Georgiav. McCollum: It's Strike Three for Peremptory Challenges, But is it the Bottom of the Ninth?

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V. Future of Peremptory Challenges

1. INTRODUCTION

A grand jury in Georgia returned a six-count indictment against three individuals, charging each with aggravated assault and simple battery. The defendants were white, while the victim was black. Shortly thereafter, leaders of the African-American community circulated leaflets urging the town's residents to boycott the defendants' place of business. Because of the community reaction to the allegedly racially motivated assaults, the prosecution, in pre-trial proceedings, moved to forbid the use of race-based peremptory challenges to remove potential jurors. Under Georgia law, forty-two people comprise the typical petit jury venire. Because the racial composition of the community was forty-three percent African-American, in all probability, the twenty peremptory challenges allowed to the defendants would have been more than enough to exclude all potential black jurors.

The trial judge denied the motion, concluding that no such prohibition restricting the exercise of peremptory challenges by a criminal defendant existed. The state supreme court affirmed the trial court's decision, reasoning that jury trials are an essential element in the protection of human rights; therefore, the court would not restrict the free exercise of peremptory challenges by the criminal defendant.

The United States Supreme Court granted certiorari to decide whether the United States Constitution prohibits the race-based exercise of peremptory challenges by criminal defendants. Five members joined in the majority opinion that held: 1) the state had standing to raise objections on behalf of the excluded jurors; 2) the accused's exercise of these challenges was considered state action to invoke constitutional scrutiny; and 3) the Equal Protection Clause of the Fourteenth Amendment prohibits the use of peremptory challenges to exclude potential jurors from jury service solely on the basis of race. The Court reversed the

2. Ga. Code Ann. § 15-12-165 (1990). In Georgia, a defendant who is indicted for an offense which carries a penalty of four years or greater is allowed to exercise twenty peremptory challenges against the jurors impaneled to hear the controversy.
3. Assuming the petit jury venire accurately reflected the community's racial composition, 19 (43% x 42 = 18.06) prospective black jurors would likely have been called for possible jury service.
7. Chief Justice Rehnquist and Justice Thomas penned two concurrences joining with the majority in the judgment. Justices O'Connor and Scalia each dissented as to the judgment.
judgment of Georgia's high court and remanded the case to the original forum for further proceedings consistent with the opinion.9

The United States Supreme Court faced these issues in Georgia v. McCollum,10 the latest case in a recent line of Supreme Court decisions restricting the exercise of racially-based peremptory challenges under the Equal Protection Clause of the Fourteenth Amendment.11 However, this decision extends the scope of equal protection review and affords protection to potential jury members challenged by criminal defendants. The irony is that, for the Equal Protection Clause to have any application, the defendant must be considered a state actor.12

McCollum was strike three for racially-based exclusions from jury service. This note focuses on the impact of McCollum on the future exercise of peremptory exclusions in today's judicial process. Section I provides a history of peremptory challenges and of the jury system itself; this section also incorporates a brief study of prior jurisprudence limiting race-based exclusions of potential jurors. Section II addresses the test for Equal Protection Clause litigation and the requirement of state action. The analysis then focuses on possible alternatives to the current Supreme Court's application of the Equal Protection Clause. Section III highlights the possible extension of this analysis to other types of discriminatory exclusions such as those based on gender. Finally, Part IV questions whether any substance remains in the peremptory challenge and the future viability of this practice after the judgment in McCollum.

II. HISTORY OF THE JURY AND APPLICABLE JURISPRUDENCE

A. The Jury

The jury system has its origins in early Roman law.13 The first evidence of this principle in the Anglo-Saxon tradition immigrated to England in 1166 A.D. with the Assize of Clarendon which allowed

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9. Id. at 2359.
10. Id. at 2348.
13. It was employed by the Romans in criminal cases, and the Lex Servilia (B.C. 104) allowed for the accuser and the accused to submit a list of impartial judices from which each would strike fifty members of the two hundred member pool of prospective jurors to allow one hundred men to hear the controversy. Batson, 476 U.S. at 120, 106 S. Ct. at 1735 (Burger, C.J., dissenting).
inquiry into robbery and murder by "the twelve most lawful men." Later, in England, the members of the jury were chosen based upon their knowledge of the events at issue. This privilege gradually evolved into today's concept of selecting those members of the pool of jurors who know nothing of the instant litigation so as to assure an impartial trial. The protection afforded by a jury immigrated with the American colonists from England, and the forefathers considered it such an essential right that they included the jury system as a constitutional safeguard in the Sixth and Seventh amendments of the Bill of Rights of the United States Constitution.

In order to implement these constitutional safeguards, a fair procedure for selecting a jury is necessary. The method employed today begins with the state drawing names "indiscriminately and by lot in open court"; subsequently the state summons those chosen to appear before the court. At this time, the trial judge and the parties' counsel have the opportunity to examine each potential juror to decide whether that person should be accepted for jury duty. Attorneys use this examination (known as voir dire) "to ferret out conscious or subconscious preconceptions and biases which may impact the selection of a fair and impartial jury."


15. Damaska, supra note 14, at 40.

16. The safeguard afforded by the Sixth Amendment refers only to a criminal proceeding. It provides:

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; which district shall have been previously ascertained by the law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

(emphasis added).

17. The Seventh Amendment provides the requirement for jury trials in certain civil proceedings. It reads:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

(emphasis added).


NOTES

After the voir dire examination, the parties may strike a potential juror from the panel for cause20 or exercise a peremptory challenge. A strike for cause occurs when the presiding judge determines that a potential juror will be unable to consider an issue to be contested at trial "fairly and impartially."21 A peremptory challenge, on the other hand, involves the right to challenge a potential juror "without assigning, or being required to assign, a reason for the challenge."22 Counsel normally bases a challenge for cause upon prejudicial information obtained during voir dire that exhibits a possible predisposition of a juror toward a given outcome; thus, the peremptory challenge can be premised on inarticulable "hunches" or a "seat-of-the-pants" judgment, or even no reason at all.23 This note focuses upon the latter of these two types of challenges and the validity of this random and indiscriminate decision-making.

B. Applicable Jurisprudence

The United States Constitution has been interpreted to afford remedies for any illicit discrimination by persons considered state actors. Evidence of the judiciary's remedial powers granted by the Constitution are found in cases that address the race-based exercise of peremptory challenges and charge that such action violates the Equal Protection Clause of the Fourteenth Amendment. The intention of the drafters of the Civil War Amendments—which included the Fourteenth—was to accomplish a constitutionalization of the Civil Rights Act of 1866.24 Thus, the primary intention of the drafters of these amendments was to guarantee equal treatment between whites and the newly freed slaves.25

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20. La. Code Crim. P. art. 797. A challenge for cause may be exercised in criminal trials for one of five reasons. They are: 1) lack of qualification, 2) partiality, 3) special relationship between the juror and parties in the case, 4) juror will not accept the law as given to him by the court, and 5) juror previously served on the indicting grand jury, or another petit jury that has tried the defendant for the same or another offense.

21. This concept was taken from Standard 8 of the Standards on Juror Use and Management issued by the American Bar Association in effect in 1989. It reads as follows:

If the judge determines during the voir dire process that any individual is unable or unwilling to hear the particular case at issue fairly and impartially, that individual should be removed from the panel. Such a determination may be made on motion of counsel or on the judge's own initiative.

Louisiana Standards on Jury Use and Management No. 7 (Final Draft 1989) (citing ABA Standards on Juror Use and Management).


Courts soon applied this guarantee to the process of jury selection.

1. Strauder v. West Virginia—The Seminal Race-Based Exclusion Jurisprudence

The Court did not address the issue of racial discrimination in jury selection until 1880. In *Strauder v. West Virginia*,\(^{26}\) the Supreme Court addressed the issue of the exclusion of non-whites, not from the jury, but from the jury venire.\(^{27}\) In *Strauder*, an all-white jury convicted a black man of murder. The state of West Virginia statutorily limited persons eligible for jury service to white male citizens of that state who were at least twenty-one years old. Thus, the issue before the Court was whether the Fourteenth Amendment prohibited a state's unilateral exclusion from jury service of all non-whites, regardless of their capacity or availability to serve.

The *Strauder* Court recognized that although a defendant has no right to "a petit jury composed in whole or in part of persons of his own race," he does have a right to be tried by a jury whose members are selected in a nondiscriminatory manner.\(^{28}\) In the view of the Court, the selection of jurors in a racially discriminatory manner not only harmed the defendant, but also injured the eliminated prospective jurors.


The Court did not consider the race-based exercise of peremptory challenges until almost 100 years after the *Strauder* decision. This case, *Swain v. Alabama*,\(^ {29}\) posed the issue of the constitutionality of race-based peremptory exclusions by a state prosecutor in a criminal case. The defendant in this case accused the prosecution of excluding members of the defendant's race from jury service on the basis of skin color. In the trial court, the jury convicted the defendant, and the Alabama Supreme Court affirmed. The United States Supreme Court also affirmed, finding no constitutional infirmity.

The Court rejected the defendant's equal protection claim, holding that to make such a case, the defendant had the burden of proving the prosecution's systematic exclusion of blacks from the petit jury over many different cases. In this instance, the defendant had not met this burden of proof and was unable to show purposeful discrimination over

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26. 100 U.S. 303 (1880).
27. The Court decided this issue to determine the propriety of federal jurisdiction.
28. *Strauder*, 100 U.S. at 305.
a period of time. Thus, although the Court frowned upon the exercise of racially-tainted peremptory challenges, it believed that a pattern of discrimination was required before it could contravene the exercise of peremptory challenges.

3. Batson v. Kentucky—Race-Based Exercise of Peremptory Challenges are Unconstitutional in the Criminal Arena

In 1986, the Court had the opportunity to reconsider and overrule Swain in Batson v. Kentucky. Here, the Court ruled that the exercise of peremptory challenges by the prosecution to eliminate potential jurors solely on account of their race violated the Equal Protection Clause because the "Constitution prohibits all forms of purposeful racial discrimination in the selection of jurors." Contrary to the ruling in Swain, the Batson Court held that the equal protection challenge may be sustained on the showing of a pattern of race-based exclusions in a single case, thereby abrogating the requirement in Swain of a demonstration of a historical pattern of discrimination.

In its decision, the Court outlined a three-pronged test to evaluate a defendant's equal protection challenge. First, to bring a successful challenge, the defendant, who must be a member of a cognizable racial group, must make a prima facie showing that the prosecution's exercise of peremptory challenges was tainted with racially-based motives. Second, once the defense has made this showing, the burden shifts to the prosecution to articulate a race-neutral explanation for the peremptory challenge. Finally, the trial court must decide whether the state's articulated explanation overcomes the defendant's prima facie presentation. If the defense does prove discriminatory intent, the trial court has great discretion with which to grant a remedy. These provisions enunciated

30. Id. at 224, 85 S. Ct. at 838. The Swain test was almost an impossible burden for the defendant to meet. In the days before written records of voir dire, a defendant had no chance of proving this "systematic exclusion." American courts only decided three cases in favor of a defendant under the Swain rule. In light of Louisiana's discriminatory history, it is not surprising that all of these cases originated in this state. See, e.g., United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974); State v. Brown, 371 So. 2d 751 (La. 1979); State v. Washington, 375 So. 2d 1162 (La. 1979).
33. Id. at 88, 106 S. Ct. at 1718.
34. The defendant makes a prima facie showing by exhibiting that the facts surrounding the jury selection process evidence a racially discriminatory exercise of peremptory challenges on the part of the prosecution. Id. at 93-94, 106 S. Ct. at 1721.
35. Id. at 96-98, 106 S. Ct. at 1722-24.
by the Court were far from clear and provided little guidance to trial courts concerning the remedy to be afforded the defendant in such circumstances.  


Five years later, the Court in *Powers v. Ohio* extended its decision in *Batson* by declaring that the defendant need not be a member of a minority to maintain a successful equal protection challenge as required in previous cases. *Powers* was also the first case to hold that a criminal defendant has standing to raise an equal protection challenge on behalf of the excluded juror.

In *Powers*, the defendant was a white man accused of aggravated murder and other related offenses. During the *voir dire* examination, the prosecution exercised seven of ten allotted peremptory challenges to remove black potential jurors. The defendant, Powers, objected after each exercise of the peremptory challenge on the basis of the Court’s previous ruling in *Batson*, but the trial court overruled these objections, and the impaneled jury convicted the defendant. Powers appealed his conviction to the Ohio Court of Appeals, claiming that the allegedly discriminatory exercise of peremptory challenges violated the Equal Protection Clause. The court of appeals affirmed the conviction. The United States Supreme Court granted *certiorari* to consider the validity of an equal protection objection of a white defendant who objects to the exclusion of a black potential juror. By doing so, the Court granted to the defendant the necessary third party standing to raise the objection for the excluded potential juror.

For the doctrine of third party standing to have effect in this equal protection violation, the Court required three factors: 1) concrete interest in the disposition of the claim; 2) the defendant’s relation to the excluded juror; and 3) the defendant’s potential for success in the claim.

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36. In Louisiana, the statutory remedies are either to seat the juror or take any other action the court deems appropriate. La. Code Crim. P. art. 795(E). In addition, the Louisiana Supreme Court has also declined to provide any guidance in this matter. See, e.g., *State v. Collier*, 553 So. 2d 815 (La. 1989). The *Batson* rationale prohibiting the race-based exercise of peremptory challenges by the prosecution has been codified in Louisiana law in Louisiana Code of Criminal Procedure article 795(C). Clifford R. Strider, *Current Legal Issues in Jury Selection*, Louisiana District Attorneys Ass’n 18th Annual Conference, August 1992.


38. This result was presaged by *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692 (1975), in which a male defendant was permitted to raise a Sixth Amendment challenge on behalf of a female who was denied the opportunity to serve on a jury. See Lee Hargrave, *Louisiana Constitutional Law, Developments in the Law, 1979-1980*, 41 La. L. Rev. 529, 530 n.5 (1981).

The Court found that these requirements were met in *Powers* to allow the prosecution to object on behalf of the excluded juror for the impermissible actions of the prosecution. The first requirement mentioned above was met, in the view of the Court, because the juror has an interest in the elimination of any racial discrimination in criminal trials which infects the integrity of the judicial system and casts doubt on the objectivity and fairness of its functions. Because such action by the prosecution harms the potential juror and prevents him from participating in the judicial process, the prosecution has inflicted a concrete injury on the rights of the excluded juror.

The state addressed the second prong of the third-party standing question by showing that the defendant and the excluded juror have the same goal, the elimination of racial discrimination from the judicial process; therefore, the Court believed that these facts satisfied the second requisite cited earlier. The potential jury member could be embarrassed because such action occurs in a public forum. Also, the venireperson, as well as the defendant, may lose confidence in the judicial system because of such discrimination. Thus, the similarity between the interests of the defendant and the potential juror allow the defendant standing to prosecute the equal protection claim on behalf of the excluded juror.

Finally, the defendant was deemed to be the proper party to bring this question because it is highly unlikely that a juror excluded on account of his race will protest and litigate his exclusion from a jury. Little opportunity exists for the excluded juror to promote his views at the time of the exclusion. Also, such a showing would be difficult for an individual juror at *voir dire* because of the impossibility of showing that this discrimination was likely to re-occur. Finally, in addition to the other considerations, the economics of the situation do not justify the expense of litigating such a suit by an excluded potential juror.

After considering the factors and rationale discussed above, the Court held that the defendant could address the disparate treatment suffered by the excluded juror and bring a claim on his behalf based upon the Equal Protection Clause, regardless of race.

5. Edmonson v. Leesville Concrete Company, Inc.—*Extension of Batson to the Civil Arena*

The Court wasted little time in applying the third-party standing decision in *Powers* to allow a civil litigant to object to his adversary's

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40. *Id.* at 1370.
41. *Id.* at 1370-72.
42. *Id.* at 1372.
43. *Id.* at 1373.
race-based exercise of a peremptory challenge. In Edmonson v. Leesville Concrete Company, Inc., the Court extended its Batson rationale to civil litigants exercising peremptory challenges. The Court reasoned that “[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.... The Constitution demands nothing less.”

However, the major issue facing the Court in Edmonson was not whether race-based peremptory challenges constituted impermissible racial discrimination. The Court had already answered this question in Batson. Rather, the Court focused upon the discrimination that resulted from the exercise of a right or privilege having its source in state authority and, if so, whether the party exercising the challenges could be considered a state actor. The Batson Court had no need to address this issue because of the rather self-evident relation between the action of the state prosecutor, when acting in his official capacity, and the state; accordingly, the actions of a state prosecutor are reasonably chargeable to the state.

Rather, in Edmonson, the issue concerning the race-based exercise of peremptory challenges took on a new dimension because both parties involved were private litigants. The fact that the participants were civil litigants posed a problem for the conventional Constitutional analysis. Normally, private litigants were not previously believed to perform functions fairly attributable to the state. In finding state action in Batson, the Court is justified because the state at least employs the prosecutor and grants him powers such as prosecuting arrested criminals and performing sundry investigative activities that, in our society, only the state possesses. Consequently, it seems much easier to find state action by the prosecutor, rather than by a private litigant. However, a state action determination is essential, for otherwise there would be no constitutional violation.

In Edmonson, the Court found such state action on the part of the private litigants by considering three factors: 1) the extent to which the litigant received the “overt, significant assistance of the court,” 2) whether the action constituted a “traditional function of state government,” and 3) whether government acquiescence in the courtroom uniquely

45. Id. at 2088.
47. This principle is inherent in the Court's decision in Shelley v. Kraemer: “[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may be fairly said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." 334 U.S. 1, 13, 68 S. Ct. 836, 842 (1948). See also Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856 (1961); Jackson v. Metro. Edison Co., 419 U.S. 345, 95 S. Ct. 449 (1974); Flagg Bros. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729 (1978).
aggravated the alleged discrimination. Through the application of the enunciated principles, the *Edmonson* Court found that the civil litigants satisfied the Fourteenth Amendment's requirement of state action.

Finally, in light of its decision in *Powers* two months earlier, the Court held that a private litigant may raise the question of equal protection on behalf of an excluded potential juror. The Court based its reasoning on the premise that there was no reason to limit third-party standing to the criminal courtroom. Therefore, the decision in *Powers* cleared the obstacles that prevented the extension of Equal Protection rights to potential jurors impaneled in criminal, as well as civil trials, rather than limiting such claims to the adversarial participants themselves. Only through *Powers* could the Court extend the holding in *Batson* to apply to litigants outside the criminal arena.

Chief Justice Rehnquist and Justice Scalia joined Justice O'Connor in dissent. O'Connor compared the "state action" in *Edmonson* to that found in previous decisions of the Supreme Court. These justices believed that precedent required more actual state involvement than simply a juror being advised by the judge of his dismissal. In this regard the dissent remarked that mere "[j]udicial acquiescence does not convert private choice into that of the state." Thus, in light of these prior decisions, the actions of the private defendants in *McCollum* do not require the constitutional liability that attaches to "wrongdoers 'who carry a badge of authority of [the government] and represent it in some capacity.'"

Justice Scalia also penned a separate dissent in which he presaged the application of the *Batson* doctrine concerning the elimination of the race-based exercise of peremptory challenges to the criminal defendant. He also pointed to the added complexity of the judicial process caused by the decision in *Edmonson* and its effect on the administration of justice. Such extra "fringe" claims add to the backlog in the American

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52. *Edmonson*, 111 S. Ct. at 2095.
53. In his dissent, Justice Scalia states:

Thus, yet another complexity is added to an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less and less to the merits of the case. Judging by the number of *Batson* claims that have made their way even as far as this Court under the pre-*Powers* regime, it 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
judicial system and divert needed resources to collateral issues, adding to the already crowded docket. Thus, according to Scalia, Edmonson had the effect of stalling justice for litigants, in spite of the Court’s enunciated purpose.

III. THE EQUAL PROTECTION DOCTRINE AND ITS APPLICATION IN GEORGIA V. MCCOLLUM

When considering the Equal Protection Clause and its interpretation, one must begin with the actual text. The mandate seems straightforward and self-explanatory: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

However, the interpretation of this simple clause has proven to be problematic and complex. After a brief recitation of the facts and issues involved in McCollum, the analysis in this section will examine the function of jury selection envisioned by the Court, viewed from the standpoint of the individual parties involved in the litigation. The second segment will examine seemingly inconsistent interpretations of the state action requirement in the United States Constitution.

A. Analysis

Georgia v. McCollum followed inevitably from the decision in Edmonson. Justice Scalia’s dissent in Edmonson foreshadowed McCollum’s result:

Batson v. Kentucky already prevents the prosecution from using race-based strikes. The effect of today’s decision (which logically must apply to criminal prosecutions) will be to prevent the defendant from doing so—so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible.

True to Justice Scalia’s warning, the Court faced this issue which the Batson Court “specifically reserved” for consideration at a later date.

suffer.

Id. at 2096. Because Edmonson was decided only one year ago, little evidence exists as to whether Justice Scalia’s warning will come to fruition.

54. United States Const., amend. XIV (1868).

55. Edmonson, 111 S. Ct. at 2095 (Scalia, J., dissenting) (citation omitted).


Chief Justice Burger, one of the two dissents in Batson, believed that the decision implicitly resolved the issue in McCollum. He reasoned:

But the clear and inescapable import of this novel holding [Batson] will inevitably be to limit the use of this valuable tool to both prosecutors and defense attorneys alike. Once the Court has held that prosecutors are limited in their use of
In McCollum, a white criminal defendant allegedly exercised his allotted peremptory challenges to exclude blacks from the jury panel during voir dire. The Court had no choice but to find a violation of the Equal Protection Clause in McCollum unless it overruled Edmonson. Writing for the majority, Justice Blackmun stated that the Court faced three issues: 1) whether the defendant's racially discriminatory exercise of peremptories inflicted the harms contemplated in Batson, 2) whether the actions on the part of the accused constituted state action for constitutional purposes, and 3) whether the state had standing to raise the equal protection challenges.

The Court easily resolved the first issue by declining to differentiate between the harms inflicted in the Batson exclusions and those involved in the instant litigation. The "multiple ends" of Batson—to remedy "the harm done to the 'dignity of persons' and to the 'integrity of the courts'"—were no less apparent in the defense context than those exercised by the prosecution. The majority declared that when "the juror is subjected to open and public racial discrimination ... the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."

The decision in Powers eliminated the need for consideration of the third issue—standing. In McCollum, the Court applied the third-party standing criteria announced in Powers to determine whether the prosecution could raise a constitutional objection on behalf of the excluded potential jurors. This three-pronged test required a concrete injury to the litigant, a close relation of prosecution to the third party, and the existence of a hindrance to the third party prosecuting his claim. Through the application of these precepts, the Court ruled that the prosecution had satisfied the requirements and, therefore, could raise the issue.


57. This statement seems rather self-evident because the author, Justice Blackmun, often referred to Edmonson, decided in the previous term. In McCollum, the Court used the same analytical framework as it did in Edmonson, thus predicking the decision on the same factors as used previously. If the decision in McCollum differed from Edmonson when using the same rationale, it would contradict the latter case, and thus require reversal.

59. Id. (quoting Powers v. Ohio, 111 S. Ct. 1364, 1366 (1991)).
60. Id. (quoting Batson, 476 U.S. at 87).
61. Id. at 2357 (citing Powers, 111 S. Ct. at 1370-71).
62. Id. In regards to the first prong of the standing test, the Court referred to the
The only issue that gave the Court pause in *McCollum* involved the alleged state action on the part of the dismissing criminal defendant. It is that issue which poses difficulty to the application of a traditional equal protection analysis. Traditionally, state action is defined as "any agency whereby the state exercised its powers."\(^{63}\) In early Supreme Court jurisprudence, the concept of state action referred to that conduct exercised in place of the state.\(^{64}\) More recently, however, in *Lugar v. Edmonson Oil Co.*,\(^{65}\) the Rehnquist Court has backed away from findings of state action, determining that state action is any activity that constitutes a traditional function of government. Thus, the decision in *Edmonson* is in stark contrast to recent constitutional jurisprudence and stretches the principle of state action beyond traditional limits when it finds state action on the part of private civil litigants. The Court in *McCollum* expanded the notion of state action to the logical extension of this line of constitutional jurisprudence—race-based exercise of peremptory challenges by the criminal defendant is state action.\(^{66}\)

The *Edmonson* Court based its finding of state action by civil litigants on four grounds: 1) the race-based exclusion occurs in a courthouse, 2) the peremptory challenge may only be exercised within the context of a jury trial, 3) this peremptory challenge is a statutory privilege granted by the state, and 4) the excluded jurors themselves may have rights to be selected in a non-discriminatory manner under the Equal Protection Clause. However, the following discussion will attempt to reveal some defects in this reasoning in the context of *McCollum*.

**B. The Exercise of the Peremptory Challenge from the Viewpoint of the Individual Participants**

This section will examine the jury selection process and the exercise of the peremptory challenge as a function of that process viewed from the position of the different participants in a criminal trial. When considering the "players," the logical beginning is to examine the situation of the person with the most to lose—the defendant. Secondly, damage to the court's integrity and perception of fairness inflicted by the criminal defendant's discrimination. Answering the second question, the Court said that "the State is the logical and proper party to assert" the claims of the excluded jurors in a criminal proceeding. *Id.* The final requisite is satisfied by the "daunting" barriers to suit faced by the excluded jurors. *Id.* (quoting *Powers*, 111 S. Ct. at 1373). Therefore, because of an analysis of these factors, the Court found that the prosecution was the proper party to assert the excluded jurors' constitutional rights.

this section focuses on the plight of the peremptorily-excused juror. Next, the role of the prosecution as an embodiment of the state must be addressed. Lastly, the state in its abstract form must be studied to evaluate its balancing of the need for justice and equitable determinations in the scope of a criminal proceeding and the desire to eliminate illicit discrimination at every juncture in today's society. One must break the criminal proceeding into its component parts to fully understand the competing interests involved in jury selection.

1. The Criminal Defendant

The defendant occupies a unique position in the criminal trial that is comparable to few situations in today's society. In this situation, the person accused of a felony has his property (i.e., a monetary fine), liberty (i.e., a sentence in prison), and perhaps even his life at stake. This situation is realized by no other litigant in the American judicial system. Normally, in a civil case, the most a person stands to forfeit is property or a large sum of money. However, most would agree that even the possibility of civil injunction or the contractual remedy of specific performance is not as severe as even the possibility of confinement in the state or federal penitentiary. For this reason, the United States Constitution affords greater protections to the criminal defendant than the civil litigant.67

In Batson, the Court stated that "[o]ur criminal justice system requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."68 However, the scales of our system of justice are hardly evenly balanced. In our system, the criminal defendant is presumed innocent until proven guilty. A crime must be proven beyond a reasonable doubt, rather than by only a preponderance of the evidence as required in the civil counterpart. Finally, before trial, the prosecution is required to furnish the defense with evidence that is favorable to the defendant.69 Thus, if the subconscious reasoning surrounding the decision in McCollum is based upon the equities of a criminal proceeding, this reliance is misplaced.

The social perception of a lone defendant versus "the full force of society" simply does not overcome these other safeguards afforded to a criminal defendant. In light of the constitutional safeguards and other concessions previously mentioned, if the peremptory challenge system

67. Compare Amendments V, VI, and VIII (governing criminal issues) and Amendment VII (governing civil litigation).
continues to function as it is presently operated, the Court could reasonably allow the criminal defendant's unfettered exercise of peremptory challenges, while limiting the prosecutor's use of that challenge in order to actually balance the criminal justice system. Justice White, writing for the majority in *Swain v. Alabama* (the first case to call into question the race-based exercise of peremptory challenges) stated that "the challenge is 'one of the most important of the rights secured to the accused.'" Thus, the judicial system may prefer the unfettered exercise of the peremptory challenge by all parties involved, rather than requiring the "overhaul" of the doctrine of state action spoken of by Justice Scalia in his dissent in *Edmonson*.

2. The Excluded Juror

The jury performs an essential truth-finding function inherent in a criminal trial. While the trial by jury is guaranteed as a protection to the accused, the right to serve on a petit jury is not expressly granted to a person in the United States. However, in *McCollum*, the Court seems to suggest that the opportunity to serve on a jury rises to a fundamental right secured under the Due Process Clause of the Fourteenth Amendment.

Fundamental rights are those rights that are either expressly granted or implied by the Constitution. The Court has previously determined that voting, while not a constitutional right, is a fundamental right for equal protection purposes. It appears that some Court decisions also find education to be such a protected right. These are only two of a myriad of rights held by the Court to be fundamental.

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72. U.S. Const. amend. VI.
73. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice O'Connor remarked, "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." 112 S. Ct. 2791, 2805 (1992). Thus, this is evidence that the rights need not be expressly listed in order to be considered fundamental.
The treatment of the two rights mentioned, voting and education, can be reconciled on the premise that, although neither are expressly granted by the Constitution, both are preservative of other rights so protected and, thus, qualify for examination as fundamental rights. Education protects by informing all students, whether in elementary, secondary, or higher education, about the democratic freedoms each student enjoys, their values, and how to obtain them. Voting allows one to voice his concern about governmental affairs and protect his way of life by voicing his protest in the form of the ballot. In this way, voting and education can be considered protective of the rights guaranteed by the Constitution.

The right to be a member of a jury bears a close resemblance to those rights listed above and also may be couched in terms of a privilege that preserves those rights expressly granted by the Constitution. The public’s participation in the judicial process by means of the jury system helps to eliminate the possible mistrust inherent in today’s legal system and to instill the citizens’ confidence in the truth-finding role of the judicial system. Thus, the non-discriminatory exercise of peremptory challenges could be an avenue by which the Court protects the “right” to be selected for jury service in a non-discriminatory manner. However, nowhere in the opinion was the action contested in *McCollum* subjected to the strict scrutiny that accompanies a determination of an issue as a fundamental right. Although *McCollum* seems to implicitly recognize jury service as such a fundamental right, the Court stops short of an outright declaration. Therefore, because the majority simply speaks in the ambiguous terms of protecting the integrity of the courtroom and does not examine the issue with its usual strict rigor, the Court must not have classified service on a jury as a fundamental right.

In *Batson* and its progeny, the Court places an immense emphasis on the plight of the excused juror. As mentioned previously, after *Powers*, the state (acting through the prosecutor) had the authority to raise the alleged discrimination on behalf of the excused juror. Thus, the doctrine of third party standing has taken the forefront in the prohibition of discrimination in the courtroom, although sometimes it has been at the expense of the defendant.

When examined for jury duty, the venireperson only answers the questions asked by the examining attorney. Other than this simple duty, a venireperson has no other function before actually being impaneled

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76. These rights range from the express right to free speech and the free exercise of religion (United States Const., amend. I) to the right to choose (Planned Parenthood of Southeastern Pennsylvania v. Casey 112 S. Ct. 2791 (1992)).

77. See supra notes 74 and 75.
and, consequently, knows little of the activities surrounding the jury selection process. The attorney may choose to peremptorily strike the potential juror. The Louisiana Code of Criminal Procedure requires that a peremptory challenge be "communicated to the court in a side bar conference of the judge" and the "attorneys conducting the examination." This conference is conducted in a confidential manner, and only the court and the examining attorneys know of the challenges until the court announces the disqualification. If these challenges are conducted properly, the juror never knows of the reason, whether it be race-based or race-neutral. Where is the harm normally required for third party standing? The Court's answer that the defendant's action "casts doubt on the integrity of the judicial process" is not sufficient. How can this action "cast doubt" when the excluded potential juror never knows of the reason for the dismissal?

The remedy of the alleged discrimination poses an even larger problem. After *Batson*, the Court did not provide a remedy and left the decision to the discretion of the trial judge. Two possible situations are illustrated by the following hypothetical situations: Does the court ask the dismissed black potential jurors to remain in another location, while allowing excluded white venirepersons to leave so as to have the former prepared for impaneling in the event that the court determines that a race-based exercise of peremptory challenges did occur? Or does the judge simply declare a mistrial at the showing of discriminatory intent, thereby causing years of delay in an already congested criminal docket? In both cases, these seemingly impractical "remedies" seem to perpetuate the recognition of the arbitrary differences between the races no less than the exercise of race-based exclusions from jury service condemned in *McCollum* and its predecessors. As a matter of fact, such separation by race may even constitute another form of harassment. Although a noble cause, the Court evidenced a lack of thought about the ramifications of the remedies involved. Trial courts, by implementing the "remedies" discussed previously, realistically do little to enhance the position of the excluded juror. In this "no-win" situation, the Court's decision in *McCollum* to enter a contrived analysis of the doctrine of state action does not further justice or civil rights.

3. The State Prosecutor

In the end, the state prosecutor stands to gain the most from the Court's decision in *McCollum*. The criminal defendant certainly does
not benefit from this decision. Although the Court arguably decided McCollum to protect the excluded juror from discrimination, this juror does not profit from the conclusion reached in this case.\textsuperscript{83} However, state prosecutors are already “handcuffed” by Batson which imposed the same prohibition against the race-based exercise of peremptory challenges by the prosecution six years earlier. Thus, McCollum took away one of a criminal defendant’s advantages over the prosecution, improving the prosecution’s situation.

Realistically, each side in a criminal proceeding is after the same distinct result: a jury which favors its respective side. By eliminating the unfettered exercise of the peremptory challenge by the defendant, the Court took away an effective weapon of the defendant that the prosecution did not possess. Now when selecting a criminal jury, both sides operate under the same rules.\textsuperscript{84} This result would obviously be favored by the prosecution.

Theoretically, the role of a prosecutor encompasses the need to protect the public and place criminals in jail. Common sense and experience shows that the voting public mainly views the prosecutor’s effectiveness by his “win/loss” record, and not his genuine desire for justice, and the electorate judges him accordingly. On the other hand, common sense also dictates that a criminal defendant, whether guilty or not, is normally attempting to tally another count in the prosecutor’s “loss” column and clear himself of the charges lodged against him. These views are diametrically opposed. However, the Court ignores the adversarial position of the litigants and considers each as state actors. It is rather difficult to understand how both sides in such mortal conflict can be considered state actors. The prosecutor is easily classified as a state actor, but can the defendant be responsible for actions exercised on behalf of the state? Despite this seeming inconsistency, the Court places the criminal defendant and prosecutor in the same function as

\textsuperscript{83} The irony of the situation is that many persons called for jury duty do not want to serve in the first place. Between employment or simple ambivalence, many seek every avenue available to avoid this "privilege." Thus, the Court has, in essence, protected the privilege that many do not want to possess.

One may attempt to contradict the previous irony by analogizing it to the right to vote and the lack of participation by many persons in the electoral process. Although the right to vote is protected by the Court, some citizens do not exercise it. However, a major difference between the two duties is found in the fact that a person is not summoned to vote, while he is summoned by the state to serve on a jury. Although a person may choose not to vote, he cannot choose not to answer a summons for jury duty. Thus, in regards to voting, the Court is protecting a choice not to do something, rather than protecting a "privilege" that many are mandated to perform. Therefore, the analogy fails.

\textsuperscript{84} However, see discussion of “The Criminal Defendant,” \textit{supra} text accompanying notes 67-71.
exercising state power. 85 Hence, the Court has shifted the balance between the prosecution and the defendant to allow the individual parties to compete on an equal level.

4. **The State's Broader Interests**

Judicial integrity and the elimination of unfair prejudice seem to be at the core of the Court's decision in *McCollum*. When this decision is taken at first blush, this impression is a valid one. The theme of the opinion seems to be: "Justice is important, but the ends do not justify the means. The Court will not recognize convictions if arrived at by infringing on others' civil rights."

However, while *McCollum* protects one group's rights, the decision ignores another important group: those members of pre-*McCollum* juries. Implicit in the unconstitutionality of a jury selected through the unfettered use of peremptory challenges is the premise that such a jury will not allow a trial that is fair to either side. As mentioned previously, the jury has a truth-finding function in the American judicial scheme. By stating that a defendant cannot exercise peremptory challenges to strike a potential juror solely because of his or her race, the implication is that the jury chosen by the uninhibited exercise of peremptory challenges is suspect and will not deliver a fair and truthful verdict. This imposes a stigma on the jurors who are not protected by *Batson* and its progeny. Thus, under this view, such a jury cannot, or will not, fulfill the truth-finding function imposed on it by society.

Finally, the decision in *McCollum* may represent a type of structural justice imposed by the Court. The author of the majority opinion, Justice Blackmun, is normally associated with correcting the "perceptions of structural harms—the suffering of vulnerable groups from general patterns of activity." 86 In the eyes of the Court, the excluded potential jurors are an unprotected and vulnerable group in need of a safe harbor. The excluded potential jurors are unrepresented by counsel and have little input into the proceedings in which they are participants. This situation leaves all jurors (but especially those of racial minorities) vulnerable. The Court obviously believed that one should not be disqualified for jury duty because of an inherent characteristic. 87 Therefore, the Court required that justice in the trial on the merits not be gained at the expense of human dignity.

85. Or does the Court itself exercise state action when it excuses a potential juror based on a discriminatory peremptory challenge? See discussion of Shelley v. Kraemer, infra text accompanying notes 104-112.


87. "Nonetheless, 'if race stereotypes are the price for acceptance of a jury panel as fair,' we reaffirm today that such a 'price is too high to meet the standard of the Constitution.'" Georgia v. McCollum, 112 S. Ct. 2348, 2358 (1992) (citing Edmonson v. Leesville Concrete Co., 112 S. Ct. 2077, 2088 (1991)).
C. Analysis of State Action in McCollum

The exercise of peremptory challenges serves no function outside the courtroom. Thus, because of the exclusive judicial setting, the Court determined that the mere implication of state complicity is enough to justify state action.

However, this exclusivity is not reason enough to impose state action upon the criminal defendant. Other factors must be taken into consideration. The criminal defendant does not exercise the challenge on the part of the state, but as an adversary to the state and its representation by the prosecution.88 The state, whether acting through a prosecutor, judge, or legislator, does not aid or encourage the criminal defendant to the extent necessary to transform the criminal into a state actor. The argument that a defendant is a state actor and performs a traditional function of the state simply because he is in a courtroom is circular: because a defendant is in court, he exercises action on behalf of the state, and he exercises action on behalf of the state because he is in court. Thus, the choice to exercise a peremptory challenge against a potential juror belongs to a criminal defendant, without "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."89 As Justice O'Conner stated in her dissent in Edmonson:

A trial . . . is by design largely a stage on which private parties may act; it is a forum through which they can resolve their disputes in a peaceful and ordered manner. The government erects the platform; it does not thereby become responsible for all that occurs upon it. As much as we would like to eliminate completely from the courtroom the specter of racial discrimination, the Constitution does not sweep that broadly.90

This statement exhibits the belief that state action requires some type of affirmative action on the part of the state. Yet, in Edmonson and McCollum, the Court makes the state responsible for the defendant's own personal choices without the state affording any overt aid to that defendant.

The decision in McCollum marks somewhat of a divergence from prior Supreme Court precedent. Its basis is found in "the traditional function of government"; however, this doctrine does not seem applicable here. The following sections will exhibit the possible divergence in the line of jurisprudence.

88. See discussion of "The State Prosecutor," supra text accompanying notes 83 and 84.
1. Polk County v. Dodson

Justice O'Connor criticized the majority's reasoning in *McCollum* \(^91\) by referring to a previous decision, *Polk County v. Dodson*. \(^92\) In *Dodson*, the Court determined that a public defender was not acting under color of state law for claims which arise under 42 U.S.C. § 1983 "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." \(^93\) In a later case, the Court held that the requirement of an actor operating under color of state law for section 1983 purposes is equivalent to the determination employed in the Fourteenth Amendment's requirement for state action. \(^94\)

How can the decision in *McCollum* square with these prior decisions? The majority attempts to distinguish *Dodson* and *McCollum* on the basis that *Dodson* merely stands for the proposition that the adversarial relationship between the state and the criminal defendant precludes a determination of state action solely on the basis of the attorney's employment. \(^95\) However, O'Connor argues that *Dodson* 's "initial holding, on which the entire opinion turned," \(^96\) was that the defense of an accused "is essentially a private function." \(^97\) A criminal defendant and public defender occupy essentially the same position in the criminal arena. Since a public defender, according to *Dodson*, was a private actor when exercising his duties, a criminal defendant should occupy the same position and, consequently, is a private actor. Indeed, if anything, the defendant in *McCollum* has less of a connection with the state than a public defender who is paid with state funds. However, this was not the holding in *McCollum*.

The premise that a public defender, when performing traditional defense functions, was not a state actor may be founded on the assumption that a public defender occupies the same position as other defense attorneys. \(^98\) One could objectively consider the exercise of a peremptory challenge by a criminal defendant as a traditional defense function. \(^99\) "[A] private party's exercise of choice allowed by state law

\(^{91}\) *McCollum*, 112 S. Ct. at 2361-63.
\(^{93}\) *Id.* at 325, 102 S. Ct. at 453. In other words, a criminal defendant may not maintain a 42 U.S.C. § 1983 action against a public defender for legal malpractice. Federal statute 42 U.S.C. § 1983 is the federal civil rights legislation that addresses grievances about injuries caused by persons who act "under color of state law."
\(^{95}\) *McCollum*, 112 S. Ct. at 2356.
\(^{96}\) *Id.* at 2362 (O'Connor, J., dissenting).
\(^{97}\) *Id.* (citing *Polk County v. Dodson*, 454 U.S. 312, 319, 102 S. Ct. 445, 450 (1981)).
\(^{98}\) *Dodson*, 454 U.S. at 319-25, 102 S. Ct. at 450-54.
\(^{99}\) *McCollum*, 112 S. Ct. at 2363 (O'Connor, J., dissenting).
NOTES does not amount to state action for purposes of the Fourteenth Amendment so long as ‘the initiative comes from [the private party] and not from the state.’”¹⁰⁰ It is inconsistent that in a criminal case, the Court considers a criminal defendant and his attorney as state actors when they privately exercise allegedly discriminatory peremptory challenges.

2. Flagg Brothers v. Brooks

The determination of state action in *McCollum* is also inconsistent with precedent found in *Flagg Brothers v. Brooks*.¹⁰¹ *Flagg Brothers* involved a New York statute that allowed a warehouseman, after proper notice, to satisfy any lien on goods stored in his possession by selling the chattels. Brooks brought this action under the Due Process Clause, claiming that the action of the warehouseman was attributable to the state because New York delegated a power to Flagg Brothers that was traditionally reserved to the state. The United States Supreme Court held that the action by Flagg Brothers did not constitute state action for purposes of the Fourteenth Amendment. In support, Justice Rehnquist, writing for the majority, reasoned that the “Court . . . has never held that a State’s mere acquiescence in a private action converts that action into that of the State.”¹⁰²

Like the warehouseman’s lien in *Flagg Brothers*, the peremptory challenge contested in *McCollum* originates in state law. The plaintiff in *Flagg Brothers* argued that the private resolution of disputes is a traditional function of government. As in the New York statute challenged in *Flagg Brothers*, the statutory exercise of peremptory challenges is limited only by the statute’s announcement of “the circumstances under which [the state] will not interfere.”¹⁰³ There is no “overt and official involvement” when a criminal-defendant and his counsel exercise peremptory challenges when selecting a jury, just as there is no involvement of the state when a warehouseman institutes “self-help” pursuant to state statute.

3. Shelley v. Kraemer

In the action taken in *McCollum*, the Court imposed an affirmative duty on the judiciary to investigate and remedy such equal protection

¹⁰⁰. *Id.* (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357, 95 S. Ct. 449, 457 (1974)).
¹⁰². *Id.* at 164, 98 S. Ct. at 1737.
¹⁰³. *Id.* at 166, 98 S. Ct. at 1738.
violations. The action taken by the Court in *McCollum* is analogous to that in *Shelley v. Kraemer*.104

*Shelley* involved a restrictive covenant against the sale of a parcel of property to non-whites. The Shelley family, as well as several other black families, attempted to buy parcels of property burdened with these restrictive covenants. Members of the neighborhood subsequently sought an injunction to enforce the discriminatory provisions of the deed. All parties to the dispute were private persons acting in their private capacity to enforce a contractual provision. In each case, the state courts upheld the contractual provisions' validity and dishonored the purchases. On appeal to the United States Supreme Court, the judgment of the state courts was reversed on equal protection grounds.105 In the opinion delivered by then Chief Justice Vinson, the Court recognized that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."106 However, the Court held that the judicial enforcement of the discriminatory content of the restrictive covenant that burdened the pieces of property was state action.

The argument espoused in *Shelley* is analogous to the one faced by the defendants in *McCollum*. In the instant litigation, the Court effectively considers that the defendants exercise action on behalf of the state because of the fact that the events take place in a courtroom. This construction extends the rationale of *Shelley* even further. As in *Shelley*, the Court in *McCollum* is placed in the position of enforcing an allegedly discriminatory action by the private litigants before it, and although the Court does not cite *Shelley* as authority in the instant opinion for the proposition of state action, it seems that the *McCollum* Court followed *Shelley*’s logic when it states that "by enforcing a discriminatory peremptory challenge, the Court 'has . . . elected to place its power, property and prestige behind the [alleged] discrimination.'"107

The logic found in both *Shelley* and *McCollum* provides a windfall to any litigant attempting to prove an Equal Protection Clause violation. Unfortunately, the Court misses the point. By "focusing analysis on whether or not there is 'state action,'" *Shelley* and its progeny would allow a determination of an equal protection abridgement in most contested cases.108 If the judicial enforcement of a contractual provision is

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106. Id. at 13, 68 S. Ct. at 842.
state action, any action taken in a controversy decided in a court of law would be considered an action on behalf of the state. For example, this would make judicial enforcement of all wills and testaments that discriminate against certain parties unconstitutional because the wills were inoperative without judicial enforcement. Thus, the enforcement constitutes state action. Once the Court draws the line as it did in *McCollum*, there is no conceivable substance to the division between state and private action.

The rationale discussed previously could signal the end of private enforcement of actions in the United States judicial system. If the Court continues to follow the same philosophy as in *Shelley* and *McCollum*, any action that touches on race would be subject to the strictest scrutiny and would be considered state action. Employment disputes occupy another area of potential conflict. Title VII of the United States Code prohibits the termination of employment by a private employer because of race or sex. However, let us suppose that Title VII did not exist and that there was no other law prohibiting such discrimination. Following the logic in *Shelley* and its progeny, it would seem that an employee fired by a private employer on account of race would have a constitutional claim. Citing *Shelley* and *McCollum*, one would argue that since the dispute must be enforced by the judicial system, the court should consider a private employer a state actor. The “power, property and prestige” of the Court would be placed behind the discrimination if the Court elected to enforce the termination. As mentioned previously, United States constitutional law does not apply to private disputes. However, any decision regarding the discriminatory employer would be in direct contradiction to *Shelley* and *McCollum*. This may reach the same result as the statutory provision now in effect; however, this strained interpretation is inconsistent with the theory of the Constitution.

Another rationale behind the decisions in *Shelley* and *McCollum* may be found in the state’s permitting such actions. In *Shelley*, the Court may have been reacting to the common law’s prejudice against restrictions on the alienation of property. This attitude, in conjunction with the racial discrimination, may have triggered the Court’s decision. Likewise in *McCollum*, the Court viewed the criminal defendants’ race-based exercise of peremptory challenges as similar discrimination based on inherent characteristics, and correspondingly disapproved. The fact that Georgia’s system of justice allows criminal trials to be decided by

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112. *Id.*
juries chosen in a discriminatory manner may have been an unmentioned factor in the Court's decision in Mccollum.

4. DeShaney v. Winnebago County D.S.S.

A different approach would be one similar to that taken in DeShaney v. Winnebago County D.S.S. In DeShaney, the Court addressed the question of whether a parent and child could sue a state department of social services for not removing the child from a home where he was subject to repeated abuse by his father. The department had several notices of the alleged abuse by the father. The child, Joshua DeShaney, continually exhibited outward signs of such abuse. However, the state never acted to remove Joshua from this environment. Later, severe beatings by his father left Joshua gravely injured, and he subsequently fell into a life-threatening coma. Because of these traumatic injuries inflicted over a period of time, Joshua was confined to an institution for the profoundly retarded for the rest of his life. Joshua and his mother brought an action against the state department of social services, claiming that by its inaction, the state was liable under 42 U.S.C. § 1983 due to its violation of the Due Process Clause.

The Court, speaking through Chief Justice Rehnquist, held that Joshua DeShaney and his mother could not recover because their claim did not manifest some action fairly attributable to the state or local government. Chief Justice Rehnquist reasoned that "[t]he Clause is phrased as a limitation on the State's power to act" and "cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."

Although Mccollum and DeShaney address different constitutional provisions—the Equal Protection Clause and Due Process Clause—the criteria for determining state action are the same for both clauses of the Fourteenth Amendment. However, the Court's conclusions as to the existence of state action are in absolute contradiction. If the standard for state action employed in Shelley and Mccollum was applied in DeShaney, the Court would be forced to find an affirmative duty owed by the department of social services. However, in the present litigation, the Court did not apply the DeShaney standard. As Chief Justice Rehnquist opined, the duty imposed by the Fourteenth Amendment is not an affirmative duty on the State, but a limitation on the government's power. However, in Mccollum, the Court takes upon itself to intervene in the relationship between two arguably private parties, the criminal

114. Id. at 191-93, 109 S. Ct. at 1001-2.
115. Id. at 195, 109 S. Ct. at 1003.
defendant and the potential juror. Granted, the facts in McComb seem to reach out for remedy; however, they are no more compelling than those facts which surround the plight of "Poor Joshua!" Both results should be the same.

Issues involving race are very sensitive and require strict scrutiny when analyzed for constitutional purposes. However, this scrutiny should apply to only the substantive issue (equal protection challenge), not the vehicle (state action) to access the issue. In a strict scrutiny analysis, a state regulation will only be upheld if it is "necessary to the accomplishment of a permissible state objective." Very few state actions regarding race are upheld under strict scrutiny. If this substantive analytical tool is applied to the state action questions in all cases claiming racial discrimination, it is most likely that the Court will make a state action determination against the discriminating party, thus making it a constitutional question. Consequently, for example, if an owner of a major league baseball team were to refuse to allow African-Americans to play in his stadium, notwithstanding any other clause of the United States Constitution, this action would constitute "state action" and, thus, be governed by the Fourteenth Amendment. The application of strict scrutiny to state action determinations arguably would result in the "constitutionalization" of most, if not all, private actions. Although racial discrimination in the private arena is despicable, it does not rise to a constitutional question, and other remedies exist to correct it.

In McComb, no affirmative duty on the part of the trial court exists to forbid the race-based exercise of peremptory challenges on the part of the defense. The trial court in McComb is analogous to the department of social services in Deshaney: both are passive by-standers with no active participation in the injury. Thus, if the Court had exercised the restraint in McComb that it did in Deshaney, it never would have reached the substantive issue of race-based exercise of peremptory challenges and would have avoided confusion. Thus, in order to maintain a consistent approach to the analysis of state action, the Court should adopt the restraint exercised in Deshaney. Only when this threshold is crossed should the Court apply the stricter scrutiny to evaluate the alleged discriminatory claim in question.

These two cases may be reconciled by the premise that the Court was willing to subject the state to responsibility for courtroom procedures, but not monetary damages. However, although this rationale may

117. Deshaney, 489 U.S. at 213, 109 S. Ct. at 1012 (Blackmun, J., dissenting).
119. Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193 (1944), is generally considered to be the last case to uphold a race-related statute under the strict scrutiny analysis. Stone et al., supra note 108, at 572.
120. Other remedies such as breach of contract, injunction, and specific performance are sufficient to remedy such situations.
be the reason behind the two different interpretations, this would not seem to be good constitutional law. The attorneys and judiciary of the United States need to have a consistent "map" of constitutional litigation to effectively represent future clients. This seeming inconsistency makes it difficult (if not impossible) for members of the bar to accurately perform in their representative capacities. It now becomes a "guessing game" to determine which liberty the Court will value more. The Court should treat similar claims brought under the same Constitutional provision by the same standards.

As exhibited previously, the equal protection analysis has undergone a rather extensive transformation from the holding in the late nineteenth century in *Swain* to the decision in *Edmonson* over one hundred years later. In *McCollum*, however, the Court has gone a step too far in its attempt to eliminate racial discrimination. The Court in *Edmonson* and *McCollum* converts a defendant's exercise of his peremptory challenge for some purposes into an exercise of challenges for cause.¹ The extension of the doctrine announced in *Edmonson* to private civil litigation is questionable enough. However, it appears the Court has taken constitutional interpretation to the extremes of reasonable analysis when "[a] criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state."²

IV. BEYOND RACE: APPLICATION OF Mccollum TO GENDER

"Since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ."³

This statement by Justice William Brennan places gender on an equal footing with race as a suspect class for constitutional equal protection purposes. However, this is not the case in practice. The proportion of cases struck down for gender discrimination is much lower than those struck down because of challenges based upon race.⁴ In his concurrence to *McCollum*, Justice Thomas warns that, by prohibiting

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¹ 121. See discussion *infra* text accompanying notes 149-162.
³ 123. *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S. Ct. 1764, 1770 (1973) (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 92 S. Ct. 1400, 1407 (1972)). However, this statement was never fully realized. The Court has never granted full "suspect" class status to gender discrimination. *Frontiero* is the "high-water" mark in this area of constitutional jurisprudence.
⁴ 124. *Chase & Ducat, supra* note 63.
the race-based exercise of peremptory challenges, the Court opens the door to constitutional questions regarding the exercise of gender-based exclusions from jury service. \(^{125}\) This section of the note will focus on the fulfillment of this admonition and the applicability of *McCollum* regarding the exercise of peremptory challenges based solely upon the potential jurors' gender.

### A. Historical Context

The Fourteenth Amendment of the United States Constitution was a post-Civil War amendment enacted to remedy the unequal treatment of the newly-freed slaves. \(^{126}\) Although the Equal Protection Clause employs the word "persons"—implying protection for both men and women, black and white, and citizen and alien—only one uneventful portion of the Congressional debate concerning the passage of the Fourteenth Amendment was devoted to whether women were entitled to the protection afforded by this piece of legislation. \(^{127}\) This premise was soon tested in *Bradwell v. Illinois*. \(^{128}\)

*Bradwell* was the first constitutional challenge to the different treatment of the sexes. \(^{129}\) It involved the refusal of an application of admission to the Illinois bar to the female plaintiff, and the bar premised its decision solely on her status as a woman. The United States Supreme Court held that this action did not violate the Privileges or Immunities Clause expressed in the Fourteenth Amendment. Writing in concurrence to the judgment, Justice Bradley expressed the "paternalistic attitude" prevalent during this time period: "Man is, or should be, woman's protector and defender. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." \(^{130}\)

These views of the Court concerning the differences between the sexes took many decades to change. It was not until 1971 that the Court disallowed, as violating the Fourteenth Amendment, the arbitrary distinctions between the sexes used as the sole reason for the mandatory preference of one sex over another. *Reed v. Reed* \(^{131}\) marked the first time that the Court exhibited a "special sensitivity to sex as a classifying

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125. "Next will come the question whether defendants may exercise peremptories on the basis of sex." *McCollum*, 112 S. Ct. at 2361 (Thomas, J., concurring).
128. 83 U.S. (16 Wall.) 130 (1872).
130. *Bradwell*, 83 U.S. at 141.
factor.”  However, the justices still addressed gender by applying a rational relationship test rather than employing a strict scrutiny review, as it does when suspect classes such as race are concerned.  Today, the Court treats gender as a quasi-suspect class and applies an intermediate standard of review which is below that given to race but above that afforded to economic provisions.

In 1976, the Court applied a heightened scrutiny standard to gender classifications in Craig v. Boren.  The issue in Craig involved an Oklahoma statute which prohibited the sale of 3.2% alcohol beer to males under twenty-one years of age, while only prohibiting it to females under the age of eighteen. In this instance, Justice Brennan, writing for the Court, espoused heightened scrutiny. In order “[t]o withstand constitutional challenge ... classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.” This marked the first time that a majority of the Court had applied anything but a rational relationship test to an equal protection challenge to determine the constitutionality of a gender-based classification.

B. Recent Jurisprudence

The United States Supreme Court has traditionally addressed the validity of exclusions from jury service because of gender on Sixth Amendment grounds rather than in equal protection challenges. In Taylor v. Louisiana, the Court invalidated a Louisiana statute excluding women from jury service unless a written declaration of intent or waiver of exemption was filed with the court signifying amenability to that duty. The Court ruled that this statute was a violation of the Sixth Amendment guarantee of a fair and impartial trial because the exclusion of fifty-three percent of the population infringed on the requirement that a jury panel be drawn from a fair cross-section of a community.

133. Reed, 404 U.S. at 75-76, 92 S. Ct. at 253-54.
135. Id.
136. Id. at 197, 97 S. Ct. at 457.
138. The defendant in Taylor was indicted by a St. Tammany Parish, Louisiana, grand jury for aggravated kidnapping. A petit jury venire of one hundred seventy-five people was drawn for the term in which the trial court would hear Taylor’s proceedings. Of this number, no females were chosen for possible jury service because of operation of the Louisiana statute. The defendant filed a motion to quash the venire because of this discrepancy, but was denied. After conviction and sentencing to the death penalty, Taylor appealed to the Louisiana Supreme Court challenging the validity of the verdict. The
The holding in *Taylor* does not apply to the selection of the jury panel itself. Thus it offers little help in the selection of a particular jury like that at issue in *McCollum*, and it provides no guidance as to the gender-based exercise of peremptory challenges and the selection of particular juries. To date the Supreme Court has not addressed the constitutionality of the gender-based exercise of peremptory challenges; however, examples of how the lower appellate courts treat the issue can be instructive. Of these courts, the Ninth and Fourth circuits are examples of the two different analyses applied by the lower federal courts.

The Ninth Circuit Court of Appeals considered the gender-based exercise of peremptory challenges in *United States v. De Gross*. In *De Gross*, the defendant was charged with three counts of aiding and abetting the transportation of an alien within the United States. During voir dire, the female defendant exercised a peremptory challenge to exclude seven males from the jury. Subsequent to the seventh strike, the prosecution objected to the exclusion of the male venirepersons. After the prosecution made a prima facie case of discrimination, De Gross offered no explanation to justify her challenges. Thus, the seventh venireperson struck was seated on the jury. An impaneled jury consisting of three men and nine women convicted the defendant of the crimes charged. De Gross appealed to the United States Court of Appeals for the Ninth Circuit, where the court upheld the equal protection challenge and prohibited the gender-based exercise of peremptory challenges.

The Ninth Circuit reasoned that an exclusion from jury service on the basis of gender harms the excluded venirepersons, weakens public confidence in the judicial system, and engenders community prejudice. The gender-based exercise of peremptory challenges are violative of the Equal Protection Clause for the same justifications as those exercises of peremptory challenges prohibited by *Batson*.


139. However, prior to publication, the United States Supreme Court granted *writ of certiorari* in *J.E.B. v. State of Alabama ex rel. T.B.*, 606 So. 2d 156 (Ala. Civ. App. 1992), to consider this very question. *J.E.B. v. T.B.*, *cert. granted*, 1993 WL 22851 (May 12, 1993). Thus, the Supreme Court will soon provide guidance on this important question. The following analysis will consider the current jurisprudence on the subject and supply a possible path of interpretation for the Court.

140. 913 F.2d 1417 (1990), *reh'g granted*, 930 F.2d 695 (1991), 960 F.2d 1433 (en banc) (9th Cir. 1992).

141. *De Gross*, 960 F.2d at 1435-36 (en banc).

142. The action against De Gross was brought in federal court; thus, it was a federally-impaneled jury that convicted him of the charges. The court applied equal protection principles found in the Fifth Amendment that are incorporated in the Equal Protection Clause of the Fourteenth Amendment. For this reason, the principles that compelled the
The decision in *United States v. Hamilton* is in stark contrast to the decision in *De Gross*. The Fourth Circuit Court of Appeals held that the decision in *Batson* did not prohibit the exercise of peremptory challenge solely on the basis of gender.

The defendants in *Hamilton* were indicted for various drug-related offenses. Each of the eight defendants was African-American. The government used seven of its eight peremptory strikes to exclude African-Americans from the jury. The district court denied the motions for mistrial, stating that the defense did not show a systematic exclusion required by *Swain v. Alabama*. While this case was on appeal, the Court decided *Batson*, relaxing the requirement for the challenging party. The case was remanded to the district court where the court found the government's racially neutral explanations satisfactory.

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The jury that ultimately convicted the defendants consisted of nine female and three male members. Of the eight peremptory strikes by the prosecution three were made against females. The explanation given by the prosecution was that "it wanted to take steps to insure that a jury would not be overly sympathetic to the female defendants." The court of appeals found the racially-neutral explanation required by *Batson* given by the prosecution acceptable. However the court rejected the defendants' claim that the Equal Protection Clause prohibited the gender-based exercise of peremptory challenges. It reasoned that "if the Supreme Court in *Batson* had desired, it could have abolished the peremptory challenge or prohibited the exercise of the challenges on the basis of race, gender, age or other group classification." Thus, the Fourth Circuit found no basis in Supreme Court jurisprudence to prohibit the exercise of peremptory challenges solely because of race.

C. Application of *Batson* to Gender-Based Exclusions

Even under the heightened scrutiny standard discussed previously in *Craig*, the gender-based exercise of peremptory challenges should be unconstitutional in light of the decisions following *Batson*, especially *Edmonson* and *McCollum*. Assuming state action is present, the litigants' discriminatory exercise of peremptory challenges implicates the Equal Protection Clause. Thus the only question remaining is whether exclusion from a jury panel solely because of gender bears a substantial relation to an important government objective.

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Court's prohibition on racially-motivated exercises of peremptory challenges in *Batson* are applicable here.

144. *Id.* at 1039-40.
145. *Id.* at 1041.
146. *Id.* at 1042.
It would appear that the approach followed by the Ninth Circuit in *De Gross* is the proper avenue for the Court to take on this issue. A litigant can no more formulate a legitimate state purpose for such an exercise of a peremptory challenge than can a party that excludes an African-American venireperson solely because of the color of his skin.\(^{147}\) As in the exercise of race-based exclusions, a woman possesses no inherent infirmities that would preclude her from jury service solely because of her gender. An attorney can no more rely on the assumption that a woman (being the traditionally more compassionate gender) would be more sensitive to a plaintiff than it can rely on the assumption that an African-American would tend to favor an African-American litigant simply because of their similar heritage. If this action is not acceptable when exercised because of race, it should not be acceptable when it is motivated by gender. Because this exclusion based on gender does not relate to a substantial state interest, in light of the Court’s decision in *McCollum*, the gender-based exercise of peremptory challenges should likewise be held unconstitutional. If the Court plans to continue the use of peremptory challenges to select juries, it must extend the same protection afforded race to gender and disallow the gender-based exercise of peremptory challenges.\(^{148}\)

V. FUTURE OF PEREMPTORY CHALLENGES

*Batson* and its progeny call into question the entire future of peremptory challenges. Placing such restrictions as those contemplated and enacted in the decisions discussed previously on criminal and civil litigants arguably dilutes the usefulness and effectiveness of the exercise of peremptory challenges. This is a severe limitation which could possibly lead to the demise of the practice of exercising this important right of the litigant.

A peremptory challenge is, by its nature, intended to be exercised without reason and subject to no external control.\(^{149}\) However, by its decisions in *Batson* and subsequent jurisprudence, the Court imposes severe restrictions on these *ad hoc* decisions of future litigants. These restrictions on the exercise of peremptory challenges in all actuality result in a “watered-down” version of the challenge for cause. This equal protection analysis imposed on the litigant’s exercise of a peremptory challenge entails “a radical change in the nature and operation of the

\(^{147}\) See, e.g., Jo, *supra* note 14.

\(^{148}\) This same rationale could be applied to any groups that are not already protected under *Batson* and its progeny. These include age, religion, wealth, alienage, handicap, birth station, and sexual preference.

challenge." This change has engendered some to call for the abolition of the peremptory challenge.

One who has called for the elimination of peremptory challenges is former Justice Thurgood Marshall. In his concurrence in Batson, Marshall viewed the only way to remove discrimination from the exercise of peremptory challenges as the abolition of the whole system. He believed the standard fashioned by the majority did not go far enough to end discrimination in the courtroom because, in his view, this test allowed the prosecution to discriminate as long as it held "that discrimination to an 'acceptable' level." Another reason for his compunction in the Court's remedy in Batson concerned the burden placed on the trial court to assess the hidden reasons behind the prosecutor's exercise of peremptory challenges. The very nature of the "arbitrary and capricious right" afforded to litigants by the peremptory challenge makes this motivation almost impossible to ascertain. Any well-trained and well-prepared attorney should be able to give neutral explanations for the exercise of a challenge when confronted with a claim of discrimination. Reasons such as the venireperson was uncommunicative or the juror has a son the same age as defendant have been found as acceptable neutral explanations. If all an attorney must do is communicate such nebulous reasons to justify his peremptory strikes, "the protection erected by the Court [in Batson] . . . may be illusory." The Batson requirements also may cause great difficulty in the ability of an attorney to examine a potential juror during voir dire. In some instances, an attorney finds a potential juror unacceptable for reasons he just cannot articulate. Once counsel exercises an initial peremptory against an African-American, according to Batson and its progeny, he can no longer utilize this "hunch" or "seat-of-the-pants" judgment when examining an African-American. Suddenly, the attorney can no longer rely upon his inarticulable reason and must devise some race-neutral grounds for the strike. It is not enough for the attorney to say,

150. Id. at 221-22, 85 S. Ct. at 836-37.
153. Id. at 105, 106 S. Ct. at 1728.
"I have a feeling that the potential juror is against my client." Without this option, the attorney must enter a prolonged and intensive examination of the potential juror, thereby possibly alienating him from objectively considering both sides of the controversy. In this situation, the realities of jury selection prevent the use of a challenge for cause because the potential juror exhibits no external partiality, but may subconsciously harbor ill feelings against the examining attorney.

The Court has never ruled that the peremptory challenge is guaranteed by the United States Constitution. However, federal jurisprudence recognizes the practice of examination of potential jurors by use of peremptory challenges as an essential component of a fair trial by jury. By limiting the function of peremptories in such a severe way, the Court may have sounded a deathknell for the peremptory challenge. Even Justice White when writing for the majority in Swain recognized that to subject individual peremptory challenges to the standards of equal protection would dramatically alter the challenge's function. Once equal protection scrutiny is applied, it will be difficult for the disputed challenge to survive even a rational review, much less heightened or strict scrutiny. The next cognizable group considered for protection will be gender, then religion, and then possibly applied to other identifiable groups in society. Where should the line be drawn?

After Batson, Edmonson, and McCollum, the exercise of peremptory challenges has been markedly undermined. The purpose expressed in these cases—the elimination of discrimination in the judicial process—is noble indeed. The integrity of the court and judicial system are important justifications. However, under the strictures imposed by the Court, peremptory challenges have outlived their usefulness. No longer are attorneys free to act on instincts. Now, in at least situations involving race, advocates must formulate reasons for such strikes. However, as the previous discussion concerning gender shows, the Court faces a difficult task to limit these situations just to the exclusion on account of race. The number of situations where neutral reasons are required will only increase with time. Once the Court protects these groups, it will have to protect everyone unless it is ready to assert that the Equal Protection Clause only addresses issues concerning race and gender.

Short of overruling Supreme Court jurisprudence, the only remedy for these concerns is found in legislative or jurisprudential action to eliminate peremptory challenges in the courtroom. As stated previously, discrimination in the courtroom based solely upon race and gender should be eliminated. However, to remedy this discrimination by diluting an

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158. Swain, 380 U.S. at 219, 85 S. Ct. at 835.
159. Id.
160. Id. at 221-22, 85 S. Ct. at 836-37.
essential trial technique such as peremptory challenges is unacceptable. The exercise of a peremptory challenge offers uses other than eliminating potential jurors on account of race or gender. This practice helps assure a party a fair trial as it helps to eliminate those potential jurors that may have pre-determined the guilt or innocence of the defendant. However, in some cases, the examining attorney simply cannot articulate his reasons for dismissal. In light of *Batson* and its progeny, the peremptory challenge system cannot survive handcuffed to reasoned inquiry. Although a peremptory challenge is “one of the most important of the rights secured to the accused,”161 “it must be exercised with full freedom, or it fails of its full purpose.”162 These new restrictions impose limits which severely impinge this “full freedom.” For this reason, in light of *McCollum* and its predecessors, peremptory challenges do not serve their traditional and intended purpose, and should be eliminated.

*J. Christopher Peters*

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