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Milking the New Sacred Cow: The Supreme Court Limits the Peremptory Challenge on Racial Grounds in Powers v. Ohio and Edmonson v. Leesville Concrete Co.

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Milking The New Sacred Cow: The Supreme Court Limits the Peremptory Challenge on Racial Grounds in *Powers v. Ohio* and *Edmonson v. Leesville Concrete Co.*

"The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds."[1]

—Justice Antonin Scalia

I. INTRODUCTION

In dealing with racial discrimination, courts have constantly been pulled in two directions, desiring on the one hand to assist in the battle against racism, and yet struggling to remain loyal to legal precedent and to adhere to established law.[2] Often, in the struggle to deal justly with racial issues, the temptation is strong for courts to step outside of legal precedent in order to impose judge-made remedies designed to curb racial discrimination.[3]

Traditionally, conservative justices have held fast to a philosophy prompting adherence to a strict construction of the Constitution in an attempt to leave lawmaking to the nation's elected legislative bodies.[4] This course of action generally stems from a commitment to "judicial restraint," a doctrine intended to avoid judge-made remedies

1. Holland v. Illinois, 110 S. Ct. 803, 811 (1990).

2. *See generally* Alexander Aleinikoff, *Article: A Case For Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) (discussing the ambivalence of the Court in addressing racial issues); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790 (1991) (analyzing the morality of Court decisions involving race); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (arguing that further equal protection safeguards are necessary to eliminate racial discrimination from the courtroom).

3. *But see* ROBERT BORK, THE TEMPTING OF AMERICA (1990) [hereinafter BORK]. "Many people have the notion that following precedent (sometimes called the doctrine of *stare decisis*) is an iron clad rule. It is not and has never been." *Id.* at 156-58.

4. *See, e.g.*, BORK at 143-60.

and to encourage sound, comprehensive legislation representative of the electorate.[5] Liberal justices, however, have typically been willing to take greater liberties in their interpretation of the Constitution in order to achieve more immediate and just results in the case before them.[6]

The judicial philosophy of the Supreme Court justices has become increasingly significant in the area of raced-based issues because the composition of the Court is slowly moving to the right. In fact, with the recent confirmation of Clarence Thomas, it could be strongly argued that the Supreme Court has become one of the most conservative courts of the twentieth century.[7] Naturally, many fear that this shift in the Court's composition will effectively erase the strides made toward the imposition and expansion of "civil rights" dogma.[8]

Surprisingly, recent indicators demonstrate that in some instances the current Court is willing to take liberties in its interpretation of precedent in order to combat racism.[9] For example, a recent line of Supreme Court decisions indicates that the Court ruled that litigants must be given the right to challenge the racially biased use of peremptory challenges during voir dire.[10] In *Batson v. Kentucky*,[11] a

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5. Generally, judicial restraint is defined as a "[s]elf-imposed discipline by judges in deciding cases without permitting themselves to indulge their own personal views or ideas which may be inconsistent with existing decisional or statutory law." BLACK'S LAW DICTIONARY 762 (5th ed. 1979). Moreover, "[t]here are three basic elements of judicial restraint: An interpretivist approach to the Constitution; a deference to the politically accountable branches of government; and an adherence to judicial precedent." James E. Wyszynski, Jr., *In Praise of Judicial Restraint: The Jurisprudence of Justice Antonin Scalia*, 1989 DET. C.L. REV. 117, 121-29 (1989) (footnotes omitted) [hereinafter WYSZYNSKI] (citing Wallace, *Whose Constitution? An Inquiry into the Limits of Constitutional Interpretation, in* STILL THE LAW OF THE LAND? 1 (1987) & Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges*, 14 HASTINGS CONST. L.Q. 487, 490 (1987)).

6. Bork, *supra* note 3, at 206-21.

7. *See supra* notes 5-6 and *infra* notes 8-9.

8. *ACLU of Northern California Opposed Thomas Nomination*, S.F. CHRON., Sept. 17, 1991, at A3; Danny Goldberg, *Perspectives on the Supreme Court; It's Religion in Sheep's Clothing; Thomas' Notions of Natural Law Would Lead Him to Side With Religious Groups and Against the Right to Abortion*, L.A. TIMES, Sept. 3, 1991, at B5; Lind P. Campbell, *Black Debate on Thomas Carries Over to Hearings*, CHI. TRIB., Sept. 20, 1991, at C1.

9. Professor Jesse H. Choper, Dean, and Earl Warren, Professor of Public Law at the University of California at Berkeley, recently commented on this issue at the U.S. Law Week's Constitutional Law Conference held on September 6-7, 1991. Professor Choper stated that "the dominance of the conservatives will [not] mean that the Court 'will rarely invoke the Bill of Rights or almost always be insensitive to personal liberties.'" 60 U.S.L.W. 2253, October 23, 1991, *available in* LEXIS, Omni Library. [hereinafter CHOPER].

10. Professor Choper cited 17 cases indicating the Court's "continued sensitivity" to civil individual rights. *See, e.g.*, Chisom v. Roemer, 111 S. Ct. 2354 (1991) ("results test" of 1982 Voting Rights Act amendments applies to judges who are elected); Burns v. United States, 111 S. Ct. 2182 (1991) (under the Federal Rules of Criminal Procedure, notice must be given to criminal defendants before judge is allowed to depart from sentencing guidelines); Connecticut v. Doehr, 111 S. Ct. 2105 (1991) (due process

1986 case involving the race-motivated use of peremptory challenges, the Supreme Court held that an African American criminal defendant may challenge the peremptorial strike of an African American venireperson[12] during voir dire[13] upon a showing of prejudice on the part of the prosecution. More recently, in *Powers v. Ohio*[14] and *Edmonson v. Leesville Concrete Co.*,[15] the Court expanded the scope of *Batson* and held that a Caucasian defendant may challenge the exclusion of an African American from the jury in a criminal trial,[16] and a litigant in a civil trial may challenge any alleged discriminatory use of peremptory challenges by opposing counsel.[17]

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is violated where a court makes a prejudgment attachment of real property before notice and a hearing); Clark v. Roemer, 111 S. Ct. 2096 (1991) (Louisiana violated preclearance procedures of the Voting Rights Act); Yates v. Evatt, 111 S. Ct. 1884 (1991) (harmful error where jury given erroneous instruction concerning the presumption of malice regarding the intent to kill); Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (a coerced confession is not harmless error); International Union, United Automotive Workers of America v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (sex discrimination found in employer's fetal protection policy precluding females of childbearing capacity from certain jobs); Demarest v. Manspeaker, 111 S. Ct. 599 (1991) (state prisoner who testifies at federal trial is entitled to witness fees); Minnick v. Mississippi, 111 S. Ct. 486 (1990) (no further questioning allowed once defendant requests counsel after administration of Miranda warnings, even if defendant has since consulted with his attorney).

11. 476 U.S. 79 (1986).

12. Black's Law Dictionary defines venire as "[t]he group of citizens from whom a jury is chosen in a given case." BLACK'S LAW DICTIONARY 1556 (6th ed. 1990). Accordingly, a venireperson is a member of the venire. It is important for the reader to realize that a member of the venire who is excluded never becomes a member of the jury. Thus, in both *Edmonson* and *Powers*, the excluded venireperson was excused during voir dire and never took part in the trial.

13. Voir dire is defined as "the preliminary examination which the court and attorneys make of prospective jurors [venirepersons] to determine their qualifications and suitability to serve as jurors." *Id.* at 1575.

14. 111 S. Ct. 1364 (1991). Justice Kennedy wrote the majority opinion in *Powers* in which Justices White, Marshall, Blackmun, Stevens, O'Connor and Souter joined. Justice Scalia wrote the dissenting opinion in which Chief Justice Rehnquist joined.

15. 111 S. Ct. 2077 (1991). Justice Kennedy wrote the majority opinion in *Edmonson* in which Justices White, Marshall, Blackmun, Stevens and Souter joined. Justice O'Connor wrote the dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined. Justice Scalia also wrote a separate dissenting opinion.

16. *Powers*, 111 S. Ct. 1364 (1991). *See generally* Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989) (giving the history of peremptory challenge jurisprudence and arguing against the extension of *Batson* to criminal defendants); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Phyllis Novick Silverman, Comment, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. PITT. L. REV. 673 (1983) (discussing current trends in law regarding the peremptory challenge and arguing for the relaxation of the *Swain* standard).

17. *Edmonson*, 111 S. Ct. 2077 (1991). *See generally Equal Protection — Jury Se-*

The court's implementation of these policies appears to be helpful, and might even prove to be effective in curbing racism in the courtroom. However, the methods used by the Court in achieving its new policy, and the long term effects of those methods, could have an adverse impact on the development of jurisprudence in this country. In both cases discussed in this comment, the Court appeared to maneuver outside of established precedent in order to expand the traditional Article III standing rules[18] and to institute a novel approach to the state action doctrine of the Fourteenth Amendment.[19]

In addressing the discriminatory use of peremptory challenges in the court system, the *Powers* and *Edmonson* Courts discussed two basic issues: third party standing and state action. Following this introduction, part II of this note will discuss the general history of peremptory challenges in modern Anglo-American jurisprudence. Part III will examine the Court's analysis of the issue of third party standing as raised in *Powers*. Next, part IV will evaluate the Court's examination of the issue of state action in *Edmonson* as applied to the discriminatory use of peremptory challenges by civil litigants. Finally, part V will discuss the impact of these two cases.

This note takes the position that the Court's goal of fighting racism in the courtroom is praiseworthy. However, the road taken to achieve this goal, although paved with good intentions, might in the long run provide further justification for judges to disregard the legislative process in rendering their decisions. In short, a legislative solution would be more appropriate. Moreover, while the Court's decisions might prove to curb racism in the short run, they could also impose burdensome and unrealistic requirements on trial courts, possibly locking up trial proceedings and making the "voir dire a Title VII proceeding in miniature."[20]

II. HISTORY OF PEREMPTORY CHALLENGES

A. Statutory History

1. England

The investigation of peremptory challenges reveals a deep history that can be traced back to the English Crown.[21] At English common

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lection — Eleventh Circuit Restricts the Discriminatory Use of Peremptory Challenges in Civil Litigation—Fludd v. Dukes, *863 F.2d 822 (11th Cir. 1989)*, 103 HARV. L. REV. 586 (1989).

18. The Supreme Court introduced a liberal version of the relationship requirement and the first person injury-in-fact requirement of the third party standing doctrine. *See* Powers v. Ohio, 111 S. Ct. 1364 (1991).

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

20. Hawaii v. Levinson, 795 P.2d 845, 857 (Haw. 1990) (Wakatsuki, J., dissenting) (quoting United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)).

21. WALTER E. JORDAN, JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECT-

law, peremptory challenges were used in both civil and criminal trials.[22] In criminal trials, jurors were initially chosen by the Crown, which enjoyed an unlimited use of peremptories.[23] However, this unchecked power was limited by a statute enacted in the year 1305 which provided that the prosecutor in a criminal case could no longer exercise peremptories at will.[24] Despite this statute, however, the treatment of venirepersons was not substantially altered. This is because subsequent to the statutory restriction on the prosecutor's use of peremptories in 1305, another doctrine developed which permitted a prosecutor to ask a venireperson to "stand aside."[25] This doctrine provided that where the prosecutor wanted to strike a juror, instead of exercising a peremptory challenge on the spot, the prosecutor could request that the venireperson "stand aside."[26] Thus, the venireperson would then wait until the venire had been exhausted. If at that time a suitable jury still had not been agreed upon, the Crown could only exclude the venireperson who stood aside "for cause."[27]

Although peremptory challenges fell into disuse in England over a century ago,[28] the right to exercise them remained an important con-

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ING A JURY, § 8.01 (1988) [hereinafter JORDAN]; *See also* Douglas Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990) (tracing the history of the peremptory challenge from its origin in English Common Law, through the early days of colonial America, up to modern-day jurisprudence). Colbert complements his discussion of the history of the peremptory challenge with constant reference to its effect on African American jurors. *Id.*

22. Swain v. Alabama, 380 U.S. 202, 212-13 (1965); JORDAN, *supra* note 21, at 269; *See also Kabatchnick v. Hanover-Elm Building Corp.*, 119 N.E.2d 169, 172 (Mass. 1954) (discussing commentaries on the debate whether peremptory challenges were originally allowed in civil cases).

23. JORDAN, *supra* note 21, at 270.

24. *Swain*, 380 U.S. at 213 (citing The Ordinance for Inquests, 33 Edw 1, stat 4 (1305) ("they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain")). *See also* COKE ON LITTLETON 156 (14th ed. 1791); JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 147 (1977).

25. *See* JORDAN, *supra* note 21, at 270; *See also Swain*, 380 U.S. at 213 n.9 (citing 4 BLACKSTONE, COMMENTARIES 353 (15th ed. 1809)); *id.* at 213 n.11 (citing Lord Grey's Case, 9 How.St.Tr. 128 (1682); *Regina v. Frost*, 9 Car. & P. 129 (1839); Mansell v. Regina, 8 El. & Bl. 54 (1857)).

26. *Swain*, 380 U.S. at 213.

27. *Id.*

28. *Id.* at 213 n.12 (citing I JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 303 (1958); PATRICK DEVLIN, TRIAL BY JURY 29-37 (1956); PENDLETON HOWARD, CRIMINAL JUSTICE IN ENGLAND 362-64 (1931)).

sideration, at least in principle,[29] and thus, such enabling statutes remained on the books.[30] The "stand aside" doctrine remained the law in England, although in recent times the number of defense peremptories was lowered to seven.[31] Nonetheless, England recently completely abolished the use of peremptory challenges under the Criminal Justice Act of 1988.[32]

2. United States

In the United States, at common law, peremptory challenges were widely permitted and utilized.[33] However, the right to use peremptory challenges is not explicitly recognized in the United States Constitution.[34] Thus, most federal courts refer to the common law or to statutes for the authority supporting the use of peremptory challenges.[35] Moreover, state legislatures have emulated the federal sys-

29. *Id.* (citing STEPHEN, *supra* note 28, at 303; DEVLIN, *supra* note 28, at 29-37; HOWARD, *supra* note 28 at 362).

30. Blackstone noted in a famous quote that a peremptory challenge is "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous." *Id.* at 212 n.9 (citing 4 BLACKSTONE, COMMENTARIES 353 (15th ed. 1809)).

31. *See Swain*, 380 U.S. at 213 N.12 (citing 6 Geo. 4, c. 50, § 29 (1825); 11 & 12 Geo. 6, c. 58, § 35 (Criminal Justice Act of 1948)); *see also* DEVLIN, *supra* note 28, at 28.

32. *See generally*, James J. Gobert, *The Peremptory Challenge - An Obituary*, 1989 CRIM. L. REV. 528. Pursuant to a discussion of the history of peremptories in England, it is important to note that the English justice system never used the extensive voir dire preceedings which have become common in America. Thus, because an attorney in England would only know the venireperson's name, sex and address, peremptories played a much smaller role in jury selection and were eventually done away with altogether. *See* W. CORNISH, THE JURY 46 (1968); Jere W. Morehead, *Prohibiting Race Based Peremptory Challenges: Should the Principle of Equal Protection be Extended to Private Litigants?*, 65 TUL. L. REV. 833, 835-36 (1991) (discussing the effect of the *Batson* rationale in both criminal and civil cases). Only three months after Morehead's article was published, the Court in *Edmonson* ruled on many issues that the article raised concerning the civil arena.

33. JORDAN, *supra* note 21, at 270-71; *Swain*, 380 U.S. at 212-18.

34. Stilson v. United States, 250 U.S. 583, 586 (1919). "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges." *Id.* Moreover, it is settled that it is not unconstitutional to repeal a statutory right to use peremptory challenges. Ross v. Oklahoma, 487 U.S. 81, 82 (1988).

35. United States v. Douglass, 25 F. Cas. 896 (C. C. S.D.N.Y. 1851) (No. 14,989); United States v. Johns, 26 F. Cas. 616, (C.D. Pa. 1806) (No. 15,481); United States v. Wilson, 28 F. Cas., (C. Ct. Pa. 1830) (No. 16,730). *But see* United States v. Cottingham, 25 F. Cas. 673, (C. Ct. N.D.N.Y. 1852) (No. 14,872). In 1790, the United States Congress, pursuant to the Criminal Justice Act of 1790, established the number of peremptories permissible in criminal trials. 1 Stat. 119 (1790). A defendant was allowed 35 peremptories in trials for treason and 20 in trials concerning a felony punishable by death. *Id.* In 1865, that number was changed to allow a defendant in capital or treason trials 20 peremptories, while the prosecution was only allowed five. 13 Stat. 500 (1865); *Swain v. Alabama*, 380 U.S. 202, at 214-15 (1965). In non-capital cases, the defense was allowed ten challenges and the prosecution was allowed three. *Swain*, 380 U.S. at 215 n.14.

In 1872, the number of peremptories in civil cases and criminal misdemeanors was raised to three for both the prosecution and the defense. *Id.* See 17 Stat. 282 (1872).

tem in establishing the statutory right to use peremptory challenges.[36]

B. History of American Case Law Regarding the Discriminatory Use of Peremptory Challenges

1. The Early Cases

Any exhaustive analysis of case law pertaining to discrimination in jury selection must begin with a trilogy of cases decided just before the turn of the century: *Strauder v. West Virginia*,[37] *Neal v. Delaware*,[38] and *Ex Parte Virginia*.[39] In these three cases, the United States Supreme Court established the foundation for jurisprudence concerning discrimination in the jury selection process.

In *Strauder v. West Virginia*, an African American male convicted of murder challenged his conviction by alleging that a state law[40] preventing African Americans from sitting on juries denied him equal protection of the law under the Fourteenth Amendment to the Constitution.[41] In addressing the challenge, the Court prefaced its holding by stating that an accused does not have the right to a jury composed of persons of his own race. Next, the Court considered whether a law could exclude potential jurors on the basis of race;[42] the Court concluded that any law which intentionally discriminates against the admission of minorities into the venire is proscribed by

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In noncapital cases, the defense enjoyed ten strikes, while the prosecution could use only three. *Swain*, 380 U.S. at 215 N.14. Under current federal law, in trials for capital crimes, felonies, and misdemeanors, defendants are allowed 20, 10, and 3 strikes, respectively, and the prosecution is permitted 20, 6, and 3 challenges. FED. R. CRIM. PROC. 24(b). *See also* JORDAN, *supra* note 21, at 270. In civil cases, both the prosecution and defense are allowed three peremptories each. 28 U.S.C. § 1870 (1988).

36. *See* VAN DYKE, *supra* note 24, at 282-84. Under state law, peremptory challenges are provided for both plaintiffs and defendants in civil cases, and the prosecution and defense in criminal cases. *Id.* In fourteen states, the defendant is allowed more peremptory challenges than the prosecution in felony trials. *Id.* Similarly, in the federal system, when the alleged crime is punishable by more than one year in prison, the defense is allowed more challenges than the prosecution. *See* FED. R. CRIM. PROC. 24(b); *see also Swain*, 380 U.S. at 215 n.14.

37. 100 U.S. 303 (1879).

38. 103 U.S. 370 (1879).

39. 100 U.S. 339 (1879).

40. 1872-73 W. VA. ACTS 102. *See also Strauder*, 100 U.S. at 305.

41. *Strauder*, 100 U.S. at 305. The law read, "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." *Id.* The exception concerned government officials. *Id.*

42. *Id.* at 305.

the equal protection clause and is invalid.[43]

In *Neal v. Delaware*, the Court dealt with a similar issue when an African American convicted rapist claimed that he had been denied equal protection because no African American was chosen to sit on his jury.[44] The trial court did not allow the defendant to present evidence showing that African Americans had been excluded from the venire.[45] Dissenting, Justice Waite expressed reservations about reversing the conviction because the record was devoid of evidence which supported the defendant's proposition.[46] However, the majority ruled that the defendant had been denied equal protection because he was not given ample opportunity to present evidence that potential jurors had been excluded from the venire based on race.[47]

In the last of this trilogy of cases, *Ex Parte Virginia*, a judge was charged with violating a federal statute[48] prohibiting court officials from allowing discrimination in the jury selection process.[49] In denying the judge's petition for habeas corpus, the Court reasoned that section five of the Fourteenth Amendment[50] empowered Congress to promulgate legislation enforcing the rights granted by the amendment.[51] Because the statute at issue was found to be constitutional, and the judge had indeed acted in a discriminatory fashion in precluding African Americans from sitting on a jury, the judge's petition was denied.[52]

Thus, the foundation the Court laid in these three cases was one of hostility toward overtly discriminatory laws and acts designed to preclude African Americans from participating in trials as jurors. While the Supreme Court did not contend that a defendant has the right to a racially diverse jury,[53] the Court did determine that no person may be denied participation on a venire because of race.[54]

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43. *Id.* at 310.

44. Neal v. Delaware, 103 U.S. 370, 371-72 (1879).

45. *Id.* at 376.

46. *Id.* at 398.

47. *Id.* at 396-97.

48. 18 Stat., pt. 3, 336 (1875); *Ex Parte* Virginia, 100 U.S. 339, 344 (1879).

49. *Ex Parte* Virginia, 100 U.S. at 340.

50. Article V, section 5, of the Fourteenth Amendment to the United States Constitution reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

51. *Ex Parte* Virginia, 100 U.S. at 347.

52. *Id.* at 349.

53. Strauder v. West Virginia, 100 U.S. 303, 305 (1880). *See* Theil v. Southern Pacific Co., 328 U.S. 217, 220 (1946). Although the American system "contemplates an impartial jury drawn from a cross-section of the community. . . .[t]his does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographic groups of the community. . . ." *Id.* (citations omitted).

54. *Strauder*, 100 U.S. at 310.

2. *Swain v. Alabama*

Until the Supreme Court's 1965 decision in *Swain v. Alabama*,[55] the law relating to discrimination in jury selection remained true to the *Strauder* line of cases and maintained the imperative that African Americans were not to be excluded from the venire due to their race.[56] This principle was founded upon the Sixth Amendment right[57] to a jury consisting of a fair cross section of the community[58] as well as the Fourteenth Amendment right to equal protection of the laws.[59] Although the Court's decision in *Swain* did little to actually change jury selection jurisprudence, it did introduce the issue of the discriminatory use of peremptory challenges into the legal forum.[60]

In *Swain*, the defendant challenged his rape conviction by asserting that the composition of his jury fell short of equal protection requirements.[61] The defendant argued that the State had purposefully excluded African Americans from participation as jurors.[62] In support of his position, Mr. Swain produced statistics showing that

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55. 380 U.S. 202 (1965).

56. *See* Norris v. Alabama, 294 U.S. 587 (1935); Hollins v. Oklahoma, 295 U.S. 394 (1935) (per curiam); Pierre v. Louisiana, 306 U.S. 354 (1939); Patton v. Mississippi, 332 U.S. 463 (1947); Avery v. Georgia, 345 U.S. 559 (1953); Hernandez v. Texas, 347 U.S. 475 (1954).

57. The Sixth Amendment to the United States Constitution reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONSTIT. amend. VI.

58. *See, e.g.*, Toni M. Massaro, *Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 502 (1986) (proposing the elimination of the prosecutor's right to peremptory challenges in a criminal trial in an attempt to safeguard a defendant's sixth amendment right to a jury "composed of at least some of the defendant's peers"); James H. Druff, Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 CAL. L. REV. 1555 (1985) (analyzing the peremptory challenge in light of Sixth Amendment jurisprudence and proposing an abolishment of the peremptory challenge altogether and a broadening of challenges based on cause); Deborah A. Johnson Wilson, *Prosecutorial Misuse of Peremptory Challenges and the Sixth Amendment*, 29 HOW. L.J. 481 (1986).

But see Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 8 (1990) (discussing the peremptory challenge in light of the legislative intent behind the Thirteenth Amendment and asserting that "the [T]hirteenth [A]mendment offers substantive protections against disqualification of African-American jurors through the peremptory challenge").

59. *See* Strauder v. West Virginia, 100 U.S. 303, 305-06; U.S. CONST. amends. VI & XIV.

60. *See* Swain v. Alabama, 380 U.S. 202 (1965).

61. *Id.* at 203.

62. *Id.*

although African American males over twenty-one constituted twenty-six percent of the total male population over twenty-one, only ten to fifteen percent of jury panelists were African Americans.[63] The Supreme Court found the contention meritless and ruled against the defendant on this issue.[64]

Next, Mr. Swain contended that the prosecution had used its peremptory challenges in a discriminatory manner in an attempt to exclude all African Americans from the jury panel.[65] In deciding this issue, the Supreme Court promulgated a test to be used in future cases. The Court held that in order to sustain a charge of discriminatory use of peremptory challenges, a defendant must demonstrate that:

> [T]he prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries. . . .[66]

Despite the fact that the prosecutor in *Swain* struck every African American from the venire, the Court found that the defendant had not demonstrated the requisite showing of discrimination to establish a valid challenge.[67]

After *Swain*, many commentators were troubled by the restrictive and harsh requirements the Court imposed on defendants attempting to establish an equal protection claim that peremptory challenges had been used by the prosecutor in a discriminatory fashion.[68] There

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63. *Id.* at 205.
64. *Id.* at 206-09.
65. *Id.* at 209.
66. *Id.* at 223.
67. *Id.* at 224-26.
68. JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW 521, 546 (3d abr. ed. 1986). *See also* Frederick L. Brown, et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192 (1978) (*Swain* standard exacts an overburdensome standard of review and thereby fails to remedy prosecutorial abuses of the peremptory challenge system); Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968) (*Swain* imposes insurmountable burden on defendant); Lisa Van Amburg, Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U. L.J. 662 (1974); F.R.D., Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966) (arguing that the *Swain* Court's deference to the peremptory challenge is responsible for continued racism in the courtroom); Bradley S. Phillips, Note, *Limiting the Peremptory Challenge* : Representation of Groups on Petit Juries, 86 YALE L.J. 1715 (1977) (claiming that African Americans as a group do not sympathize with an African American defendant in a criminal trial, but the reason African American jurors may give lighter sentences is their "understandable suspicion" of the workings of government).

One commentator found the Supreme Court's conclusion in *Swain* to be incredible, especially in light of the fact that the Court "found no constitutional violation despite the undisputed fact that no black had served on a jury in Tallegada County in fifteen years." JORDAN, *supra* note 21, at 279. Many courts have also expressed their discontent with the *Swain* standard. *See, e.g.*, Booker v. Jabe, 775 F.2d 762, 767 (6th Cir.

was a great deal of skepticism that such a harsh test could ever be met, thus putting Fourteenth Amendment protection out of the reach of most defendants.[69] However, from 1965 until 1986 *Swain* remained valid law, and, as predicted, although numerous claims were presented to the courts, virtually none were successful in challenging the discriminatory use of peremptory challenges.[70]

3. *Batson v. Kentucky*

In 1986, the Supreme Court, in *Batson v. Kentucky*, reconsidered the issue of racial discrimination in the use of peremptory challenges.[71] The Court concluded that the harsh *Swain* requirements did not comport with equal protection rights under the Fourteenth Amendment.[72] Thus, the Court overruled *Swain* in an attempt to provide reasonable means of recourse to defendants who had been convicted by juries selected by means of racially motivated peremp-

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1985), *vacated and remanded;* McCray v. Abrams, 750 F.2d 1113, 1120-22 (2d Cir. 1984); *vacated on other grounds*, 478 U.S. 1001 (1986); People v. Wheeler, 583 P.2d 748, 766 (Cal. 1978); Michigan v. Booker, 478 U.S. 1001 (1985), *opinion reinstated*, Booker v. Jabe, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987).

69. *See* Honorable George Bundy Smith, Swain v. Alabama: *The Use of Peremptory Challenges to Strike Blacks From Juries*, 27 HOW. L. J. 1571 (1984).

70. Cases demonstrating unsuccessful *Swain* challenges include: United States v. Delay, 500 F.2d 1360 (8th Cir. 1974); Little v. United States, 490 F.2d 686 (8th Cir. 1974), *cert. denied*, 419 U.S. 861 (1974); United States v. Pollard, 483 F.2d 929 (8th Cir. 1973) *cert. denied*, 414 U.S. 1137 (1974); United States v. Ming, 466 F.2d 1000 (7th Cir. 1972) *cert. denied*, 409 U.S. 915 (1972); United States v. Carlton, 456 F.2d 207 (5th Cir. 1972); United States v. Williams, 446 F.2d 486 (5th Cir. 1971); Brown v. Crouse, 425 F.2d 305 (10th Cir. 1970); Davis v. United States, 374 F.2d 1 (5th Cir. 1967). *See* Clara L. Meek, *The Use of Peremptory Challenges to Exclude Blacks from Petit Juries in Civil Actions: The Case for Striking Peremptory Strikes*, 4 REV. LIT. 175, 182 n.31 (1985) (extensive list of cases in which defendants were unsuccessful in their attempt to meet the *Swain* requirements); *McCray v. Abrams*, 750 F.2d 1113, 1120 (2d Cir. 1984) ("Not surprisingly, almost no other defendants have met this standard of proof"); *See* Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 13 (1982) (discussing *Swain* in the context of a capital case and noting the difficulty of meeting the *Swain* standard under those conditions). *But see* Jonathan B. Mintz, *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 challenges in twenty-one years); James D. Pearson, Jr., Annotation, *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R. 3D 14 (1977) (noting that only one state, Louisiana, has granted new trials based on *Swain* challenges, and that even Louisiana has only granted two such new trials; State v. Washington, 375 So. 2d 1162 (La. 1979) (successful *Swain* challenge); State v. Brown, 371 So. 2d 751 (La. 1979) (same).

71. 476 U.S. 79 (1986).

72. *Batson*, 476 U.S. at 80.

tory strikes.[73]

In *Batson*, the defendant had been convicted on two counts of second degree burglary.[74] He appealed his conviction, claiming that the jury had been improperly impaneled due to the prosecution's discriminatory use of peremptory challenges in violation of the Fourteenth Amendment.[75] In reversing the defendant's conviction, the Supreme Court promulgated a three-part prima facie test that a defendant must satisfy in order to successfully challenge a prosecutor's discriminatory use of peremptory challenges.[76]

First, the defendant must show that she is a member of a cognizable racial group.[77] The second part of the test allows a defendant to rely on the fact that peremptory challenges permit "those to discriminate who are of a mind to discriminate."[78] Lastly, the defendant must establish that the "facts [of the case] and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venire[persons] from the petit jury on account of their race."[79] After the defendant has made a prima facie showing, the burden then shifts to the State to give a "neutral explanation" as to why the venireperson was excluded.[80] However, such an explanation need not rise to the level of a "for cause" challenge.[81] If the judge accepts the explanation, then the defendant's prima facie case is rebutted.[82] In the end, it is largely up to the trial court's broad discretion to determine whether the prosecutor exhibited "purposeful discrimination."[83]

Since its promulgation, the *Batson* test has undergone detailed scrutiny,[84] which has revealed that the three-part test can be boiled down to a simple inquiry: whether the trial judge believes that the prosecutor exercised his peremptory challenges in a discriminatory fashion.[85] Part one of the test, requiring a defendant to show that he belongs to a cognizable racial group,[86] appears to be a non-sequitur, as virtually every person can trace his or her roots to some cognizable racial group.[87] The second "requirement" does not appear to be a

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73. *Id.* at 93.
74. *Id.* at 83.
75. *Id.* at 83-84.
76. *Id.* at 96. *See* JORDAN, *supra* note 21, at § 8.06.
77. *Batson*, 476 U.S. at 96.
78. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
79. *Id.*
80. *Id.* at 97.
81. *Id.*
82. *Id.* at 98. *See also* JORDAN, *supra* note 21, at § 8.07.
83. *Batson*, 476 U.S. at 98.
84. *See* JORDAN, *supra* note 21, at § 8.06.
85. *See infra* notes 86-91 and accompanying text.
86. *Batson*, 476 U.S. at 96.
87. One possible problem with the Court's criterion is that it does not require a

requirement at all. It merely directs the judge to take judicial notice of the "arbitrary and capricious" nature of the peremptory challenge.[88]

The last requirement of the defendant's prima facie case contains the heart of the test. The judge must decide, in light of all of the evidence, whether the prosecutor, in her peremptorial strike of a venireperson, did in fact discriminate on the basis of race.[89] Finally, after considering all three prongs of this test, if the judge decides that the prosecutor intentionally discriminated against members of the venire, then the prosecutor must provide a neutral explanation for striking the venireperson.[90] Once again, it is up to the judge to decide whether the prosecutor's explanation is plausible.[91] Thus, in actuality, this five-step test boils down to one simple query: Does the trial judge believe that the prosecutor used the peremptory challenge in a discriminatory fashion?[92]

4. *Powers v. Ohio and Edmonson v. Leesville Concrete Co.*

The Supreme Court's most recent treatment of the issue of the discriminatory use of peremptory challenges is delineated in two cases which were decided within months of each other: *Powers v. Ohio*[93] and *Edmonson v. Leesville Concrete Co.*[94] Interestingly, these cases do not modify or clarify the *Batson* test. They merely expand the availability of a *Batson* challenge.[95] Thus, while the Court in *Batson* allowed a criminal defendant to dispute a prosecutor's alleged discriminatory use of peremptory challenges,[96] *Powers* and *Edmonson* make the *Batson* challenge available to all litigants in the civil context[97] and to defendants in criminal cases where the excluded

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defendant to show that she belongs to a cognizable *minority* group. Thus, it is feasible that one could show that she is a full-blooded German, of Aryan descent, and thereby satisfy the first part of the *Batson* test.

88. *See Batson*, 476 U.S. at 96.

89. *Id.* at 96-96. The judge may take into account the prosecutor's statements and questions during voir dire as well as any pattern of strikes. *Id.*

90. *Id.* at 97.

91. *Id.* at 98.

92. *See supra* notes 86-91 and accompanying text.

93. 111 S. Ct. 1364 (1991).

94. 111 S. Ct. 2077 (1991).

95. *See Edmonson*, 111 S. Ct. at 2088-89 (private litigant in civil case may employ *Batson* challenge); *Powers*, 111 S. Ct. at 1370-74 (criminal defendant may use *Batson* challenge whether or not she shares same race as excluded jurors.)

96. *See supra* notes 86-91.

97. *Edmonson*, 111 S. Ct. at 2077.

venireperson is of a different race than that of the defendant.[98]

It is also worth noting that in neither *Powers* nor *Edmonson* did the Supreme Court decide that the venireperson had actually been wrongfully excluded from the jury.[99] Rather, in both cases, because the trial courts had improperly refused to consider a *Batson* challenge, the Supreme Court merely held that a trial judge *must* consider a *Batson* challenge asserted by an attorney during voir dire,[100] and *must* make a ruling in light of the particular circumstances.[101] Where the trial judge refuses to make such a ruling, the defendant is awarded a new trial.[102] Accordingly, in both *Powers* and *Edmonson*, the Supreme Court reversed the convictions and remanded the cases for a new trial because the respective trial judges had refused to rule on the *Batson* challenges.[103]

III. THIRD PARTY STANDING

Article III of the United States Constitution states that any matter brought before the courts must involve a case or controversy between two parties.[104] Courts have interpreted this requirement to mean

98. *Powers*, 111 S. Ct. at 1364.

99. *Edmonson*, 111 S. Ct. at 2088-89; *Powers*, 111 S. Ct. 1364.

100. *Edmonson*, 111 S. Ct. at 2088-89; *Powers*, 111 S. Ct. at 1374.

101. *Edmonson*, 111 S. Ct. at 2088-89; *Powers*, 111 S. Ct. at 1374.

102. Jordan, *supra* note 21, at 270.

103. *Edmonson*, 111 S. Ct. at 2089; *Powers*, 111 S. Ct. at 1374.

104. U.S. CONST., art. III, Sect. 2. Article III, section 2, subsection 1, reads in its entirety:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controverises to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. But Article III, section 2, was limited by the Eleventh Amendment, which states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. For a discussion concerning the injury-in-fact requirement, see Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980) (discussing the problem of injury-in-fact in cases involving constitutional harm and arguing that there is no cognizable difference between plaintiffs alleging ideological injury and those alleging personal injury, and thus, both should have standing). Professor Tushnet also pointed out how the "entire concept of standing is awfully prone to manipulation and incoherence" given the inconsistency of the law. *Id.* at 1715 n.72; *see also* Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968) (asserting that recognition of standing "is not necessarily equivalent to recognition of a right." Thus, courts are not restricted by a requirement of a plaintiff with a direct injury-in-fact); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969) (arguing that there is no historical authority for the propo-

that a party must have a "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. . . ."[105] Normally, in an attempt to conserve judicial resources, courts narrowly interpret the "injury-in-fact" requirement.[106] Nonetheless, for public policy reasons, courts have looked to prudential considerations[107] to occasionally allow a broader interpretation of the standing requirements.[108] Thus, where a taxpayer can show that a certain spending measure violates a specific provision of the Constitution, that taxpayer will have standing to challenge the measure.[109] As a general rule, however, the courts have rejected any unnecessary broadening of the standing rules.[110]

In addition to occasionally expanding the rules of standing, courts have established outright exceptions to the traditional standing requirements.[111] One such exception, third party standing,[112] provides

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sition that "the Constitution demands injury to a personal interest as a prerequisite to attacks on allegedly unconstitutional action").

105. Sierra Club v. Morton, 405 U.S. 727, 731 (1972). *See generally* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 13, at 60 (4th ed. 1983); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459 (abr. student ed. 1965). One commentator has described the injury-in-fact requirement as follows: "In theory, a litigant must now demonstrate, regardless of the actual existence of a claimed injury or its subjective importance, an individuated harm impacting specifically upon him and of a tangible, concrete nature." LAURENCE H. TRIBE, CONSTITUTIONAL LAW, § 3-16, at 114 (2d ed. 1988) [hereinafter TRIBE].

106. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984) (no standing for parents of black children attending public schools to challenge alleged discriminatory tax exemptions to private schools); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471-72 (1982) (no standing for federal taxpayers challenging grant by Housing, Education and Welfare Department to Christian college); Singleton v. Wulff, 428 U.S. 106 (1976) (physicians who alleged economic injury from state abortion statute found to have standing); Warth v. Seldin, 422 U.S. 490, 499-501 (1975) (no standing for litigants challenging zoning law because litigants had never been denied a variance or a permit by zoning board).

107. *See* TRIBE *supra* note 105, at §§ 3-14, 3-19.

108. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (standing for minority potential homebuyer excluded from opportunity to purchase home); Flast v. Cohen, 392 U.S. 83 (1968) (federal taxpayer standing to challenge constitutionality of tax).

109. Flast v. Cohen, 392 U.S. 83 (1968) (federal taxpayer standing to challenge constitutionality of federal spending program); United States v. Butler, 297 U.S. 1 (1936) (federal taxpayer accorded standing to challenge federal agricultural commodity processing tax.)

110. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (no standing to challenge the practice of House members serving in Armed Forces Reserve); United States v. Richardson, 418 U.S. 166 (1974) (no standing granted to citizen challenging statute allowing director of CIA to certify expenditures as opposed to providing a regular accounting of funds as required under the Constitution at article I, section 9, clause 7.)

111. TRIBE, *supra* note 105, at § 3-19.

standing to those who are not themselves sufficiently injured, but who have been sufficiently connected to a situation in which injured third parties are not motivated to litigate their own rights in court.[113] The test for third party standing was set out in *Singleton v. Wulff*.[114] In *Singleton*, the Supreme Court determined that a litigant may have standing to litigate the rights of a third party where: 1) the litigant himself has suffered "injury-in-fact,"[115] 2) the litigant enjoys a close relation to the third party,[116] and 3) the third party is unable or unlikely to protect his own interests.[117]

A. Third Party Standing in Powers v. Ohio

1. Injury-in-fact

As explained above, courts have narrowly construed "injury-in-fact" in order to conserve judicial resources,[118] to adhere to a strict reading of the Constitution,[119] and to avoid rendering advisory opinions.[120] The courts have held that potential jail time,[121] economic loss,[122] and physical injury[123] each constitute injury-in-fact. More-

112. *See generally* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984) (discussing third party standing).

113. *See id.*; Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393 (1981) (Professor Rohr expounds on the rule of third party standing with special attention to to justification in light of the Supreme Court's decisions on mootness in class actions); Robert A. Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL. L. REV. 1308 (1982) (tracing the history and current treatment of the rule of third party standing in the courts and advocating the removal of third party standing from constitutional litigation).

114. 428 U.S. 106 (1976).

115. Singleton, 428 U.S. at 112 (describing injury-in-fact as a "sufficiently concrete interest in the outcome of the[] case to make it a case or controversy subject to a federal court's Art. III jurisdiction").

116. *Id.* at 114-15.

117. *Id.* at 115-16.

118. *See supra* note 106.

119. TRIBE, *supra* note 105, at §§ 3-9, 3-14, 3-15.

120. *Id.* at §§ 3-9, 3-14.

121. For example, in *Griswold v. Connecticut*, the physician plaintiff had given his patients birth control information and prescriptions in violation of a federal statute. Griswold v. Connecticut, 381 U.S. 479, 480-81 (1965). The doctor was litigating in order to avoid a jail sentence. As an integral part of his defense, the doctor chose to litigate his patients' right to privacy. The Court held that the doctor's injury of potential jail time was "injury in fact." *Id.*

Similary, in *Eisenstadt v. Baird*, the appellant, a distributor of contraceptive information, in an attempt to stay out of jail, chose to litigate the right of single people to have access to birth control. Eisenstadt v. Baird, 405 U.S. 438, 440 (1972). The Court again held that potential jail time was injury-in-fact. *Id.* at 446. See also Doe v. Bolton, 410 U.S. 179 (1973) (potential criminal prosecution constitutes injury-in-fact).

122. In *Craig v. Boren*, the plaintiff suffered economic loss, an injury which the Court recognized as injury-in-fact. Craig v. Boren, 429 U.S. 190 (1976). *See also* Association of Data Processing Serv. Orgs. Inc. v. Camp, 397 U.S. 150 (1970); Hardin v. Kentucky Utils. Co., 390 U.S. 1 (1968); Barrows v. Jackson, 346 U.S. 249 (1953) (plaintiff

over, where a plaintiff has been illegally discriminated against[124] or wrongfully deprived of liberty,[125] courts occasionally find sufficient injury-in-fact.[126]

With these principles in mind, Justice Kennedy, writing the majority opinion in *Powers v. Ohio*,[127] held that the defendant had suffered the requisite injury-in-fact, justifying application of the third party standing doctrine.[128] In *Powers*, the appellant, a Caucasian defendant in a criminal prosecution, claimed that he had been injured in fact because an African American venireperson had been excluded from the jury by the prosecutor's alleged discriminatory use of peremptory challenges.[129] The Court held that the defendant had been injured because "racial discrimination in the selection of jurors . . . places the fairness of a criminal proceeding in doubt . . . and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law."[130] Justice Kennedy also expressed his concern that the discriminatory use of peremptory challenges calls into question the integrity of the entire criminal proceeding.[131]

However, Justice Scalia, who dissented in *Powers*, commented that never before had the Supreme Court addressed the issue of injury-in-fact in such generalities and perceptions of injustice.[132] He pointed out that the majority never claimed that the individual defendant suffered any injury as a result of a biased jury.[133] Justice Scalia then directed attention to *Holland v. Illinois*,[134] a case decided in 1990 in which he wrote the majority opinion.[135] In *Holland*, the Court held

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who sold his house to an African American in violation of neighborhood restrictive covenant was faced with $10,000 breach of contract claim).

123. *See* 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, JUR.2D, § 3531.4 (1984 & Supp. 1991).

124. TRIBE, *supra* note 105, at § 3-16, p. 119.

125. *Id.* at § 3-16.

126. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 262 (1977) (standing upon "show[ing] an injury to itself that is 'likely to be redressed by a favorable decision.' ")(quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976)); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 205 (1972) (legislative definition conferred standing when allegation of injury "by a discriminatory housing practice.")

127. 111 S. Ct. 1364 (1991).

128. *Powers*, at 1372-73.

129. *Id.* at 1366.

130. *Id.* at 1371 (citations omitted).

131. *Id.*

132. *Id.* at 1378-80 (Scalia, J. dissenting).

133. *Id.* at 1379 (Scalia, J., dissenting).

134. 493 U.S. 474 (1990).

135. *Powers*, 111 S. Ct. at 1379 (Scalia, J., dissenting).

that "a prohibition upon the exclusion of cognizable groups through peremptory challenges. . .would undermine rather than further. . .the [defendant's] right to trial by 'an impartial jury.' "[136] Justice Scalia also asserted that as recent as the Court's previous term, the same Court had suggested that "in some circumstances [such exclusions] may *increase* fairness."[137] Scalia concluded his discussion on this point by noting that he was "unmoved" by Mr. Powers' complaint that the removal of an African American from the jury prejudiced Mr. Powers, a Caucasian.[138]

In *Powers*, the majority broadened the traditional notion of injury-in-fact in the third party standing arena by holding that a specific criminal defendant sustains an "injury-in-fact" where the general public may perceive the atmosphere of the criminal proceeding to be unfair.[139] Interestingly, the Court never addressed the issue of whether the questionable use of peremptory challenges placed doubt concerning the fairness of the proceeding into the mind of *this* appellant, in *this* case. Moreover, the dissent challenged the majority's definition of "injury-in-fact," and argued that Mr. Powers never demonstrated that he himself had sustained the requisite personal injury sufficient to establish third party standing.[140]

2. Relationship Between the Parties

The second requirement of third party standing is the existence of a close relationship between the third party and the litigant.[141] Traditionally, only recognized confidential relationships[142] or certain financial relationships[143] have satisfied the standard for a third party standing relationship.[144] Only in very limited circumstances has the Court departed from its traditional rulings and granted third party

136. *Holland*, 493 U.S. at 474.

137. *Powers*, 111 S. Ct. at 1379 (Scalia, J., dissenting)(emphasis added).

138. *Id.* at 1381 (Scalia, J., dissenting).

139. *Id.* at 1371.

140. *Id.* at 1379 (Scalia, J., dissenting.)

141. Singleton v. Wulff, 428 U.S. 106, 114-15 (1976) (third party standing exception applicable if third party has relationship with right-holder such that third party will be effective proponent with real interest).

142. For example, in *Griswold v. Connecticut*, a doctor was allowed to litigate the rights of his patients because the Court deemed the doctor-patient relationship to be close enough to satisfy the doctrine of third party standing, in part because the doctor was convicted of a crime for providing patients with contraceptives. Griswold v. Connecticut, 381 U.S. 479, 481 (1965). *See generally* William W. Van Alstyne, *Closing the Circle of Constitutional Review From* Griswold v. Connecticut *to* Roe v. Wade*: An Outline of a Decision Merely Overruling Roe*, 1989 DUKE L.J. 1677 (1989). Moreover, in *United States Dept. of Labor v. Triplett*, the attorney-client relationship was held to be a close enough relationship to allow an attorney to litigate the due process rights of his client. United States Dep't of Labor v. Triplett, 494 U.S. 715, 720-21 (1990).

143. *See* Craig v. Boren, 429 U.S. 190 (1976) (distributor-distributee relationship).

144. *See generally* TRIBE, *supra* note 105, at § 3-19.

standing to a litigant whose relationship to the third party was more distant.[145]

In light of this precedent, the Court in *Powers* evaluated the relationship between a criminal defendant and a person on the venire.[146] Justice Kennedy once again stepped outside traditional precedential boundaries by holding that the venireperson-defendant relationship is within the confines of the third party standing doctrine.[147] Curiously, the Court's analysis of this point was relatively scant.[148] Rather than squarely addressing the *actual relationship* between the defendant and the venireperson, Justice Kennedy focused on *common interests* that the defendant and the venireperson shared.[149] The Court ruled that because a defendant and an excluded venireperson have a common interest in eliminating racial discrimination from the courtroom,[150] they therefore have the requisite relationship for the defendant to litigate the interests of the excluded venireperson under the third party standing doctrine.[151] The Court explained this common interest by describing in detail the interests of both the venireperson and the defendant in the fairness of the proceeding.[152]

Justice Kennedy's reasoning appears to circumvent the relationship requirement. The Court argued that a relationship exists between a defendant and a venireperson merely because of the existence of a commonality of interests.[153] However, the presence of the shared interest in the fairness of a court proceeding does not seem to rise to the level of a precedentially recognized close relationship.

Furthermore, the Court did not elaborate on the actual relationship existing between Mr. Powers and any excluded venireperson. While it is true that at one point the majority did speak of a "bond of

145. For example, in *Craig*, the Court held that a distributor-distributee relationship withstood third party standing scrutiny. *Craig*, 429 U.S. at 190. *See also* United States v. SCRAP, 412 U.S. 669 (1973) (an association or organization may litigate the rights of its members); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (private school may litigate the due process rights of its students and their parents when unconstitutional law, as applied to parents, threatens association's property or business); *see generally* TRIBE, *supra* note 105, at 137-39.

146. Powers v. Ohio, 111 S. Ct. 1364, 1372 (1991).

147. *Id.* at 1373.

148. *See id.* at 1372.

149. *Id.*

150. *Id.*

151. *Powers*, 111 S. Ct. at 1372.

152. *Id.*

153. *Id.*

trust" between a defendant and a *juror*,[154] it was not asserted that this same bond of trust existed between the defendant and an excluded *venireperson*.[155] Thus, in order to satisfy the "relationship" requirement of the third party standing doctrine, the Court now requires only that the litigant and the third party have a "common interest."[156] In this case, the "common interest" was ridding the courtroom of discrimination.[157] However, the ambiguity in the phrase "common interest" could lay the foundation for a further expansion of third party standing.

3. Inability or Unlikelihood of Third Parties To Defend Their Rights

Historically, the Supreme Court has held that a litigant may litigate the rights of a third party where the third party is unable or unlikely to litigate their own rights.[158] In *Barrows v. Jackson*,[159] the Court addressed the issue of third party standing where a third party was unable to defend his or her rights.[160] Additionally, the Supreme Court held in *Singleton v. Wulff*,[161] that where a third party is merely *unlikely* to litigate his rights, under certain circumstances a separate party may litigate those rights before the court.[162]

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154. *Id.*

155. *See id.* This may have been an oversight on the majority's part, but it is significant in demonstrating the ambiguity surrounding the majority's position on the third party standing issue.

156. *Id.* It is conceivable that a completely disinterested person who chose to observe a trial would also share the common interest in the perceived fairness of the proceedings.

157. *Id.*

158. *See* Barrows v. Jackson, 346 U.S. 249 (1953).

159. 346 U.S. 249 (1953).

160. *Id.* at 257. In *Barrows*, the defendant had sold his house to an African American in violation of a restrictive covenant which the defendant had previously signed. *Id.* at 252. The covenant prohibited any person in the neighborhood from selling his house to an African American. *Id.* at 251-52. When the defendant violated the covenant, members of the homeowners association sued him for breach of covenant. *Id.* The defendant claimed that the covenant was invalid as a violation of the Fourteenth Amendment to the United States Constitution. *Id.* at 253. However, the defendant did not claim that the covenant had violated his own rights, but that the rights violated were those of the potential African American homebuyers. *Id.* at 254-55. The Court held that because it would be very difficult for potential African American homebuyers to assert their rights, in this situation the defendant could litigate those rights under the doctrine of third party standing. *Id.* at 258-59.

161. 428 U.S. 106 (1976).

162. *Id.* at 116-17. In *Singleton*, a doctor challenged a state statute denying his patient Medicaid benefits for an abortion, claiming that the statute violated his patient's rights under Roe v. Wade. *Id.* at 110. A plurality of the Court ruled that a litigant need not establish that it would be impossible for the third party to litigate their rights, but merely that there exists a "genuine obstacle," preventing the third party from asserting their rights in court. *Id.* at 116 n.6. The Court reasoned that because a woman's need for privacy is a "genuine obstacle," precluding her from asserting her rights in court, her doctor may assert those rights as a third party litigant. *Id.* at 117.

In *Powers v. Ohio*,[163] the Court pointed out numerous barriers preventing a venireperson wrongfully excluded from a jury from asserting his rights.[164] The Court held that these barriers satisfied the third prong of the third party standing test.[165] Justice Kennedy reasoned that a venireperson, who has no opportunity to be heard at the time of his exclusion, would have a difficult time *proving* that the prosecutor discriminated against him.[166] Further, the small financial amount at stake, coupled with the economic burden of litigation, provides a venireperson with little incentive to bring suit.[167] Moreover, an effort to obtain declaratory or injunctive relief would probably be futile, given that discrimination against this specific venireperson during voir dire would be very unlikely to recur.[168] Accordingly, because it is highly unlikely that a venireperson would bring, let alone win, a suit,[169] the Court held that these barriers satisfy this requirement of third party standing.[170]

B. Third Party Standing in Edmonson v. Leesville Concrete Co.

In *Edmonson v. Leesville Concrete Co.*,[171] a civil case, the appellant asserted that the opposing counsel's use of peremptory challenges was racially discriminatory.[172] In dealing with this third party standing issue, Justice Kennedy, again writing for the majority, incorporated by reference his reasoning in *Powers*.[173] He drew little distinction between the civil and criminal context when analyzing the relationship between a defendant and an excluded venireperson and the injuries sustained by both.[174] The only cognizable difference concerned injury-in-fact to the litigant.[175] While in a criminal context the complainant would be in danger of criminal prosecution, the litigant in a civil trial would be in danger of pecuniary loss.[176] However, because both of these injuries constitute judicially recognized

163. 111 S. Ct. 1364 (1991).
164. *Powers*, 111 S.Ct. at 1373.
165. *Id.* at 1373.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. 111 S. Ct. 2077 (1991).
172. *Edmonson*, 111 S. Ct. at 2081.
173. *Id.* at 2087.
174. *Id.* at 2087-88.
175. *Id.* at 2088.
176. *Id.*

injury-in-fact, the Court ruled that the civil litigant had standing to litigate the rights of the excluded venireperson.[177]

Thus, in *Powers* and *Edmonson*, the Court effected substantial change in the law concerning third party standing. As the law stands now, not only does a defendant who perceives the trial as unfair suffer the requisite injury-in-fact, a litigant now need only allege some "common interest" shared with the third party in order to satisfy the relationship requirement of the doctrine.[178]

IV. STATE ACTION

The Fourteenth Amendment to the United States Constitution, section 1, proclaims: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[179] This passage, commonly referred to as the equal protection clause, provides citizens protection against state sponsored discrimination.[180] This passage does not, however, provide protection against discrimination by private parties.[181] As Justice Bradley stated in the *Civil Rights Cases*:[182] "Individual invasion of individual rights is not the subject matter of the [Fourteenth] Amendment."[183]

In the *Civil Rights Cases*, the Court struck down federal legislation prohibiting private owners of inns, theaters, and others places of public accommodation from denying access and service on the basis of race.[184] The Court reasoned that (1) the Fourteenth Amendment applies only to state action,[185] (2) section five of the amendment does not empower Congress to pass anti-discrimination laws proscribing private conduct, but only allows Congress to pass laws preventing the states from prohibiting the exercise of Fourteenth Amendment rights,[186] and (3) the Thirteenth Amendment, which abolished slavery, is not broad enough to cover private discrimination.[187]

The *Civil Rights Cases* created the doctrine of "state action,"[188]

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177. *Id.*

178. Consequently, as this type of injury is now recognized pursuant to the establishment of third party standing, there is no reason why any party attempting to procure first party standing may not allege that he has been injured by perceiving government activity as being unfair.

179. U.S. CONST. amend. XIV.

180. *Id.*

181. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

182. 109 U.S. 3 (1883).

183. *Id.* at 11.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 21-22. *See generally* Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967) (discussing the courts' failure to delineate the substantive rights of wartime acts, such as the Reconstruction Civil Rights Acts).

188. For a discussion of the purposes of the state action doctrine, see TRIBE, *supra*

which has been a key factor in shaping equal protection jurisprudence. Over the past forty-three years, the Supreme Court has decided a myriad of cases dealing with state action,[189] beginning with *Shelley v. Kramer*,[190] and leading up to the Court's recent decision in *Edmonson v. Leesville Concrete Co.*[191] Although the equal protection clause has been interpreted as proscribing only discriminatory state action, and not private acts of discrimination, the dividing line between the two has become blurry at best.[192] In the words of Justice O'Connor in her dissent in *Edmonson*, this line of cases has "not been a model of consistency."[193]

The incongruity of Supreme Court decisions concerning state action can be traced back to the beliefs and legal philosophies of a handful of Chief Justices who provided leadership in the interpretation and application of equal protection principles.[194] For example,

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note 105, at § 18-2, *The Problem of State Action* (2d ed. 1988). *See generally* H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA 13 (1968).

189. *See generally*, Hala Ayoub, Comment, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. U. L. REV. 893 (1984) (discussing the symbiotic relationship test); Anthony Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1, 22-23, 79 (state action doctrine in general).

190. 334 U.S. 1 (1948).

191. 111 S. Ct. 2077 (1991). *See also* Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 363 (1977) (discussing the development of the state action doctrine in the nineteenth century and asserting that the "problems of the irresponsible use of private power escape constitutional scrutiny").

192. *See generally*, Frederick F. Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433 (1977); David S. Elkind, Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

193. *Edmonson*, 111 S. Ct. at 2089 (O'Connor, J., dissenting). Another commentator, Professor Charles Black, characterized the condition of state action law as "a conceptual disaster area." Charles L. Black, Jr., *The Supreme Court, 1966 Term - Foreword: 'State Action,' Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967). *See also* Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1484 n.156 (1982) (stating that "the whole state action area appears now, more than ever, a shambles").

194. *See generally* Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587 (1991) (giving a comprehensive history of the state action doctrine including the trends of previous courts and the individual state action "models" followed by current Supreme Court members); Kevin L. Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 329 (1990) (exploring both the federal and state state-action doctrines and asserting that "structural differences between federal and state governments can drain federal constitutional doctrine of its utility when that doctrine is incorporated

during the years of the Warren Court, those eager to find state action harnessed the most votes,[195] and, consequently, of six major cases decided by the Warren Court, state action was found in all six.[196] During these years, the Court began to bypass the question of whether the state was the actor and to proceed right to the issue of whether the right was violated,[197] despite the fact that state action is required for the application of the Fourteenth Amendment.[198] Thus, because the Court was so ready to assign state action to the most nominal private action, commentators began to speak of the "twilight of state action."[199]

In recent Supreme Court decisions, however, the state action doctrine has returned "with a vengeance,"[200] gaining more than enough votes to become firmly embedded in case law.[201] Consequently, of

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into state constitutional law"); *Recent Development: Fourteenth Amendment — State Action — Seventh Circuit Recognizes a Broader State Duty to Act. —* Ross V. United States, *910 F.2d 1422 (7th Cir. 1990)*, 104 HARV. L. REV. 1147 (1991); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985) (tracing the expansion of the state action doctrine throughout the Vinson and Warren courts, and the doctrine's subsequent decline in the Burger and Rehnquist courts). Professor Chemerinsky also argues for the abolition of the entire doctrine because "[i]t requires courts to refrain from applying constitutional values to private disputes even though there is no other form of effective redress." *Id.* at 507. He believes it is inequitable to protect against government abuse, but not comparable private abuse. *Id.* at 519-27.

195. For example, Shelley v. Kraemer, 334 U.S. 1 (1948), decided by the Warren court, began a long line of state action cases sympathetic to the victims of private discrimination. Several commentators were skeptical of the *Shelley*'s underlying rationale. *See, e.g.,* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29-31 (1959). However, there was considerable debate on the issue. *See, e.g.,* Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Louis Henkin, *Shelley v. Kraemer: Notes For a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

196. Amalgamated Food Wmp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966); Lombard v. Louisiana, 373 U.S. 267 (1963); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Terry v. Adams, 345 U.S. 461 (1953).

197. J. BARRON & C. DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 349 (1986) [hereinafter BARRON]. One commentator has noted, "During the Warren years, the Court seemed so willing to find state action in nominally private conduct that commentators began to speak of the twilight of the state action doctrine. It seemed as if the doctrine was being merged into the issue of whether the right was violated rather than serving as a threshold issue of whether the constitutional right was even implicated." *Id.* Accordingly, several commentators were hopeful that the Warren Court would provide the demise of the state action doctrine altogether. For example, one commentator stated, "[W]hen it is realized that we have entered the time of the twilight of state action, the Court is revealed as perhaps beginning the construction of the new and sensible road of evaluating the constitutional issue concerning discrimination on the merits rather than letting the accident of state action make the determination." Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 382 (1963).

198. The Fourteenth Amendment states in pertinent part: "[N]or shall any *State* . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV (emphasis added).

199. Williams, *supra* note 197, at 347.

200. BARRON, *supra* note 197, at 349.

201. *See infra* note 202.

eleven cases decided by the Burger and Rehnquist Courts, state action was only found in three.[202] Ironically, the Rehnquist Court broke with this precedent in *Edmonson* and decided that a civil litigant is a state actor when exercising peremptory challenges.[203] The Chief Justice did, however, join in Justice O'Connor's dissent.[204]

A. Three Interpretations of The State Action Doctrine

The majority in *Edmonson*, led by Justice Kennedy, began its analysis by recognizing the two-part test, enumerated in *Lugar v. Edmondson Oil Co.*,[205] used in determining whether state action exists.[206] The first part of the *Lugar* test requires that a "claimed constitutional deprivation result[] from the exercise of a right or privilege having its source in state authority."[207] The Court found this requirement to be satisfied.[208] Next, the Court turned to the second part of the *Lugar* test, namely, "whether the private party charged with the deprivation could be described in all fairness as a state actor."[209] The Court acknowledged three tests to which courts turn in

202. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (no state action); Blum v. Yaretsky, 457 U.S. 991 (1982) (no state action); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) (state action found); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (no state action); Flagg Bros., Inc., v. Brooks, 436 U.S. 149 (1978) (no state action); Hudgens v. N.L.R.B., 424 U.S. 507 (1976) (no state action); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (no state action); Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (state action found); Norwood v. Harrison, 413 U.S. 455 (1973) (state action); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (no state action); Evans v. Abney, 396 U.S. 435 (1970) (no state action).

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

204. *Id.* at 2089 (O'Connor, J., dissenting).

205. 457 U.S. 922 (1982).

206. *Edmonson*, 111 S. Ct. at 2082-87.

207. *Id.* at 2082-83.

208. *Id.* at 2083. The first part of the *Lugar* test is satisfied when it is shown that the peremptory challenge has its source in state authority. *Id.* It is not contested that this requirement is satisfied in this case. Clearly, although there is no constitutional right to a peremptory challenge, counsel's right to use such challenges is firmly embedded in case law and statutory authority. *Id.*; *see also supra* note 35 and accompanying text.

209. *Id.* When the Court analyzed the second part of the *Lugar* test, the Court referred to the "peremptory challenge system" and the "jury trial system" as having their source in state authority. The Court used these arguments in an attempt to satisfy the first and second factors involved in the *second* part of the *Lugar* test, namely, (1) whether the government significantly participated in the action, and (2) whether the action is a traditional state function. However, in doing so, the Court merely reiterated its "source in state authority" arguments to demonstrate that the requirements for the second part of the *Lugar* test were satisfied. Thus, in effect, it seems that the Court bypassed the heart of the second part of the test: Did the individual's actions in the present case constitute state action?

deciding whether a party is a state actor: (1) whether the government provided "overt, significant participation,"[210] (2) whether the litigant was performing a traditional governmental function,[211] and (3) whether the injury to the excluded venireperson was "aggravated in a unique way by the incidence of governmental authority."[212] The majority held that the facts in *Edmonson* justified a finding of state action under any of the three tests.[213] Accordingly, the Court found that a private civil litigant is a state actor when exercising a peremptory challenge.[214] The following discussion examines the Court's analysis of these three tests. This comment takes the position that the Court should not consider a private civil litigant who exercises a peremptory challenge to be a state actor.

B. Participation of the Government

1. Majority Opinion in *Edmonson*

Where the government has been involved in discriminatory action, courts have examined whether the government's participation was significant enough to constitute "state action" under the Fourteenth Amendment, thereby implicating equal protection safeguards.[215] In discussing "government participation," the *Edmonson* majority focused on the peremptory challenge system as a whole. Justice Kennedy argued that without significant government participation, "the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist."[216] The Court recited the extensive governmental administrative procedures used in assembling a venire, including the utilization of government courtrooms and personnel.[217] Moreover, the Court noted that the judge, a government employee, is the one who excuses the excluded venireperson.[218] Because of this governmental participation, the *Edmonson* majority concluded that the government had overtly and significantly participated in the exercise of peremptory challenges.[219]

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210. *Id.* at 2083-85.
211. *Id.* at 2083, 2086-87.
212. *Id.* at 2083, 2087.
213. *Id.* at 2083.
214. *Id.* at 2086-87.
215. For a compilation of the early cases dealing with this issue, see James D. Barnett, *What is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?*, 24 OR. L. REV. 227 (1945).
216. *Edmonson*, 111 S. Ct. at 2084.
217. *Id.*
218. *Id.* at 2084-85.
219. *Id.* at 2085. It is helpful to note that while the majority cited to five cases in its arguments, it performed little factual analysis. The Court cited Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982), and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), to state the general rule, and then referred to three other cases for general authority. The Court referred to Virginia v. Rives, 100 U.S. 313 (1880), for the proposition that

In determining whether "state action" exists, it is helpful to clarify exactly what "action" is being scrutinized. In *Edmonson*, the action was a private attorney's exercise of a peremptory challenge. However, instead of focusing on this specific act, the majority's analysis concentrated on the "peremptory challenge system" and the "jury system" as a whole.[220] The Court argued that because the state establishes and administers these systems,[221] any person, who by means of the system achieves discriminatory ends, is a state actor.[222]

Justice Kennedy's discourse on the theory behind the jury system and peremptory challenge schemata does not seem helpful in an analysis of the specific issues involved. According to the majority's analysis, one could argue that *every* action a private citizen takes is state action because the private citizen acted within a constitutionally established society which is governed by laws instituted and enforced by the government.[223] In one sense, it is true that without "government" activity peremptory challenges would not exist, and, therefore,

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a judge's excusal of a juror constitutes a "final and practical denial" of the juror's constitutional rights. *Edmonson*, 111 S. Ct. at 2085. However, *Rives* is distinguishable from *Edmonson*. In *Rives*, the "final and practical denial" of the defendants' rights was the court's refusal to allow the African American defendants, accused of slaying a caucasian male, to remove their case from state court to federal court, in order to obtain a fair trial. *Rives*, 100 U.S. 315. In contrast, the judge in *Edmonson* merely advised a juror that he had been excused after a private attorney exercised a peremptory challenge. *Edmonson*, 111 S. Ct. at 2085. Furthermore, in *Rives*, the judge was the one exercising his discretion on a point of law: the removability of the case. This is inapposite to *Edmonson*, where the private attorney was the person exercising a peremptory challenge, and that choice did not pertain to a point of law. It is reasonable that the judge's ruling in *Rives* on a point of law constituted a "final and practical denial" of the litigants' rights. Yet, this denial of rights is less clear when a judge merely advises a juror that a litigant has exercised his right to a peremptory challenge, as in *Edmonson*.

Next, the Court cited to Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), for the proposition that by excusing the juror, the Court has elected to "place its power, property and prestige behind the [alleged] discrimination." *Edmonson*, 111 S. Ct. at 2085. Finally, the Court appealed to the reasoning in National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988), as supporting the assertion that in the area of peremptories, the Court " 'create[d] the legal framework governing the [challenged] conduct.' " *Edmonson*, 111 S. Ct. at 2085.

220. *Edmonson*, 111 S. Ct. at 2083.

221. *Id.* at 2083-85.

222. *Id.* at 2085-87.

223. The Court argued that "Congress has established the qualifications for jury service . . ." and that the peremptory challenge system "could not exist" without the "significant pariticipation of the government." *Id.* at 2084 (citing 28 U.S.C. § 1865 (1966 & Supp. 1991)). The Court then listed fifteen statutes used for the establishment and regulation of jury selection. *Id.*

could not be used in a discriminatory manner. But that analysis appears to miss the point. As Justice O'Connor stated in her dissent:

> That these actions may be necessary to a peremptory challenge— in the sense that there could be no such challenge without a venire from which to select— no more makes the challenge state action than the building of roads and provision of public transportation make state action of riding on a bus.[224]

Moreover, in deciding whether the government "significantly participated" in the discriminatory use of peremptory challenges, it is important to determine the extent of the government's role in the action taken. As pointed out in Justice O'Connor's dissent, the government's role in *Edmonson* was limited to that of advising the venireperson that the private attorney had excluded her from the jury.[225] Framing the issue in that way, the question becomes whether that specific governmental act constitutes "significant participation of the government."[226]

The Supreme Court in *Lugar v. Edmonson Oil Co.*[227] and *Burton v. Wilmington Banking Authority*[228] discussed this very issue of what constitutes significant participation of the government. In *Lugar*, the plaintiff alleged that a state statute providing for a writ of attachment contained procedures which violated due process.[229] Because the sheriff, a state employee, executed the writ, the Court found state action.[230] The Court reasoned that the allegedly defective procedural requirement combined with the sheriff's conduct constituted "state action."[231]

Moreover, in *Burton*, a restaurant owner leased space in a government building and then refused to serve African Americans.[232] Those who ate at the restaurant parked in the adjacent state-owned parking lot; thus, the state profited from the discriminatory practices of the restaurant.[233] The Court held that the restaurant owner was a

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224. *Id.* at 2090 (O'Connor, J., dissenting).
225. *Id.* (O'Connor, J., dissenting).
226. *Id.* at 2089 (O'Connor, J., dissenting).
227. Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982).
228. 365 U.S. 715 (1961).
229. *Lugar*, 457 U.S. at 925.
230. *Id.*
231. *Id.* at 941-42.
232. *Burton*, 365 U.S. at 719-20.
233. *Id.* at 724-25. *See generally*, Larry W. Yackle, *The Burger Court, "State Action," and Congressional Enactment of the Civil War Amendments*, 27 ALA. L. REV. 479 (1975); Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 382 (1963) (arguing that *Burton* permits the abdication of the state action doctrine when discussing the discrimination issue). Theodore J. St. Antione, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993, 1005-06 (1961) (asserting that private conduct which is condoned, but not required, by state law should be considered state action, and calling the *Burton* decision "a model of circumspection if not irresolution"); Thomas P. Lewis, *Burton v. Wilmington Parking Authority - A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).

state actor because of the perceived symbiotic relationship between the owner and the state parking authority.[234]

In its state action analysis in *Edmonson*, the majority argued that the judge's dismissal of the venireperson resulted from an exercise of the state's coercive power. The existence of state action in *Edmonson* is analogous to the situations in both *Lugar* and *Burton*. In *Lugar*, the state acted through the sheriff in executing the writ, and in *Burton*, the state benefitted by the discriminatory actions of the restaurant owner. Similarly, in *Edmonson*, the state acted through the judge in excluding a venireperson. Because the judge's act played a part in the dismissal of the venireperson, there can be no doubt that there was *some* government participation.

However, the *Edmonson* Court apparently never came to terms with the *degree* of government participation required to satisfy the state action doctrine. In *Blum v. Yaretsky*,[235] the Supreme Court held that the government "normally can be held responsible for a private decision *only* when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the *choice must in law* be deemed to be that of the State."[236] Thus, the test not only contains a quantitative requirement that the State exercise coercive power, but also includes a qualitative component that the "*choice must in law* be deemed to be that of the State."[237] The facts in *Edmonson* do not appear to satisfy this second requirement. In *Edmonson*, the choice to exclude the juror was not made by the judge, it was made by counsel.[238] Therefore, it is difficult to classify that choice as being made by the State when it was not the judge's decision to make.[239]

It is argued that by neutrally allowing private discrimination in a private counsel's exercise of peremptory challenges, the Court, in effect, participated in the discrimination by allowing it to happen.[240] This raises the issue of the degree of government participation required to satisfy the state action doctrine.

234. *Id.* at 725.
235. 457 U.S. 991 (1982).
236. *Blum*, 457 U.S. at 1004 (emphasis added).
237. *Id.* (emphasis added).
238. *Edmonson*, 111 S. Ct. at 2081.
239. *Id.*
240. *Id.* at 2090 (O'Connor, J., dissenting).

2. Justice O'Connor's Dissenting Opinion in *Edmonson*

In her dissent in *Edmonson*, Justice O'Connor addressed the issue of the requisite degree of government participation and found no state action.[241] Justice O'Connor approached this problem by viewing the events at issue as two "actions." First, the private attorney peremptorially struck a venireperson. Then, the trial judge, by excusing the juror, enforced the private action with the coercive power of the state.[242] Thus, two actions took place: an act by the private litigant, and an act by the judge. Clearly, the private attorney's exercise of choice was not in and of itself state action.[243] On the other hand, the judge's act, when evaluated independently, was unquestionably state action.[244]

Thus, the issue becomes whether an attorney's exercise of a peremptory challenge becomes state action when evaluated in conjunction with the judge's dismissal of the venireperson. Justice O'Connor argued that because the trial court's act in *Edmonson* was *de minimis*, the act in itself was not substantial state action, and further, the judge's act did not cause the attorney's act to rise to the level of state action.[245]

To support her position, Justice O'Connor relied on *Jackson v. Metropolitan Edison Co.*[246] and *Flagg Bros., Inc. v. Brooks*.[247] In *Jackson*, a state-regulated and licensed public utility terminated the plaintiff's electrical service pursuant to a state-approved procedure for terminating the electric service of those who did not pay their electric bills.[248] The state provided the procedure and endorsed the utility company's implementation of the procedure.[249] Moreover, the state would use its coercive power, if necessary, to legitimize the utility company's behavior.[250] Yet, because it was the *utility company's choice* to terminate Jackson's service, the Court found no state action.[251] The analogy to *Edmonson* is evident; the peremptory chal-

241. *Id.* at 2089-92 (O'Connor, J., dissenting).
242. *Id.* at 2090 (O'Connor, J., dissenting).
243. *Id.* (O'Connor, J., dissenting.)
244. *Id.* (O'Connor, J., dissenting).
245. *Id.* at 2092 (O'Connor, J., dissenting).
246. 419 U.S. 345 (1974).
247. 436 U.S. 149 (1978).
248. *Jackson*, 419 U.S. at 346-47.
249. *Id.* In other words, if the customer sued the electric company for terminating her service, a court would find the company's actions legal because they complied with state-established procedures. That the company's actions were legal in this case is evident from the plaintiff's decision not to challenge the utility's actions as violative of the state-established procedure. Rather, she claimed that the procedure itself was illegal because it violated her fourteenth amendment right to equal protection of the laws, actionable through 42 U.S.C. § 1983.
250. *See supra* note 249.
251. *Jackson*, 419 U.S. at 358.

lenge system is a state-established and state-backed procedure enforced by the state's coercive power. Yet, because it was the private counsel's choice to exclude Mr. Edmonson, there was no state action.

Similarly, in *Flagg Brothers*, a warehouseman entrusted with goods subsequently decided to sell them pursuant to state-established procedures.[252] The state, through its coercive power, backed the legality of the subsequent sale.[253] The Court reasoned that while the state provided the mechanism for selling the goods, there was no state action because it was the warehouseman's choice to utilize this mechanism.[254]

In both *Flagg Brothers* and *Jackson*, the government implemented neutral procedures which private citizens used in a discriminatory fashion. Moreover, if necessary, the state would back the decisions of the private parties by the coercive power of the courts. Yet, although the government implemented the procedures and upheld them when they were utilized by a private party, this did not convert the act of a private party into state action.[255] Similarly, where the government neutrally establishes the peremptory challenge system, and then enforces the private exercise of the challenge, the government participation should not convert private action into state action.[256] In its analysis on this point, the majority did not discuss *Flagg Brothers* or *Jackson*.

2. Traditional State Function

When a private actor engages in functions traditionally considered to be exclusively reserved for the state, and does so in a discriminatory fashion, courts have generally found state action for which Fourteenth Amendment relief is afforded.[257] On this point, Justice

252. *Flagg Brothers*, 436 U.S. at 153.

253. *Id.* at 165. That is, if the previous owner of the goods sued to recover his property, the courts would rule against him.

254. *Id. See generally*, Thomas P. Rowe, Jr., *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of* Flagg Brothers, Inc. v. Brooks, 69 GEO. L.J. 745 (1981) (referring to *Jackson*, *Flagg*, and one other case, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), as "the Rehnquist trilogy").

255. 111 S. Ct. at 2091-92 (O'Connor, J., dissenting).

256. *Id.* at 2092 (O'Connor, J., dissenting).

257. Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946). *But see* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Smith v. Allwright, 321 U.S. 649 (1944).

Kennedy once again began his analysis in *Edmonson* by focusing not on the private actor, but on the general character of a jury, which Justice Kennedy described as the "quintessential governmental body."[258] Thus, the majority found state action because, "[t]he peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor."[259]

The majority argued from the premise in *Terry v. Adams*,[260] that the selection of state officials constitutes state action.[261] In *Terry*, a private political quasi-governmental organization in which only Caucasian Americans were allowed to participate chose the democratic party's candidate in the primaries.[262] The Court found that the selection of a political candidate was a traditional governmental function, and therefore, the actions of the private organization in this regard constituted state action.[263] The *Edmonson* majority argued by analogy that the selection of a jury, a body of state officials, also constitutes state action.[264]

However, *Terry* is distinguishable from *Edmonson*. While the selection of the political candidate in *Terry* may be considered a traditional government function, the selection of the jury in *Edmonson* stems from a " 'tradition' . . . of unguided private choice."[265] Instead of disputing this historical assertion, the majority maintained its argument that because the jury is a governmental body, the choice of a private attorney is state action.[266] It might also be argued that the private individual voters choosing a candidate in *Terry* can be analogized to the private individual attorneys exercising peremptory challenges in *Edmonson*. However, this analogy is not germane. In *Terry*, it was not individual voters who chose the candidate in a general election, but a quasi-governmental political organization which chose a candidate in the primaries. Thus, unless the majority is claiming that a private attorney is analogous to a quasi-governmental political organization, the comparison is not persuasive.[267]

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258. *Edmonson*, 111 S. Ct. at 2085. The difficulty in the majority's argument appears evident from a reading of its own statement. Here, Kennedy's argument was that a jury "ha[s] no attributes of a private actor." *Id.* But, whether the *jury* is a private or state actor seems beside the point. The question is whether the *private attorney* is or is not a state actor under the circumstances.

259. *Id.*

260. 345 U.S. 461 (1953).

261. *Edmonson*, 111 S. Ct. at 2085.

262. *Terry*, 345 U.S. at 463-64.

263. *Id.* at 477.

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

265. *Id.* at 2093 (O'Connor, J., dissenting). For a discussion of the history of peremptory challenges, see *supra* notes 19-99 and accompanying text.

266. *Edmonson*, 111 S. Ct. at 2085.

267. *See id.* at 2080-81. It is true that an attorney is an " 'officer[] of the court.' " State Bar of California v. Superior Court, 278 P. 432, 435 (1929). However, rarely, if ever, are the decisions of a private attorney deemed to be those of the court. In other

Justice O'Connor, in her dissent, disputed the majority's statement of the law.[268] The majority found that in order to be state action, the private action must be "a traditional function of government."[269] However, the majority did not address the issue of whether the function was exclusively that of the government. As stated in *Jackson* and *Flagg Brothers*, and as pointed out by Justice O'Connor's dissent in *Edmonson*, to engage in state action, the private actor must exercise "powers traditionally *exclusively* reserved to the State."[270] Thus, "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."[271] While the majority argued that the exercise of peremptory challenges is a traditional government function,[272] it is more difficult to assert that the exercise of a peremptory challenge is *exclusively* a government function.

Next, the majority analyzed *Polk County v. Dodson*,[273] a case in which a public defender was not considered to be a state actor when representating a criminal client.[274] To distinguish *Dodson*, the *Ed-*

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tasks in the practice of law, such as filing motions, discovery, etc., the attorney acts on his client's behalf, rarely on behalf of the government. Yet, nearly every task performed by an attorney requires court approval in some way. Complaints need to be accepted by the court. Discovery requests may only be enforced by court-backed motions to compel. The rules applying to the taking of depositions are only valid to the extent that they are backed by the authority of the court. The Court's ruling in *Edmonson* could conceivably make each of these tasks performed by an attorney subject to the state-action doctrine.

268. *Id.* at 2093 (O'Connor, J., dissenting).

269. *Id.* at 2085.

270. *Jackson*, 419 U.S. at 352 (emphasis added). *See Flagg Brothers*, 436 U.S. at 159; *Edmonson*, 111 S. Ct. at 2093 (O'Connor, J., dissenting). The majority in *Edmonson* chose not to adhere to the exclusivity requirement. Professor Choper made the following comments regarding the *Edmonson* Court's handling of the exclusivity requirement:

> Kennedy never used the key limiting word used by the Burger-Rehnquist Court — 'exclusively.' . . . Instead of asking the critical question of whether the function here is one exclusively reserved to the states, Kennedy said the jury is 'a quintessential government body,' and a private person is then given the power (through the jury selection process) to choose government employees.

CHOPER, *supra* note 9, at 12. For a discussion of the exclusivity requirement, see *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57 (1978) (in deciding *Flagg Brothers*, the Burger Court extracted an exclusivity requirement from the facts, but not the rationale of previous state action cases).

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

272. *Id.* at 2085.

273. 454 U.S. 312 (1981)

274. *Dodson*, 454 U.S. at 317. *See generally* Kenneth S. Schlesinger, Polk County v. Dodson: *Liability Under Section 1983 for a Public Defender's Failure to Provide Ade-*

monson Court asserted that while the public defender representing a criminal client is in a position adverse to the government, a private litigator and the government "work for the same end" in selecting a jury.[275] Thus, the Court reasoned that a private litigator should be considered a state actor.[276]

However, there are difficulties with the Court's position. First, the majority's position contains logical inconsistencies. The majority argued that a public defender is not a state actor because the public defender shares an adversarial relationship with the government.[277] However, the Court then concluded that Mr. Edmonson was a state actor because, as a civil litigant, he was not in an adversarial relationship with the government.[278] The Court, in effect, argued that one who is not in an adversarial relationship with the government is a state actor. Yet, not being in an adversarial relationship with the government does not necessarily make one a state actor.

Second, Justice Kennedy's contention that a private litigator and the government "work for the same end" in choosing a jury is troublesome.[279] In any civil trial in which the government is not a party, the government's goal, achieved through the judge, is to ensure that a fair jury is chosen. However, the goal of the private attorney is to choose a jury that is disposed to find in favor of her client. These goals are not synonymous. In any civil case, where each litigant attempts to choose a jury that will rule in his favor, it is logically impossible for the government, through the judge, to work for the ends of both litigants simultaneously. Consequently, the government must remain neutral. As Justice O'Connor's dissent explained, "That's the point. The government does not encourage or approve these strikes, or direct that they be used in any particular way, or even that they be used at all. The government is simply not 'responsible' for the use of peremptory strikes by private litigants."[280]

Finally, in attempting to establish that the exercise of peremptory challenges by a private litigant in a civil trial is "a power 'traditionally exclusively reserved to the State,' "[281] the majority cited to *West*

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quate Counsel, 70 CAL. L. REV. 1291 (1982) (agreeing with Justice Blackmun's dissent in *Dodson* and arguing that public defenders act under color of state law); Jeffrey C. Gilbert, *In Defense of Public Defenders:* Polk County v. Dodson, 36 U. MIAMI L. REV. 599 (1982) (arguing that *Dodson* found no state action merely as a device to limit section 1983 actions against public defenders.)

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

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

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

281. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 157 (1978) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)).

v. Atkins.[282] In *West*, a state prison inmate brought a claim against a private physician hired by the prison.[283] The prisoner claimed that the doctor had deprived him of necessary medical care.[284] In ruling that the doctor was a state actor, the Court reasoned that the doctor's actions could fairly be attributed to the state.[285] The *Edmonson* majority's analysis of *West* was merely a conclusory statement that "when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance."[286] The majority then concluded by decrying the evils of discrimination.[287]

Justice O'Connor ended her dissent with a discussion of two more cases, *Rendell-Baker v. Kohn*[288] and *Jackson v. Metropolitan Edison Co.*,[289] neither of which were discussed by the majority.[290] Both cases stand for the proposition that performance of a state-regulated or state-funded function is not state action unless that action is traditionally the exclusive prerogative of the State.[291]

D. Aggravated by Incidence of Governmental Authority

At the close of the majority opinion, Justice Kennedy posited his version of the "aggravated by incidence of governmental authority" test.[292] He employed a novel "location" argument which now joins the ranks of state action jurisprudence: "[T]he injury caused by discrimination is made more severe because the government permits it to occur within the courthouse itself."[293] The majority did not cite to any authority for this proposition,[294] and did not attempt to distinguish *Polk County v. Dodson*,[295] a case in which discriminatory acts, performed within the courtroom, were not considered to be state ac-

282. 487 U.S. 42 (1988).
283. *West*, 487 U.S. at 44.
284. *Id.* at 45.
285. *Id.* at 56-57.
286. *Edmonson*, 111 S. Ct. at 2087.
287. *Id.*
288. Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (discriminatory actions of a state-funded private school for maladjusted students not considered state action).
289. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (the alleged discriminatory actions of a state-regulated utility not considered state action).
290. *Edmonson*, 111 S.Ct. at 2091-93 (O'Connor, J., dissenting.)
291. *See Rendell-Baker*, 457 U.S. 830; *Jackson*, 419 U.S. 345.
292. 111 S. Ct. at 2083.
293. *Id.* at 2087.
294. *Id.*
295. 454 U.S. 312 (1981).

tion.[296] The majority concluded its state action analysis by once again expressing a general concern regarding the invidious effects of racial discrimination in the judicial system.[297]

V. IMPACT

The impact of the Court's decisions in *Powers* and *Edmonson* is not difficult to ascertain. As the law stands, the prosecution in a criminal case may not use peremptory challenges in a racially discriminatory manner.[298] Moreover, all civil litigants are bound by this standard.[299]

A. Defendants' Use of Peremptory Challenges

The remaining questions concern whether a defendant in a criminal case may use peremptory challenges in a racially discriminatory manner,[300] and whether litigants, civil or criminal, may use gender discrimination in the exercise of peremptory challenges.[301] Although several circuit courts have ruled on these issues,[302] the Supreme Court has yet to speak. Following the principles set out in *Polk County v. Dodson*,[303] it would seem difficult for the Court to find that defense attorneys are state actors. However, with its new "location" rationale for state action, it is now possible that the Court may find criminal defense attorneys to be state actors[304] because their discriminatory use of peremptory challenges would necessarily occur in the courtroom.[305]

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296. *Id.* at 334.

297. *Edmonson*, 111 S. Ct. at 2088.

298. Powers v. Ohio, 111 S. Ct. 1364 (1991).

299. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991).

300. The Court recently granted a writ of certiorari to decide this very issue. State v. McCollum, 405 S.E.2d 688 (Ga. 1991), *cert. granted*, 112 S. Ct. (1991).

301. *See Sex-Based Juror Exclusions Reviewed*, FACTS ON FILE WORLD NEWS DIG., June 13, 1991, § E1, at 442.

302. *Compare* United States v. DeGross, 913 F.2d 1417 (9th Cir. 1990), *reh'g en banc granted*, 930 F.2d 695 (1991) (holding that an attorney may not discriminate on the basis of gender in exercising peremptory challenges); State v. Levinson, 795 P.2d 845 (Haw. 1990) (discriminatory use of peremptory challenge to exclude female from jury based on gender violates state constitution equal protection clause); with Di Donato v. Santini, 283 Cal. Rptr. 731 (1991) (California Court of Appeal let stand a superior court decision precluding the exclusion of women from the jury on the basis of gender).

303. 454 U.S. 312 (1981). In *Dodson*, the Court held that a public defender is not a state actor because he is in an adversarial relationship with the government. *Id.* at 326-27.

304. One court stated that because of the Court's reasoning in *Edmonson*, it is "inescapable" that the Supreme Court will extend the availability of the *Batson* challenge to prosecutors. State v. Anaya, No. CA-CR 90-0110, 1991 WL 186989 (Ariz. App. Sept. 19, 1991).

305. *See supra* note 293 and accompanying text. It is foreseeable that a different analysis would be used for public defenders as opposed to private criminal defense attorneys.

B. Gender Discrimination

Moreover, it might be difficult to extend the Court's rationale in *Batson*, *Powers*, and *Edmonson* to issues of gender.[306] One reason is that gender challenges would not be limited to women. A gender challenge could be brought when a man is discriminatorially excluded from a jury. Other issues which might be considered in the future are whether attorneys may use peremptory challenges to discriminate on the basis of sexual preference, religion, age, language[307] and residency.[308]

C. Administrative Burden of New Challenges

Several commentators have echoed Justice Scalia's concern with respect to the logistical burden *Edmonson* and *Powers* impose on the courts.[309] They argue that the *Edmonson* challenge, combined with the *Powers* and *Batson* challenges, will bring the peremptory challenge system to a halt.[310] In an attempt to stall or impose burdens on the opposing side, counsel could virtually challenge every attempt to strike a juror. This is because any time two women, two men, or two minorities are excused consecutively, a challenge could be raised.

The repercussions of this dilemma could cause one of two results. The courts could become clogged with endless challenges to peremptory strikes, thus imposing heavy financial burdens on the courts and the parties. On the other hand, attorneys might simply choose to refrain from using peremptory challenges altogether, seriously hindering the process of empaneling impartial juries.

It is unclear which, if either, of these scenarios will occur. The future likely holds a combination of the two. However, the immediate effect of the *Powers* and *Edmonson* decisions will not be disastrous. But they do add two more straws to the proverbial camel's back.

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306. *But see supra* note 301.

307. *Peremptory Strikes of Bilingual Jurors Weren't Based on Racial Discrimination*, BNA WASH. INSIDER, May 29, 1991.

308. United States v. Bishop, 60 U.S.L.W. 2639 (9th Cir. Mar. 25, 1992) (exclusion of a venireperson based on residence in a low income, high crime, African American neighborhood deemed unconstitutional).

309. Aaron J. Broder, *Trial Tactics and Techniques*, N.Y. LAW JOURNAL, July 1, 1991 at 3 (explaining the practical implications of the *Edmonson* and *Powers* decisions); James P. Connors, *"Edmonson v. Leesville Concrete Co.": Effect on the Civil Jury Selection Process*, N.Y. LAW JOURNAL, August 9, 1991 at 1. *But see* Joseph Kelner & Robert S. Kelner, *Civil Jury Selection Under 'Edmonson'*, N.Y. LAW JOURNAL, June 25, 1991. (agreeing with the *Edmonson* majority that the extension of the *Batson* challenge will improve the judicial system).

310. *See* Broder, *supra* note 309, at 3.

D. Aberrational Nature of Holdings

The broader impact of the Court's holdings, however, does warrant comment. Professor Choper saw the state action holding in *Edmonson* as "aberrational."[311] If this is true, then the decision might go the way of *Shelley v. Kramer*,[312] lost in the black hole of anomalous Court decisions.[313] This assessment appears to ring true considering the Rehnquist Court's track record in state action cases.[314] The third party standing holding in *Powers* could also be seen as aberrational. Labeling the connection between an excluded venireperson and a criminal as a "close relationship" seems to be a proposition that will not withstand future scrutiny.

E. Political Nature of Decision

What is not aberrational, however, is the political nature of the Court's behavior. Unfortunately, this dimension of judging is ever present and always tempting. Alexander Hamilton in *The Federalist Papers* offered the following comments which speak to this issue:

> Whoever attentively considers the different departments of power must perceive that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[315]

Hamilton went on to proclaim, "[T]here is not liberty if the power of judging be not separated from the legislative and executive powers."[316]

Because of the problems of third party standing and state action, the sensible solution to the problem of racism in the courtroom must originate in the legislature rather than the courts. Such a legislative solution was proposed by the Honorable George Bundy Smith. Judge Smith suggested that any legislation authorizing peremptory chal-

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311. *See* CHOPER, *supra* note 9, at 2.

312. 334 U.S. 1 (1948).

313. "The Supreme Court . . . has refused to apply *Shelley*." Chemerinsky, *supra* note 194, at 526 (citing R. KLUGER, SIMPLE JUSTICE 528 (1976) ("*Shelley* had no lasting impact")).

314. *See* Choper, *supra* note 10, at 8. Professor Choper commented that *Edmonson* "is more a reflection of [Justice] Kennedy's personal abhorrence of racial discrimination." *Id.*

315. THE FEDERALIST No. 78, at 522-23 (Alexander Hamilton) (Wesleyan U. ed. 1961).

316. *Id.* at 523 (quoting I. MONTESQUIEU, SPIRIT OF LAWS, 181).

lenges be amended with "one simple sentence as follows: The peremptory challenge shall not be used by either the prosecutor or the defendant to exclude a prospective juror solely on the basis of race or color."[317] Such an amendment could also include phrasing precluding discrimination based on gender, and it could be extended to the civil arena.

VI. CONCLUSION

At the heart of American democracy is the belief that the logic and debate of the marketplace, not coercion or violence, is the vehicle by which individual attitudes and beliefs are challenged and ultimately changed. Inherent in this system is the fundamental notion that people cannot and must not be forced to embrace any given political or social belief, regardless of how right or desirable it appears to be. Coercing a private party to conform her behavior to a given set of social or political beliefs leads not to a constructive and enduring transformation of society's worldview, but rather to resentment and bitterness toward the government. Such a policy divides rather than unifies.

It is true that where the government is truly an actor, the Constitution speaks loudly and clearly that the government is not permitted to discriminate. The State may not be a perpetrator in the racism travesty. However, when the State oversteps its bounds and encroaches upon the right to freedom of expression and belief treasured by every American citizen, the State has gone too far, and the ultimate consequences will inevitably be destructive.

In *Powers v. Ohio*[318] and *Edmonson v. Leesville Concrete Co.*,[319] the Court seemed to strain its traditional limitations in order to attain the short-term goal of racial equality in the courtroom. Although battling racism is a worthy goal, Justice Scalia castigated the majority for taking a "self-satisfying" stance in its "unmeasured and misdirected" blow against racism.[320]

For example, the Court held that a person may litigate the interests of a third party where the two parties share a "common interest."[321] In *Powers*, the common and laudable interest was to rid the courtrooms of discrimination. But, in the next case, virtually anyone

317. Honorable George Bundy Smith, *supra* note 69, at 1594.
318. 111 S. Ct. 1364 (1991).
319. 111 S. Ct. 2077 (1991).
320. *Powers*, 111 S. Ct. at 1382 (Scalia, J., dissenting).
321. *Id.* at 1372.

may have access to the courts, regardless of whether they themselves have been injured, as long as they share a common interest with some person who has been injured in some way and is unwilling to litigate. This strained interpretation of the "case or controversy" requirement could easily lead to an influx of litigation, wholly unintended by the framers of the Constitution. As Justice Scalia stated in his separate dissent in *Edmonson*:

> [I]t is a certainty that the amount of judges' and lawyers' time devoted to implementing today's newly discovered Law of the Land will be enormous. That time will be diverted from other matters, and the overall system of justice will certainly suffer. [M]uch of [the price] will be paid by the minority litigants who use our courts.[322]

These recent peremptory challenge rulings also continue the remedy inaugurated in *Miranda v. Arizona*[323] of using the key to the jailhouse door "not to free the arguably innocent, but to threaten release upon the [sic] society of the unquestionably guilty unless [government officials] take certain steps that the Court newly announces to be required by law."[324] In *Powers*, a murderer's conviction was overturned because a venireperson's rights were violated.[325] In effect, the Court argued that because A's rights were violated, B should be rewarded. Yet, the Court never intimated that the defendant did not get a fair trial. This type of remedy is difficult to justify.

It is acknowledged that in a *Batson* case, where the defendant demonstrates injury, a new trial might be a justifiable remedy. Yet, in *Powers*, the rights violated were admittedly those of the venireperson. In such a case, if the venireperson did come forward and win an equal protection claim against the prosecutor, the remedies would flow from Section 1983 of Title 42 of the United States Code.[326] However, even this section provides for monetary and injunctive relief for the victim of the discrimination, not a third party who witnessed the discrimination.[327] In a *Powers* scenario, it is unrealistic to assume that an excluded venireperson would have wanted, as part of her

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322. *Edmonson*, 111 S. Ct. at 2096 (Scalia, J., dissenting).

323. 384 U.S. 436 (1966).

324. *Powers* 111 S. Ct. at 1381.

325. *Id.* at 1374.

326. 42 U.S.C. § 1983 states:

> 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

327. *Id.*

damages, the convicted murderer to receive a new trial. Yet, this is the remedy the Court implemented.

Racism continues to be a provocative and serious problem facing this nation. It is an emotionally charged issue which penetrates the hearts and minds of all who come in contact with it, and tragically, the destructive effects of racial hatred are widespread. Recently, however, "racial equality" seems to have approached the status of a sacred cow, "unreasonably immune from ordinary criticism."[328] Yet, even worthwhile goals must not be achieved through overlooking precedent and straining existing law, lest we end up winning the proverbial battle, but losing the war. Hopefully, racial equality will not approach the status of a litmus test, predetermining the outcome of cases involving race. In the words of the *Holland* Court: "The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds."[329]

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328. Webster's Third New International Dictionary (1966).
329. Holland v. Illinois, 110 S. Ct. 803, 811 (1990).