48, 61, 549 A.2d 1092, 1098 (Super. Ct. 1986) (same); *Miami v. Cornett*, 463 So. 2d 399, 402 (Fla. Dist. Ct. App. 1985) (same); *Jackson v. Housing Authority*, 321 N.C. 584, 585, 364 S.E.2d 416, 416 (1988) (jury discrimination provision of state constitution bars racially-based peremptory challenges in civil actions). See also Note, *Race-Based Peremptories No Longer Permitted in Civil Trials: Jackson v. Housing Authority of High Point*, 67 N.C.L. REV. 1262 (1989). See generally Note, *The Discriminatory Use of Peremptory Challenges Within Connecticut Civil Proceedings: Arguments for Their Unconstitutionality*, 9 U. BRIDGEPORT L. REV. 197, 198-99 (1988) (discriminatory use of peremptory challenges violates state and federal constitutions); Note, *The Case for Striking Peremptory Strikes*, *supra* note 8, at 215 (arguing for the complete elimination of peremptory challenges in civil actions).

77. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (governmental discrimination in public schools unconstitutional).

78. See *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

79. See *Fludd v. Dykes*, 863 F.2d 822, 829 (11th Cir.), *reh'g en banc denied*, 873 F.2d 300 (11th Cir.), *cert. denied*, 110 S. Ct. 201 (1989). See also Note, *The Case for Black Juries*, 79 YALE L.J. 531, 534 (1970) (exclusion of jurors on racial grounds in civil actions as invidious as in criminal actions).

80. See *Batson*, 476 U.S. at 87 (discriminatory jury selection harms the excluded juror).

81. See, e.g., *Edmonson*, 860 F.2d at 1312-13.

82. *Id.* at 1314.

Finally, in addition to applying the *Batson* holding in a civil case, the *Edmonson* court recognized that peremptory challenges based on race deny the excluded juror's constitutional rights, regardless of the objecting litigant's race vis a vis that of the excluded juror.<sup>83</sup> Although the *Batson* decision included the requirement that the objecting party be of the same race as the excluded jurors, the failure of a litigant to meet the *Batson* standing requirement<sup>84</sup> does not alleviate the harm done to the improperly excluded jurors.<sup>85</sup> Thus the *Edmonson* decision stands for the elimination of all peremptory challenges based on race, without any additional requirement as to the race of the objecting party.<sup>86</sup>

This view of the impact of *Edmonson* is based on the logical application of the theory of third-party standing.<sup>87</sup> When the courts recognize the right of a prospective juror to be free from racial discrimination, third-party standing is immediately implicated because the excluded juror is in no position to protect his own rights.<sup>88</sup> If a

83. *Id.* at 1314-15. The *Edmonson* court stated that litigants could still exercise the peremptory challenge for any reason *except* to exclude prospective jurors on racial grounds. *Id.* at 1315. The *Edmonson* decision thus does not hedge on the importance of the right of the prospective juror to be free of racial classification. *Id.*

84. The *Batson* Court did not specifically state the requirement of shared race between the objector and the excluded jurors in terms of standing. *See Batson*, 476 U.S. at 96. However, it is clear that this requirement is a condition precedent to a criminal defendant's standing to raise the objection. *See, e.g., United States v. Rodriguez-Cardenas*, 866 F.2d 390, 392 (11th Cir. 1989) (hispanic defendant in criminal action lacks standing under *Batson* to challenge prosecution's exclusion of blacks from jury); *Cf. Castenada v. Partida*, 430 U.S. 482, 494-95 (1977) (defendant must show discrimination against his race or group to raise equal protection claim).

85. *See Carter v. Jury Comm'n*, 396 U.S. 320, 329-30 (1970) (citizens excluded from juries on racial grounds have standing to sue on their own behalf). The *Carter* Court stated that "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Id.* at 329.

86. *Edmonson*, 860 F.2d at 1314. The *Edmonson* court noted that in the case of the plaintiff *Edmonson*, the strict standing requirement of *Batson* was fulfilled. *Id.* at 1315.

87. Generally speaking, a litigant may assert only his own constitutional rights. *See Barrows v. Jackson*, 346 U.S. 249, 255 (1953). However, in certain cases a party may raise the rights of third parties. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 501-02 (1975) (rights of third parties may be raised when a statute implies a "right of action" in plaintiff); *Barrows*, 346 U.S. at 257 (third party standing permitted to protect rights which would otherwise be denied). *See generally Monaghan, Third Party Standing*, 84 COLUM. L. REV. 277, 286-88 (1984) (modern third-party standing theory begins with the *Barrows* case).

88. *Barrows*, 346 U.S. at 257. In *Barrows*, the court allowed a white litigant to raise the rights of non-whites as a defense to a suit for breach of a racially-restrictive covenant. *Id.* at 259. In permitting third-party standing in this situation, the *Barrows* Court stated:

[I]n the instant case, we are faced with a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court.

*Id.* at 257 (emphasis in original).

litigant, or the court itself, lacks standing to raise the *Batson* objection, then the injury to the excluded juror's rights will escape redress.<sup>89</sup> Indeed, it is arguable that if no objection is made, the court must raise the issue sua sponte.<sup>90</sup> In this sense the *Edmonson* decision stands for the elimination of the court's participation in racist peremptory challenges altogether.<sup>91</sup>

In deciding that *Batson* applies to the racist use of peremptory challenges in civil cases, the *Edmonson* court squarely confronted an ugly, inexcusable practice in the federal courts. To its credit, the *Edmonson* decision places the demands of the equal protection clause ahead of the reactionary desire to maintain the peremptory challenge's "historic scope" as a challenge admitting of no contradiction.<sup>92</sup> The *Edmonson* decision vindicates the equal protection rights of the litigant as well as those of the challenged venireperson by stating a clear message: When peremptory challenges are used as a tool for racial discrimination in the process of jury selection, the "no state action" shibboleth<sup>93</sup> should not, and cannot, forestall the elimination of racism from the courts of the United States.<sup>94</sup>

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89. See Breck, *Peremptory Strikes After Batson v. Kentucky*, 74 A.B.A. J. 54, 60 (1988). Cf. *Clark v. City of Bridgeport*, 645 F. Supp. 890, 897 (D. Conn. 1986) (invoking the court's supervisory power to protect excluded juror's rights when objecting party was white and excluded jurors were black). If no objection can be raised, the challenged juror would not even be aware that she was excluded from the jury by means of a peremptory challenge, still less what the basis of the peremptory challenge was. See, e.g., *People v. Gary M.*, 138 Misc. 2d 1081, 1092, 526 N.Y.S.2d 986, 995-96 (Sup. Ct. 1989). Obviously, the practical result of denying standing to the litigant or the court is to deprive the excluded juror of the knowledge that a litigant had discriminated against her. See *People v. Kern*, 149 A.D.2d 187, 234, 545 N.Y.S.2d 4, 33 (App. Div.), *leave to appeal granted*, 74 N.Y.2d 812, 545 N.E.2d 884, 546 N.Y.S.2d 570 (1989).

90. See, e.g., Monaghan, *supra* note 87, at 295-96 (arguing that the court must raise the third-party standing issue sua sponte in cases where the judicial process itself denies federal rights).

91. See *Edmonson*, 860 F.2d at 1313. The *Edmonson* court stated that "[j]ustice would indeed be blind if it failed to recognize that the federal court is employed as a vehicle for racial discrimination when peremptory challenges are used to exclude jurors because of their race." *Id.*

92. See *Edmonson*, 860 F.2d at 1314-15. Similarly, in *Batson*, although the Court recognized the long history of the peremptory challenge in criminal proceedings, the majority stated that restrictions on its use were necessary to "enforce[] the mandate of equal protection and further[] the ends of justice." See *Batson*, 476 U.S. at 98-99.

93. The word "shibboleth" is used here in both of its common meanings: As a password allowing entry into a protected group, and as a "worn out or discredited doctrine." See 4 W. BENET, *THE READER'S ENCYCLOPEDIA* 1024 (1948).

94. The *Edmonson* decision is now pending en banc rehearing before the Fifth Circuit Court of Appeals. See *Edmonson*, 860 F.2d at 1317. It thus remains to be seen whether *Edmonson* will continue to stand for the eradication of racism in the federal courts.

