FOURTEENTH AMENDMENT—PEREMPTORY CHALLENGES—THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS A CRIMINAL DEFENDANT'S EXERCISE OF RACIALLY DISCRIMINATORY PEREMPTORY CHALLENGES—*Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

The United States Constitution prevents a state from denying equal protection of the laws to any person within that state's jurisdiction.[1] More than a century ago, the Supreme Court declared that a state statute, which prevented black citizens from serving on a jury, violated this constitutional guarantee.[2] Despite

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[1] The Equal Protection Clause of the Fourteenth Amendment provides, in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. *See* G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1, 332-33 (1974) (quoting U.S. CONST. amend. XIV, § 1); *see also* Robert J. Kaczorowski, *Revolutionary Constitutionalism In The Era of the Civil War And Reconstruction*, 61 N.Y.U. L. REV. 863, 910 (1986) (discussing the Fourteenth Amendment in the context of other post-civil war legislative attempts at eliminating the last vestiges of slavery). Professor Kaczorowski suggested that the Fourteenth Amendment, despite its negative wording, affirmatively guaranteed an individual his civil rights. Kaczorowski, *supra*, at 912. In support of this contention, Kaczorowski noted that the initial version of the Fourteenth Amendment authorized Congress to defend the civil rights of every United States citizen. *Id.* at 913. The professor posited that the negative wording in the ratified version of the Amendment could be attributed to the natural rights theory. *Id.* at 912.

Despite its negative wording, the Fourteenth Amendment signalled the possibility for enormous change in the criminal justice system. *Id.*; *Developments In The Law-Race And The Criminal Process*, 101 HARV. L. REV. 1472, 1483 (1988) [hereinafter *Developments*]. More specifically, the Equal Protection Clause was seen as a powerful instrument in the fight against racial discrimination. *See Developments*, *supra*, at 1485. The Equal Protection Clause was eventually limited in scope, however, where it conflicted with "the autonomy of private social relations." *Id.* Toward the end of the nineteenth century, the Court generally resolved this conflict in favor of private social relations, unless a state's action was manifestly racially discriminatory. *Id.* at 1487-88. More recently, however, the Court has begun to view the Equal Protection Clause more expansively in the area of racial discrimination. *Id.* at 1489. For example, in *Brown v. Board of Education*, the Court declared that racial segregation of public schools contravened the Equal Protection Clause. Brown v. Board of Education, 347 U.S. 483, 495 (1954). In addition to serving as a tool against racial discrimination, the Equal Protection Clause was intended to invalidate other forms of discriminatory state actions. Kaczorowski, *supra*, at 916-17; *see, e.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976) (holding state law prohibiting sale of 3.2% beer to males under twenty-one and females under eighteen contravened the Equal Protection Clause); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 664 n.1, 666 (1966) (concluding that pre-voting poll tax of $1.50 was invidious discrimination and violated the Equal Protection Clause); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (finding state legislature's failure to reapportion legislative seats according to population violated the Equal Protection Clause).

[2] *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1880). The West Virginia statute, castigated in *Strauder*, provided, in pertinent part: "1. All white male per-

this and other efforts,[3] potential jurors continued to be excluded from jury service[4] because of their race.[5] One way in which liti-

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sons, who are twenty-one years of age, and not over sixty, and who are citizens of this state, shall be liable to serve as jurors, except as hereinafter provided." 1872-1873 W. VA. ACTS 102. *Cf.* Buchanan, *supra* note 1, at 332 (asserting inclusion of black citizens within Due Process Clause "removed one of slavery's most severe disabilities—the slave's legal incapacity to attack arbitrary action authorized or mandated by government").

[3] *See, e.g.*, Thiel v. South Pac. Co., 328 U.S. 217, 220 (1946) (declaring that prospective juror selection shall be made without regard to juror's "economic, social, religious, racial, political and geographical" background); Norris v. Alabama, 294 U.S. 587, 598 (1935) (stating that Equal Protection Clause's prohibition against exclusion from jury service on racial grounds would be illusory if state could simply rebut presumption of racial motive with mere generalities); Neal v. Delaware, 103 U.S. 370, 397 (1881) (holding state's purposeful exclusion of black people from serving on either grand or petit juries violated black defendant's equal protection rights); *Ex parte* Virginia, 100 U.S. 339, 340, 342, 349 (1880) (upholding federal statute that prohibited state court judges from excluding blacks from jury venires or petit juries on equal protection grounds).

[4] The jury selection procedure generally begins when county jury officials compile lists of potentially qualified jurors' names. Michael Sullivan, Comment, *The Prosecutor's Right to Object to a Defendant's Abuse of Peremptory Challenges*, 93 DICK. L. REV. 143, 144-45 (1988). These lists are generated from various public documents. *Id.* at 145. Once potential jurors have been assembled at the courthouse, statutory disqualification occurs. *Id.* Prospective jurors who are not statutorily barred from serving then become the venire pool. *Id.* Before trial, the prospective jurors in the venire return to the court for the voir dire stage of jury selection. *Id.* Voir dire consists of a face-to-face examination of prospective jurors to determine their ability to decide a particular case. Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 545 (1975). Specifically, either counsel or, in many jurisdictions, the judge questions the potential jurors to ascertain any possible biases. Sullivan, *supra*, at 145. Counsel may then excuse jurors by exercising a challenge for cause or a peremptory challenge. *Id.* at 145-46; *see also* Babcock, *supra*, at 545 (noting that "*voir dire* provides litigants with information that enables them to select a jury either by arguing to excuse for cause or by challenging peremptorily").

[5] Batson v. Kentucky, 476 U.S. 79, 101 (1986) (White, J., concurring). In *Batson*, the Court held that a state must provide a racially neutral reason for excluding a black juror once a defendant had established a prima facie case that the juror was excluded because of that juror's race. *Id.* at 98. In a concurring opinion, Justice Marshall cited empirical evidence suggesting that Missouri prosecutors used 81% of their peremptory challenges to exclude black venirepersons in 15 cases during 1974. *Id.* at 103 (Marshall, J., concurring) (citing United States v. Carter, 528 F.2d 844, 848 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976)). Similarly, Justice Marshall observed that South Carolina prosecutors excluded 82% of black venirepersons in thirteen cases between 1970 and 1971. *Id.* (citing McKinney v. Walker, 394 F.Supp. 1015, 1017-18 (S.C. 1974), *aff'd*, 529 F.2d 516 (4th Cir. 1975)). Finally, Justice Marshall noted that federal prosecutors in Louisiana exercised 69% of their peremptory challenges against black venirepersons in 53 cases between 1972 and 1974. *Id.* (citing United States v. McDaniels, 379 F. Supp. 1243, 1244 (E.D. La. 1974)). The lack of minorities on voter registration lists, as one commentary has suggested, may explain the underrepresentation of minority jurors. *See Developments*, *supra* note 1, at 1562-63. As a result of this exclusion, black defendants are more likely to be convicted by all-white juries. *Id.* at 1559-60; *see also* Douglas L.

gants exclude qualified jurors on the basis of race is through the "peremptory challenge."[6]

The peremptory challenge enables a party to exclude prospective jurors from the petit jury[7] without cause.[8] Although

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Colbert, *Challenging The Challenge: Thirteenth Amendment As A Prohibition Against The Racial Use Of Peremptory Challenges*, 76 CORNELL L. REV. 1, 111 n.550 (1990) (reporting that white juror prejudice resulted in increased conviction rates for African-American and Hispanics than white defendants).

[6] Colbert, *supra* note 5, at 93. A peremptory challenge is defined as "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990); 4 WILLIAM BLACKSTONE, COMMENTARIES *346 (noting that "[i]n criminal cases, or at least in capital ones, there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge"); *cf.* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2083 (1991) (declaring that "[p]eremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who would otherwise satisfy the requirements for service on the petit jury").

In general, courts employ two different systems for using peremptory challenges. Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 228 (1986). In jurisdictions using the "struck system," a jury pool initially contains the number of jurors required in a petit jury, in addition to the number of jurors permitted to be peremptorily struck. *Id.* Parties then exercise their peremptories until the proper number of petit jurors has been reached. *Id.* By contrast, those jurisdictions employing the "sequential system" use their peremptory and for cause challenges after each prospective juror is scrutinized. *Id.* This process is repeated until a petit jury is formed. *Id.*

[7] A petit jury, as distinguished from a grand jury, is defined as "[t]he ordinary jury for the trial of a civil or criminal action . . . ." BLACK'S LAW DICTIONARY 856 (6th ed. 1990). The function of a grand jury, on the other hand, is to determine "whether probable cause exists that a crime has been committed and whether an indictment (true bill) should be returned against one for such a crime." *Id.* at 855. The English tradition of trial by jury in criminal cases existed several centuries before the United States Constitution. Duncan v. Louisiana, 391 U.S. 145, 151 (1968). The English colonists in America adopted the jury trial tradition and incorporated it into the United States Constitution and the constitutions of all the states. *Id.* at 152-53. One reason cited for the unwavering support of the jury trial was its protective function of insulating citizens from government oppression. *Id.* at 155. For a discussion tracing the development of the jury in Anglo-Saxon legal history, see 4 WILLIAM BLACKSTONE, COMMENTARIES *342-48.

[8] Sullivan, *supra* note 4, at 146 (quoting Swain v. Alabama, 380 U.S. 202, 220 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986)). Counsel makes a challenge for cause when a juror "[has] formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offence charged. . . . " *Hopt v. Utah*, 120 U.S. 430, 433 (1887). One commentator, however, argued that the challenge for cause is problematic for it requires the courts to make numerous assessments about human psychology. Babcock, *supra* note 4, at 550; *see also* Colbert, *supra* note 5, at 122 (contending that challenge for cause cannot adequately ensure a defendant's right to an impartial jury); 4 WILLIAM BLACKSTONE, COMMENTARIES *347 (asserting that peremptory challenge is essential for attorneys who alienate a juror they failed to remove for cause). *But see* Gurney, *supra* note 6, at 253, 257, 267 (suggesting abolition of peremptory challenges will force attorneys to question ju-

this centuries-old device[9] is not constitutionally guaranteed,[10] it has become practically inseparable from the notions of a fair and impartial trial.[11] Efforts to limit the peremptory challenge, there-

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rors in more responsible manner and challenge for cause can effectively replace peremptory challenges).

9 *See Swain*, 380 U.S. at 212-20 (surveying history of peremptory challenge from fourteenth century to application in United States in twentieth century); *see also* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 165-66 (1989) (discussing limited use of peremptory challenges in England); 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, 193-95 (1978) (examining development of peremptory challenges from fourteenth-century England to nineteenth-century American jurisprudence); Colbert, *supra* note 5, at 9 (addressing English Parliament's limitations of peremptory challenges to defendants only to preserve defendant's fair trial rights); Sullivan, *supra* note 4, at 147 (reviewing importance of peremptory challenge in colonial and early American history).

10 *See, e.g.*, Georgia v. McCollum, 112 S. Ct. 2348, 2358 (1992) (declaring peremptory challenges not constitutionally required); Gray v. Mississippi, 481 U.S. 648, 663 (1987) (asserting peremptory challenges subordinate to rights guaranteed by Constitution); *Swain*, 380 U.S. at 219 (citing non-constitutional basis for peremptory challenge); Frazier v. United States, 335 U.S. 497, 505 n.11 (1948) (noting statutory origins of peremptory challenge); Stilson v. United States, 250 U.S. 583, 586 (1919) (maintaining Constitution only secures right to impartial jury, not right to exercise peremptory challenges); State v. McCollum, 405 S.E.2d 688, 692 (Ga. 1991) (Bentham, J., dissenting) (contending use of peremptory strike had no state constitutional foundation), *rev'd*, Georgia v. McCollum, 112 S. Ct. 2348 (1992).

Commentators have suggested, however, that a litigant's use of a peremptory challenge may be constitutionally protected. Babcock, *supra* note 4, at 555-56; Colbert, *supra* note 5, at 10-11. For example, Babcock argued that the *Swain* Court's emphasis on the importance of peremptory challenges could be viewed as overruling the *Stilson* Court's conclusion that peremptory challenges were not constitutionally guaranteed. Babcock, *supra* note 4, at 556. Similarly, Colbert noted that the Framers of the Constitution had originally proposed language that would have mandated challenges for the accused. Colbert, *supra* note 5, at 10. Such language, Colbert added, was not incorporated into the Sixth Amendment, but was, however, codified in 1790. *Id.* at 10-11 (citing AN ACT FOR THE PUNISHMENT OF CERTAIN CRIMES AGAINST THE UNITED STATES, ch. 9, § 30, 1 Stat. 119 (1790)). This Act provided, in pertinent part:

> [I]f any person or persons be indicted of treason against the United States, and shall stand mute or refuse to plead, or shall challenge peremptorily above the number of thirty-five of the jury . . . the court, in any of the cases aforesaid, shall notwithstanding proceed to the trial of the person or persons so standing mute or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly.

AN ACT FOR THE PUNISHMENT OF CERTAIN CRIMES AGAINST THE UNITED STATES, ch. 9, § 30, 1 Stat. 119 (1790).

11 Jean M. Shanley, Comment, *The Discriminatory Use of Peremptory Challenges After* Holland, 22 SETON HALL L. REV. 58, 68-69 (1991); *see also* James R. Acker, *Exercising Challenges After* Batson, 24 CRIM. L. BULL. 187, 192 (1988) (maintaining peremptory challenges play major role in securing jury that is free of extreme biases). One

fore, have faced great opposition.[12]

In a recent case, *Georgia v. McCollum*,[13] the United States Supreme Court prohibited a white criminal defendant from exercising peremptory challenges in a racially discriminatory manner.[14] In reaching this decision, the Court determined that a criminal defendant's peremptory challenges were state action,[15]

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scholar has suggested, however, that peremptory challenges foster juror prejudice. Alschuler, *supra* note 9, at 170. Alschuler commented:

> Peremptory challenges ensure the selection of jurors on the basis of insulting stereotypes without substantially advancing the goal of making juries more impartial. The Equal Protection Clause forbids the arbitrary classification of human beings, and peremptory challenges are inherently arbitrary. Even when exercised on grounds other than race, these challenges are unconstitutional.

Id.; *see also Developments*, *supra* note 1, at 1565 (discussing empirical evidence supporting claim that peremptory challenges may actually frustrate jury impartiality); Gurney, *supra* note 6, at 230-36 (discussing how peremptory challenges create jury partiality).

12 Joel H. Swift, *Defendants, Racism and the Peremptory Challenge: A Reply to Professor Goldwasser*, 22 COLUM. HUM. RTS. L. REV. 177, 178 (1991). In *Batson v. Kentucky*, 476 U.S. 79 (1986), Chief Justice Burger argued that requiring a racially neutral explanation for peremptory challenges would unduly burden the courts. Batson v. Kentucky, 476 U.S. 79, 130 (1986). The explanation requirement, the Chief Justice opined, would render a peremptory challenge indistinguishable from a challenge for cause. *Id.* at 127. Others have argued that the *Batson* decision, which required racially neutral explanations for peremptory challenges, created administrative burdens. Alschuler, *supra* note 9, at 174-76, 199. For a discussion on how various courts have monitored racially discriminatory peremptory challenges, see Acker, *supra* note 11, at 197-201.

13 112 S. Ct. 2348 (1992). A number of discussions of the case have appeared. *See, e.g.*, George J. Arnold & Matthew L. Moodhe, *Race-Based Peremptory Challenges By Criminal Defendants*—Georgia v. McCollum, CBA RECORD, Sept. 1992, at 35 (concluding that *McCollum* will restore symmetry to jury selection process); Honorable Garrett E. Brown Jr., *Race-Based Jury Challenges by Defendants Barred*, 131 N.J.L.J., 682 (suggesting that *McCollum* will likely extend to ethnic and nationality-based discrimination); Michael N. Chesney & Gerard T. Gallagher, Note, *State Action and the Peremptory Challenge: Evolution of the Court's Treatment and Implications for* Georgia v. McCollum, 67 NOTRE DAME L. REV. 1049, 1061, 1076 (1992) (predicting, before the *McCollum* decision, the Court's treatment of state actor and Sixth Amendment issues).

14 *McCollum*, 112 S. Ct. at 2351, 2359.

15 *Id.* at 2356 (quoting Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2085 (1991)). Racial discrimination, no matter how abhorrent, is not prohibited under the Fourteenth Amendment unless the discrimination has its source in state action. 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, 811-12 (1989). To determine whether state action exists, the Court has used either a "public function" or a "nexus" test. John J. Hoeffner, Note, *Defendant's Discriminatory Use Of The Peremptory Challenge After* Batson v. Kentucky, 62 ST. JOHN'S L. REV. 46, 53 (1987). The public function test seeks to determine whether an action taken by a private party was uniquely or traditionally reserved for the government. *Id.* at 53. If such a finding is made, the private actor's conduct is state action. Sullivan,

and that the State had standing to raise an objection based on the excluded juror's equal protection rights.[16] The Court concluded that the State could require a racially neutral explanation for the defendant's peremptory challenges upon a prima facie showing that those challenges were racially discriminatory.[17]

On August 10, 1990, three members of the McCollum family were indicted for multiple counts of aggravated assault and simple battery.[18] The McCollums, who are white, were accused of physically attacking Myra and Jerry Collins, who are black, following an altercation at the McCollums' cleaning store.[19] After

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supra note 4, at 159. The nexus test seeks to determine whether there was a sufficiently close relationship between the state and the contested action to warrant a finding of state action. Hoeffner, *supra*, at 15. For a discussion of the state action analysis by the *McCollum* Court, see *infra* notes 86-110 and accompanying text.

16 *McCollum*, 112 S. Ct. at 2357. A state's objection to a criminal defendant's racially discriminatory peremptory challenge could only be sustained if the state was found to have third-party standing to a claim on behalf of the excluded juror. Sullivan, *supra* note 4, at 163. Despite a general prohibition against third-party standing, some exceptions have been made. *Id.* at 164. Two major factors considered by the Court in third-party standing situations have involved the relationship between the state and the injured party and the injured party's ability to sue without third-party assistance. *Id.* at 164-65 (quoting Singleton v. Wulff, 428 U.S. 106, 114-16 (1976)). For a discussion of the *McCollum* Court's third-party standing analysis, see *infra* notes 113-18 and accompanying text.

17 *McCollum*, 112 S. Ct. at 2359. The Court has suggested that statistical evidence of disparate treatment may, in certain contexts, establish a prima facie case of racial discrimination. Alschuler, *supra* note 9, at 170. The Court has not, however, delineated standards for lower courts to determine whether a prima facie case of racially discriminatory peremptory challenges exists. *Id.* at 171; *see also* Brown et al., *supra* note 9, at 197-200 (examining the various tests employed by the Court to establish a prima facie case of discrimination). For a discussion of the elements required to establish a prima facie case of racially discriminatory peremptory challenges, see *infra* notes 46-52 and accompanying text.

18 *McCollum*, 112 S. Ct. at 2351. Thomas McCollum was indicted for two counts of aggravated assault for striking Myra Collins on the head with a baseball bat and a wall plaque, and for attempting to strike Jerry Collins with a baseball bat. Indictment Superior Court of Dougherty County, filed August 10, 1990, Georgia v. McCollum, No. 90R816, *reprinted in* Joint App. at 3-4, Georgia v. McCollum, 112 S. Ct. 2348 (1992) [hereinafter Indictment]. William Joseph McCollum was indicted for one count of simple assault for beating Myra Collins with his hands and knocking her to the floor. Indictment at 4. William McCollum was also indicted for two counts of aggravated assault for hitting Myra Collins with a gun and hitting her head against a counter top. *Id.* at 5. Ella Hampton McCollum was indicted for a simple battery for repeatedly kicking Myra Collins. *Id.* at 4.

19 Respondent's Brief, State v. McCollum, 405 S.E.2d 688 (Ga. 1991), *reprinted in* Joint App. at 24, Georgia v. McCollum, 112 S. Ct. 2348 (1992) [hereinafter Respondent's Brief]. The McCollums claimed that because the Collinses had become violent, they tried to remove them from their store. Mark Curriden, *Court KO's Bias In Picking Criminal Jury*, THE ATLANTA CONSTITUTION, July 13, 1991, at B3. Authorities reported, however, that the McCollums' attack was racially motivated. *Id.*; *see generally* Charles H. Jones, Jr., *An Argument For Federal Protection Against Racially Moti-*

securing the indictments, and anticipating that the defendants would use their peremptory strikes in a racially discriminatory manner,[20] the State of Georgia filed a pre-trial motion to prohibit the defendants from exercising racially based challenges.[21] The State requested that the court require the defendants to articulate a racially neutral explanation for peremptory challenges, should the State present a prima facie showing of racial discrimination.[22] The State reasoned that the defendants might use their

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vated Crimes: 18 U.S.C. § 241 And The Thirteenth Amendment, 21 HARV. C.R.-C.L. L. REV. 689, 691-92 (1986) (discussing racially motivated crimes and the Court's and Congress's response to these crimes). Soon after this violent episode, leaflets were distributed throughout the community, encouraging local black patrons to boycott the defendants' place of business.

Respondent's Brief, *supra*, at 38. Specifically, the leaflet provided:

> *"KEEP THE DREAM ALIVE"*
>
> Dr. Martin Luther King taught that "non-violence" is the way to peace.
>
> *BE INFORMED* . . . The McCollum Family, owners of McCollum's Dry Cleaners located at 1703 E. Broad Ave. in Albany attacked, kicked and beat a young black woman and her husband with a baseball bat, several days ago as they attempted to pick up clothing and dry cleaning.
>
> This Community must respond to this violent act with "non-violence" & direct action. *We urge you to select another Dry Cleaners for your clothing.*
>
> The McCollums have *no respect* for your black sister & brother, your daughter & son, your wife & husband. Spend your money with people who respect you. *Select another cleaners for your clothing!*
>
> 1-15-90
>
> Unity Community of Albany
> Rep. John White, Chairman

Reprinted in Respondent's Brief, *supra*, at 38.

[20] *McCollum*, 112 S. Ct. at 2351; State's Pretrial Motion, Superior Court of Dougherty County, filed August 10, 1990, Georgia v. McCollum, No. 90R816, *reprinted in* Joint App., at 6-10, Georgia v. McCollum, 112 S. Ct. 2348 (1992) [hereinafter State's Pretrial Motion]. The State implied that the racial makeup of the parties and the county itself might prompt the defendants to use their challenges in a racially discriminatory manner. State's Pretrial Motion, at 6-10. The McCollums asserted, however, that race was injected into the case because of the local black community's boycott of their dry cleaning store. Respondent's Brief, *supra* note 19, at 35. The McCollums reasoned that "under such circumstances, the defendants are entitled to peremptorily excuse members of the black race from the trial jury, not because they are black, but because they are black and the black community has attempted to prejudice blacks against the white defendants in this case." *Id.*

[21] *McCollum*, 112 S. Ct. at 2351; *see* State's Pretrial Motion, *supra* note 20, at 6-10. The State requested that the court require defendant's counsel to articulate a racially neutral explanation for a jury challenge if the State made out a prima facie case of racially discriminatory challenges. *Id.*

[22] *McCollum*, 112 S. Ct. at 2351-52; *see also* Elizabeth L. Earle, *Banishing The Thirteenth Juror: An Approach To The Identification Of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1223-24 (1992) (surveying various types of methods employed by courts to identify racist remarks). For example, a court may employ an "intent-based inquiry," which considers a prosecutor's comment to be racist if it was intended to

twenty peremptory strikes[23] to exclude the eighteen black jurors on the panel.[24]

The trial court denied the State's motion, but certified the issue for immediate review.[25] The Georgia Supreme Court granted the State's application for an interlocutory appeal,[26] and affirmed the trial court's denial of the State's motion to prohibit the defendant's use of racially based peremptory strikes.[27] The

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be. *Id.* at 1224. Courts have also used a "weight of evidence inquiry," which finds a comment is racist when that comment has an inferential prejudicial effect on a potential juror. *Id.* at 1227. Finally, some courts have found comments that gratuitously refer to race are impermissible under the "relevance-based inquiry." *Id.* at 1224, 1230.

[23] At the time of *McCollum*, § 15-12-165 of the Georgia Penal Code provided:

> Every person indicted for a crime or offense which may subject him to death or to imprisonment for not less than four years may peremptorily challenge 20 of the jurors impaneled to try him. Every person indicted for an offense which may subject him to imprisonment in a penal institution for any time less than four years may peremptorily challenge 12 of the jurors impaneled to try him. The State shall be allowed one-half the number of peremptory challenges allowed to the accused.

GA. CODE ANN. § 15-12-165 (Michie 1990). The State of Georgia impanels 42 jurors in a felony trial. *McCollum*, 112 S. Ct. at 2351 n.1 (citing GA. CODE ANN. § 15-12-160 (Michie 1990)).

[24] *McCollum*, 112 S. Ct. at 2351. The State argued that according to the 1980 Census figures for Dougherty County, Georgia, blacks comprised 43% of the population. State's Pretrial Motion, *supra* note 20, at 7. The State pointed out that this percentage would translate into 18 blacks in a total jury pool of 42 persons. *Id.* Assuming that the defendants used 18 of their 20 peremptory challenges to strike black jurors, the State reasoned that no blacks would likely be impaneled in the petit jury. *Id.* Because the Collinses and two key state witnesses were black, the State anticipated that the defendants would exercise their peremptory challenges in a racially discriminatory manner. *Id.* at 6-7.

[25] *McCollum*, 112 S. Ct. at 2352; Georgia v. McCollum, No. 90R816 (Ga. App. Oct. 22, 1990) (order denying preliminary motion), *reprinted in* Joint App. at 14, Georgia v. McCollum, 112 S. Ct. 2348 (1992) (No. 91-372) [hereinafter *Order*]. The trial judge held that neither State nor federal precedent extended the prohibition of racially-based peremptory strikes to a criminal defendant. *Order*, *supra*, at 15. Recognizing the importance of the State's motion, however, Judge Kelley recommended that the case be certified for immediate review. *Id.*

[26] State v. McCollum (Ga. Nov. 15, 1990) (order granting interlocutory appeal), *reprinted in* Joint App. at 16, Georgia v. McCollum, 112 S. Ct. 2348 (1992). In granting review, the court declared that it was especially interested in whether racially discriminatory peremptory challenges violated the impartial jury requirement found in the state's constitution. *Id.* at 17. The Georgia Constitution provides, in pertinent part: "In criminal cases, the defendant shall have a public and speedy trial by an impartial jury . . . ." GA. CONST. art. 1, § 1, para. XI.

[27] State v. McCollum, 405 S.E.2d 688, 689 (Ga. 1991), *rev'd*, Georgia v. McCollum, 112 S. Ct. 2348 (1992). Before the court rendered its decision, the United States Supreme Court decided both Powers v. Ohio, 111 S. Ct. 1364 (1991), and Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991). *Id.*; State's Supplemental Brief, State v. McCollum, 405 S.E.2d 688 (Ga. 1991), *reprinted in* Joint App.

supreme court also denied the State's subsequent motion for reconsideration.[28]

The United States Supreme Court granted Georgia's petition for *certiorari*[29] to determine whether a criminal defendant was prohibited from exercising racially discriminatory peremptory challenges.[30] The Court reversed the Georgia Supreme

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at 42-43, Georgia v. McCollum, 112 S. Ct. 2348 (1992) (No. 91-372) [hereinafter Supplemental Brief I]. In *Powers*, the Court concluded that a white criminal defendant had standing to raise a *Batson*-type objection when the State used its peremptory challenges to exclude prospective black jurors because of the jurors' race. *Powers*, 111 S. Ct. at 1373. Because the juror and the defendant were not of the same race, however, the *Powers* Court had to base its conclusion on the defendant's ability to raise an excluded juror's equal protection rights. *Id.* For a discussion of *Powers*, see *infra* notes 61-67 and accompanying text. Relying on *Powers*, the State in the case at bar filed a supplemental brief in support of their appeal to the Georgia Supreme Court. Supplemental Brief I, *supra*, at 42-43. The State argued that the *Powers* decision was sufficiently analogous to warrant a finding in its favor. *Id.*

In *Edmonson*, the Court concluded that a private civil litigant's exercise of racially discriminatory peremptory challenges violated an excluded juror's equal protection rights. *Edmonson*, 111 S. Ct. at 2087. The *Edmonson* Court added that the opposing civil litigant had standing to raise the equal protection claim on behalf of the excluded juror. *Id.* Filing another supplemental brief, the State argued that *Edmonson* should control when a criminal defendant exercised racially discriminatory peremptory challenges. State's Second Supplemental Brief, State v. McCollum, 405 S.E.2d 688 (Ga. 1991), *reprinted in* Joint App. at 44-45, Georgia v. McCollum, 112 S. Ct. 2348 (1992) [hereinafter Supplemental Brief II]. The Georgia Supreme Court refused to extend that Court's holding in *Powers* or *Edmonson* to the case at bar. *See McCollum*, 405 S.E.2d at 690 (Benham, J., dissenting).

[28] *McCollum*, 112 S. Ct. at 2352; Decision on Motion for Reconsideration, State v. McCollum, 405 S.E.2d 688 (1991), *reprinted in* Joint App. at 60, Georgia v. McCollum, 112 S. Ct. 2348 (1992).

[29] Georgia v. McCollum, 112 S. Ct. 370 (1991).

[30] *McCollum*, 112 S. Ct. at 2352 (1992). The Court noted that several jurisdictions had already prohibited a defendant's use of a racially discriminatory peremptory challenge. *Id.* at 2354 n.6 (citing cases). *See, e.g.*, United States v. Greer, 939 F.2d 1076, 1085 (5th Cir.) (declaring defendants not entitled to use peremptory challenges to eliminate prospective Jewish jurors), *reh. granted*, 948 F.2d 934 (1991), *reinstated in part*, 968 F.2d 433 (1992); People v. Kern, 554 N.E.2d 1235, 1243 (N.Y. 1990) (holding criminal defendants in the "Howard-Beach incident" prohibited under state's equal protection clause from exercising peremptory challenges in a racially discriminatory manner), *cert. denied*, 111 S. Ct. 77 (1990); Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass. 1979) (finding right to a peer jury contravened when members of discrete groups peremptorily challenged because of affiliation with that group), *cert. denied*, 444 U.S. 881 (1979).

Examining the issue of gender discriminatory peremptory challenges, the *McCollum* Court noted that the Ninth Circuit had prohibited such challenges under the Fifth Amendment equal protection principles in *United States v. DeGross*. *Id.* at 2352 n.3 (citing United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc)). In *DeGross*, a female defendant was charged with aiding and abetting the movement of an illegal alien in the United States. *DeGross*, 960 F.2d at 1435. After the defendant used her peremptory challenges to strike seven males, the district court granted the Government's request that the defendant provide a gender-neu-

Court's decision, and extended the prohibition against racially based peremptory challenges to criminal defendants.[31] The Court held that such challenges violated the excluded jurors' equal protection rights under the Fourteenth Amendment, and could be prohibited because the criminal defendant was essentially a state actor when exercising peremptory challenges.[32]

The Supreme Court first addressed the validity of racial influence in the jury selection process under the Equal Protection Clause of the Fourteenth Amendment in *Strauder v. West Virginia*.[33] In *Strauder*, an all-white male jury tried, convicted and sentenced a black defendant for murder.[34] Relying on the Fourteenth Amendment,[35] the *Strauder* Court found that every citizen,

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tral explanation for these strikes. *Id.* at 1435-36. Because DeGross was unable to offer a gender-neutral basis for her eighth peremptory challenge, it was disallowed. *Id.* at 1436. Thereafter, the defendant objected to the Government's exclusion of a prospective female Hispanic juror. *Id.* The district court found that DeGross had established a prima facie case of a gender discriminatory peremptory challenge, and required the Government to articulate a gender-neutral reason for its strike. *Id.* The court allowed the challenge even though the Government was able to successfully rebut the defendant's inference. *Id.* The Ninth Circuit Court of Appeals, reasoning that the exclusion of prospective women jurors because of their gender inflicted the same harms on the excluded juror and the community identified in *Batson*, found that the Government's peremptory challenge was improper. *Id.* at 1438, 1443.

31 *McCollum*, 112 S. Ct. at 2359.

32 *Id.* at 2356-57.

33 100 U.S. 303, 305, 310 (1879). *See* Alschuler, *supra* note 9, at 190 (commenting that *Strauder* may also stand for incorporation of Sixth Amendment right to impartial jury trial in Fourteenth Amendment's Equal Protection Clause); Colbert, *supra* note 5, at 65-67 (analyzing *Strauder* Court's opinion in context of post-Civil War amendments); *Developments*, *supra* note 1, at 1567 (discussing *Strauder* Court's reliance on Equal Protection Clause to invalidate a racially discriminatory West Virginia statute).

34 *Strauder*, 100 U.S. at 304, 305. Before his trial in the Circuit Court of Ohio County, West Virginia, the defendant sought removal to federal district court. *Id.* at 304. The defendant based his removal request on his belief that he could not receive equal treatment under the laws because of the racially restrictive nature of the West Virginia jury selection statute. *Id.* The West Virginia statute provided, in pertinent part: "1. All white male persons, who are twenty-one years of age, and not over sixty, and who are citizens of this state, shall be liable to serve as jurors, except as hereinafter provided." The trial court denied the defendant's request for removal, and denied the defendant's subsequent motions to quash the venire, challenge the array and obtain a new trial. *Strauder*, 100 U.S. at 304-05.

35 The majority reasoned that the Fourteenth Amendment could only mean that:

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

regardless of race, had a constitutional right to be tried before a jury selected by racially neutral means.[36] The Court cautioned, however, that the Equal Protection Clause did not necessarily guarantee to a defendant the right to be tried by jurors of the same race.[37] Nevertheless, the Court held that the West Virginia statute, which restricted jury service to white men,[38] was unconstitutional.[39]

Id. at 307. The Court based its interpretation of the Fourteenth Amendment on the historical context surrounding its drafting and ratification. *Id.* at 306. This context, according to Justice Story, revealed that the recently emancipated blacks needed protection from white "jealousy and positive dislike." *Id.* Justice Strong also reiterated several of the protective reasons for the Amendment invoked by its Framers. *Id.* For example, the Republican Congress urged passage of this Amendment to prevent the repeal of the Civil Rights Act of 1866. Kaczorowski, *supra* note 1, at 910. The Republicans feared that such an appeal might take place after the Southern Representatives and Senators were allowed to rejoin the Congress. *Id.* The Civil Rights Act of 1866, however, as well as the Fourteenth Amendment, were intended to "secure a corpus of fundamental rights that [all Americans] were to enjoy as U.S. citizens." *Id.* at 898. Professor Kaczorowski concluded that national citizenship was superior to state citizenship. *Id.* at 899.

36 *Strauder*, 100 U.S. at 305. The Court expressed its difficulty in comprehending how whites and blacks could be equally protected when a black defendant could not possibly be tried before a jury containing members of his race. *Id.* at 309; *cf.* Alschuler, *supra* note 9, at 188-89 (arguing issue of standing in *Strauder* was based on proposition that state statute removed jurors who might have been sympathetic to defendant's position, rather than based on racial solidarity between defendant and a juror); Colbert, *supra* note 5, at 66 (noting *Strauder* Court had found "the exclusion of blacks from jury duty also threatened to perpetuate black inferiority, the ideological underpinning of slavery").

37 *Strauder*, 100 U.S. at 305. The Court observed that a criminal defendant does not have a right to a grand or petit jury composed of persons entirely or partly of his own race. *Id.* Instead, the Court emphasized that the Constitution only prohibits the exclusion of jurors solely on the basis of race. *Id.* Despite this distinction and the prohibitory language found in the Amendment itself, Justice Strong liberally interpreted the Fourteenth Amendment to include an affirmative immunity. *Id.* at 307-08. This affirmative immunity, according to the Court, gave black people "the right to exemption from unfriendly legislation against them distinctively as colored. . . ." *Id.* The Court clarified, however, that the right only applied against state action. *Id.* at 310. *See infra* notes 87-111 and accompanying text (discussing state action as applied to defendants' peremptory challenges).

38 The majority pointed out that despite its prohibition against racially discriminatory state restrictions of jurors, the states were free to restrict jury service by gender, age, education, citizenship and landowner status. *Strauder*, 100 U.S. at 310. The Court reasoned that the Fourteenth Amendment was not intended to extend to such groups in jury selection. *Id.*

39 *Strauder*, 100 U.S. at 310. The majority concluded that the West Virginia statute, which discriminated against prospective black jurors, violated the rights of a "colored man" under the Equal Protection Clause. *Id.* The *Strauder* Court also expressed that the State's discriminatory statute inflicted an injury on excluded jurors. *Id.* at 308. The Court stated that such exclusion "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that

In *Swain v. Alabama*,[40] the Court applied an equal protection analysis to determine whether the State's exercise of race-based peremptory challenges were constitutionally prohibited.[41] In *Swain*, an all-white jury in Talladega County, Alabama convicted and sentenced a black man to death for rape.[42] The United

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equal justice which the law aims to secure to all others." *Id.* *See* Neal v. Delaware, 103 U.S. 370, 397 (1881) (asserting racially discriminatory exclusion of a juror violates juror's constitutional rights); *cf.* Carter v. Jury Comm'n, 396 U.S. 320, 329-30 (1970) (holding jurors excluded because of race can seek affirmative civil relief).

Relying on his dissent in *Ex parte Virginia*, Justice Field, joined by Justice Clifford, authored a dissenting opinion. *Strauder*, 100 U.S. at 312 (Field, J., dissenting). In *Ex parte Virginia*, a state judge was indicted for excluding blacks from jury service solely on the basis of race. *Ex parte* Virginia, 100 U.S. 339, 340 (1879). The petitioner's actions were alleged to have violated a Congressional Act. *Id.* at 344 (citing Civil Rights Act of 1875, ch. 114, § 4, 18 Stat., 336 (1875) (current version at 18 U.S.C. § 243 (1988)). The *Ex parte Virginia* Court held that the Act was constitutional and denied the petitioner's writ of habeas corpus. *Id.* at 349. Justice Field argued that the Court's decision in *Ex parte Virginia* failed to distinguish civil rights, which were protected by the Thirteenth and Fourteenth Amendments, and political rights, which were still a matter of state sovereignty. *Id.* at 368 (Field, J., dissenting).

40 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). *See* Babcock, *supra* note 4, at 555-56 (implying that Court's emphasis in *Swain v. Alabama* on historical tradition of peremptory challenges could be interpreted to signify that peremptory challenges are constitutionally protected); Honorable George Bundy Smith, Swain v. Alabama: *The Use of Peremptory Challenges to Strike Blacks From Juries*, 27 How. L.J. 1571, 1594 (1984) (suggesting courts should use Sixth Amendment, Federal Rules of Civil Procedure and state constitutional provisions to circumvent the *Swain* ruling); Sullivan, *supra* note 4, at 149 (discussing *Swain* Court's evidentiary formulation for establishing a prima facie case of racially discriminatory peremptory challenges); J. Alexander Tanford, *Racism In The Adversary System: The Defendant's Use Of Peremptory Challenges*, 63 S. CAL. L. REV. 1015, 1055 (1990) (noting *Swain* Court's concern for the community).

41 *Swain*, 380 U.S. at 223-24. The *Swain* Court addressed the petitioner's three separate claims. *Id.* at 205, 209, 222. Petitioner's first claim concerned the discriminatory manner in which the State selected both the grand jury and the petit jury venire. *Id.* at 205. The Court found, however, that the State did not completely exclude blacks. *Id.* at 206. The Court reasoned that of the county's total population, 26% were black males, and of this 26%, between 10% and 15% were selected for service on either grand or petit jury panels. *Id.* at 205. Petitioner's second claim related to the State's use of racially discriminatory peremptory strikes in petit juries. *Id.* at 209. Reciting a lengthy history of peremptory challenges, Justice White maintained that the challenges would lose their effect and purpose if they were open to examination. *Id.* at 212-21, 221-22. Regarding the petitioner's third claim that the State had systematically removed blacks from all criminal and civil petit juries, the Court stated that the petitioner could prevail with proper evidence. *Id.* at 222-23, 223-24.

42 *Swain*, 380 U.S. at 231 (Goldberg, J., dissenting). Specifically, the petitioner, a 19 year-old, was convicted of raping a 17 year-old white woman. *Id.* At trial, the prosecutor used six peremptory challenges to remove all six black venirepersons. *Id.* at 205. Petitioner's motions to strike the jury venire and have the petit jury declared void were denied. *Id.* at 203.

States Supreme Court, analyzing the prosecution's apparently racially based strikes, determined that such strikes contravened the purpose of the peremptory challenge.[43] The Court maintained, however, that a criminal defendant had the burden of producing sufficient evidence demonstrating that a prosecutor had consistently exercised peremptories in a discriminatory fashion.[44] The *Swain* Court found that the petitioner failed to meet his burden,

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[43] *Id.* The Court asserted that the systematic exclusion of blacks suggested that the peremptory challenge had been used to violate a black defendant's equal protection rights. *Id.* The Court implied, however, that the State's systematic exclusion of blacks was permissible when the reason for the exclusion was related to the particular case being tried. *Id.*

[44] *Id.* at 226. The Court implied that a prima facie case of racially discriminatory peremptory challenges might exist if a defendant demonstrated that the State had removed all prospective black jurors in a particular case. *Id.* at 224; *see supra* note 17 (discussing elements required to establish prima facie case of racial discrimination in jury selection). Clear evidence of systematic exclusion, the Court asserted, might overcome any presumption protecting the State. *Swain*, 380 U.S. at 224-26. The lack of evidence in this case, noted the majority, prevented rebuttal of any inferences raised *against* the State. *Id.* at 226. In any event, the Court found that the petitioner had not met his initial burden, obviating the need for further inquiry. *Id.* at 224. Justice White also determined that the defendant's inconclusive evidence regarding the prosecutor's past conduct was insufficient to raise any inference of misconduct in Talladega County. *Id. Cf.* Brown et al., *supra* note 9, at 197 (criticizing *Swain's* evidentiary formulation for prima facie case of racially discriminatory peremptory challenges); *Developments*, *supra* note 1, at 1567-76 (surveying Court's attempts to establish criteria to recognize racial discrimination under Sixth and Fourteenth Amendments).

In a strong dissent, Justice Goldberg charged that the *Swain* decision would seriously impede efforts to eliminate jury discrimination. *Id.* at 231 (Goldberg, J., dissenting). Justice Goldberg added that the petitioner had established a prima facie case of racially discriminatory peremptory challenges in accordance with Court precedent. *Id.* at 231-32 (Goldberg, J., dissenting). Justice Goldberg pointed out that the Court had previously cited "the rule of exclusion" as one method to determine whether discrimination occurred in jury selection. *Id.* (quoting Hernandez v. Texas, 347 U.S. 475, 480 (1954)). According to the *Swain* dissent, the rule of exclusion was designed to shift the evidentiary burden to the State once a defendant had established total exclusion of a judicially cognizable group. *Id.* (quoting Patton v. Mississippi, 332 U.S. 463, 466 (1947)). The cases cited by Justice Goldberg lent ample support to his position. *See Hernandez*, 347 U.S. at 482 (holding exclusion of otherwise qualified prospective jurors because of national origin violated Fourteenth Amendment); *Patton*, 332 U.S. at 468 (holding prima facie case of racial discrimination was established when no black had served as grand or petit juror for thirty years). Under the rule of exclusion, substantial underrepresentation could establish a prima facie case where the selection procedure was open to abuse or provided an opportunity to discriminate. Castaneda v. Partida, 430 U.S. 482, 494 (1977) (citations omitted). The controversial *Swain* decision remained a subject of concern for a long time. *See* Batson v. Kentucky, 476 U.S. 79, 91-93 (1986) (criticizing *Swain* for placing crippling burden of proof on defendants); Georgia v. McCollum, 112 S. Ct. 2348, 2352 (1992) (asserting that *Swain* decision permitted defendant to raise equal protection claim under limited circumstances); Colbert, *supra* note 5, at 93-94 (criticizing *Swain* Court for failing to recog-

despite evidence that the State had not impaneled a single black juror on a petit jury in Talladega County between 1950 and 1964.[45]

The *Swain* decision remained the law of the land for twenty-one years until it was finally overruled in *Batson v. Kentucky*.[46] *Bat-*

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nize use of prosecutorial discrimination in jury selection process as a tool to deny black criminal defendants justice).

[45] *Swain*, 380 U.S. at 223-26. In concluding that the defendant did not meet his evidentiary burden, the Court stressed that there was no indication that the total exclusion of blacks from jury service resulted solely from the State's use of its peremptory challenges. *Id.* at 224. The Court asserted that statistical proof of black exclusion from jury service would be insufficient, in itself, to demonstrate state responsibility for such exclusion. *Id.* at 227. Justice Goldberg's dissent pointed out, however, that the Court had previously held that such extensive empirical data would suffice for a prima facie case of discrimination. *Id.* at 231-32 (Goldberg, J., dissenting) (quoting Norris v. Alabama, 294 U.S. 587, 591 (1935)). Moreover, Justice Goldberg noted that the Court had previously held a defendant established a prima facie case when blacks were totally excluded from jury service, despite their significant numbers in the community and their equal ability to serve as jurors. *Id.* at 232 (Goldberg, J., dissenting) (citing *Hernandez*, 347 U.S. at 480). Justice Goldberg remarked that when a defendant had demonstrated a prima facie case of discrimination, the State then had the burden to articulate a nondiscriminatory reason for its strikes. *Id.* at 238 (Goldberg, J., dissenting). The dissent concluded that the State failed to meet its burden. *Id.* at 239 (Goldberg, J., dissenting). Finally, the dissent accused the Court of imposing new and heavier burdens on the defendant. *Id.* at 241-42 (Goldberg, J., dissenting).

Swain proved to be fertile ground for speculation and commentary. *See* Goldwasser, *supra* note 15, at 813 (suggesting that defendant's conviction in *Swain* was upheld because he could not establish that only the State had excluded black venirepersons). *But see* Swift, *supra* note 12, at 180-81 (arguing *Swain* Court based its conclusion on constitutional validity of a racially discriminatory peremptory challenge, not on state actor analysis).

[46] 476 U.S. 79, 93 (1986). Justice Powell, writing for the majority, overruled the evidentiary formulation set forth in *Swain*, finding that *Swain* was inconsistent with more recent standards developed "for assessing a prima facie case under the Equal Protection Clause." *Id.*.

Numerous interpretations of the *Batson* decision have emerged. *See, e.g.*, Acker, *supra* note 11, at 195 (declaring that *Batson* did not prohibit exclusion of blacks on a case-specific basis); Alschuler, *supra* note 9, at 200 (arguing that *Batson* did not end use of racially discriminatory peremptory challenges in many circumstances); Goldwasser, *supra* note 15, at 821-22 (arguing against extension of *Batson* to criminal defendant's exercise of peremptory challenges); Tanford, *supra* note 40, at 1019-36 (delineating arguments for and against extension of *Batson* to criminal defendants' exercise of peremptory challenges); Sean Chapman, Note, *Jury Selection* Batson v. Kentucky: *A Significant Step Toward Eliminating Discrimination in the Jury Selection Process*, 29 ARIZ. L. REV. 697, 705 (1987) (concluding *Batson* decision would help reduce racially discriminatory peremptory challenges); William F. Harvey, Note, Batson v. Kentucky: *Jury Discrimination and the Peremptory Challenge for Cause*, 20 CREIGHTON L. REV. 221, 245 (1986) (asserting defendant's Sixth and Fourteenth Amendment rights fully protected only through abolition of peremptory challenge); Brian Wilson, Note, Batson v. Kentucky: *Can the 'New' Peremptory Challenge Survive the Resurrection of* Strauder v. West Virginia, 20 AKRON L. REV. 355, 359-60 (1986) (reporting

son concerned an all-white jury's conviction of a black defendant for second-degree burglary and receipt of stolen goods.[47] Rejecting the requirement that the criminal defendant establish racism in the jury selection,[48] the *Batson* Court adopted a less severe evidentiary formulation characteristic of post-*Swain* cases.[49] Most importantly, the Court permitted a criminal defendant to establish a prima facie case of racially-based jury exclusion from evidence adduced at the defendant's own trial.[50]

Swain Court's emphasis on importance of peremptory challenge rejected by *Batson* Court).

47 *Batson*, 476 U.S. at 82, 83. During jury selection, the State used its peremptory challenges to remove all four black venirepersons. *Id.* at 83. The petitioner moved to discharge the jury on the grounds that the challenges used in this manner violated his Sixth and Fourteenth Amendment rights. *Id.*

48 *Id.* at 92-93. Justice Powell charged that the defendant's burden of proof to establish an equal protection violation was "crippling." *Id.* at 92. The Court added that this almost insurmountable burden had given prosecutors free reign to racially discriminate without practical fear of adverse consequences. *Id.* at 92-93. Under *Swain*, the *Batson* Court opined, a "defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges." *Id.* at 92 n.17 (citing United States v. Pearson, 448 F.2d 1207, 1217 (1971)).

Defendants have adopted a number of lines of attack on perceived prosecutorial misconduct. *See* Brown et al., *supra* note 9, at 202, 204, 209 (examining Missouri cases that illustrate various defendants' arguments, and Courts' responses to those arguments, advanced in claims of prosecutorial misuse of peremptories).

49 *Batson*, 476 U.S. at 95. A number of cases appeared to gradually erode the *Swain* Court's strict evidentiary formulation. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) (suggesting "disproportionate impact" analysis may be relevant indicator to determine whether racial discrimination existed); Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972) (placing burden on state to articulate racially neutral reason for exclusion of juror once defendant made a prima facie case); *Hernandez*, 347 U.S. at 482 (allowing defendant to raise claim of purposeful discrimination with evidence of systematic exclusion); *see also* Alschuler, *supra* note 9, at 168 (asserting that *Batson* not only overruled *Swain*'s evidentiary formulation, but also altered defendant's proof requirements); *Developments*, *supra* note 1, at 1575 (discussing *Batson* Court's overturning of *Swain*'s evidentiary formulation).

50 *Batson*, 476 U.S. at 96. The Court outlined a three-part analysis in determining whether a defendant had established a prima facie case. *Id.* First, the defendant had to demonstrate he was a member of a recognized racial group, and that the State had used its peremptory challenges to remove members of that group. *Id.* (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)). Second, the defendant had to establish that peremptory challenges provided the prosecution with the opportunity to discriminate. *Id.* (citing Avery v. Georgia, 345 U.S. 559, 562 (1953)). Finally, the defendant had the burden of showing that the prosecution used its peremptory challenges to exclude the venirepersons from the petit jury because of race. *Id.* The majority added that once a defendant succeeded in showing a prima facie case, the burden shifted to the state to produce a racially neutral explanation for excusing black jurors. *Id.* at 97. Once this burden shifted, the Court concluded, the State could not rebut this inference by arguing that blacks could not be impar-

The Court based its conclusion on the Equal Protection Clause,[51] despite the fact that petitioner relied on the Sixth Amendment requirement that a jury consist of a fair cross-section of the community.[52]

The fair cross-section requirement of the Sixth Amendment became the focal point of the Court's analysis in *Holland v. Illinois*,[53] in which the Court addressed whether a white criminal defendant could challenge the State's exclusion of black persons from the jury at this trial.[54] The jury, from which each of only

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tial in a particular case, or that the prosecutor's challenges were made in good faith. *Id.* at 97-98. *But see* Alschuler, *supra* note 9, at 170-71 (observing that *Batson* Court did not provide lower courts with practical standard to determine whether defendant established prima facie case of racially discriminatory peremptory challenges).

[51] *Batson*, 476 U.S. at 97. Justice Powell declared that "[j]ust as the Equal Protection Clause forbids the States to exclude black persons from the venire . . . it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Id.*

[52] *Id.* at 84 n.4. The majority noted that the petitioner had explicitly requested that his case be decided under the Sixth Amendment to avoid directly confronting the Court's holding in *Swain*. *Id.* The Court declined, however, to express any view on the petitioner's Sixth Amendment claim. *Id.* In a pointed dissent, Chief Justice Burger reminded the Court that it had never before decided an issue in a petitioner's favor when the grounds for reversal were not raised in either the lower courts, the petitioner's brief or his oral arguments. *Id.* at 112-15, 117 (Burger, C.J., dissenting). Moreover, the Chief Justice argued that the petitioner had even expressly requested that his case be decided without reference to the Equal Protection Clause. *Id.* at 113-15 (Burger, C.J., dissenting).

[53] 110 S. Ct. 803 (1990). *Holland* has received much critical attention. *See, e.g.*, Jefferson E. Howeth, Note, *Race-Based Peremptory Challenges and the Sixth Amendment:* Holland v. Illinois, 110 S. Ct. 803 (1990), 48 WASH. & LEE L. REV. 579, 586, 591, 596 (1991) (criticizing *Holland* for mischaracterizing principal objective of jury trial, failing to recognize relevant Sixth Amendment precedent and allowing racially discriminatory peremptory challenges to undermine the jury system); Darin P. McAtee, Note, Holland v. Illinois: *The Supreme Court Narrows The Scope Of Protection Against Discriminatory Jury Selection Procedures*, 13 HARV. J.L. & PUB. POL'Y 1061, 1068 (1990) (arguing *Holland* Court's rejection of petitioner's Sixth Amendment claim indicated *Batson*-type claim would not prohibit all forms of prosecutorial stereotyping); Shanley, *supra* note 11, at 73-77 (discussing various judicial efforts employing Sixth Amendment to eliminate racially discriminatory peremptory challenges).

[54] *Holland*, 110 S. Ct. at 805. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. CONST. amend. VI. The Court has interpreted this Amendment to require that a jury be composed of a fair cross section of the community. *See Holland*, 110 S. Ct. at 807 (quoting Taylor v. Louisiana, 419 U.S. 522, 527 (1975)); *cf.* Thiel v. South Pac. Co., 328 U.S. 217, 220 (1946) (maintaining that impartial jury requirement did not require "every jury [to] contain representatives of all the economic, social, religious, racial, political and geographical groups of the community. . . . [Nevertheless,] prospective jurors shall be selected by court officials without systematic and intentional exclusion of these groups.").

The Court imposed the jury trial requirement of the Sixth Amendment on the

two black venire members was struck, convicted the white defendant of armed robbery, rape, deviant sexual assault and aggravated kidnapping.[55] The *Holland* Court found that although the defendant had standing to raise a Sixth Amendment challenge that his jury did not represent a fair cross section of the community,[56] this challenge ultimately failed because the Sixth Amendment guaranteed only an impartial jury,[57] not a representative one.[58] The majority concluded its decision by implying

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states, through application of the Fourteenth Amendment, in Duncan v. Louisiana. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). In *Duncan*, the petitioner was convicted of simple battery in the Louisiana state court system. *Id.* at 146. Under Louisiana law, the maximum penalty for this offense was two years. *Id.* The petitioner's request for a jury trial was denied because Louisiana only granted jury trials in cases involving punishment by hard labor or death. *Id.* The United States Supreme Court held that a crime, punishable by two years in prison, was sufficiently serious to necessitate a jury trial. *Id.* at 161-62. Later, in *Taylor v. Louisiana*, the Court determined that a fair cross section of the community, with adequate female representation, was required on the venire to satisfy a defendant's Sixth Amendment right to be tried before an impartial jury. Taylor v. Louisiana, 419 U.S. 522, 526-27 (1975). Taylor, who appealed his aggravated kidnapping conviction, protested that none of the 175 venire members were women. *Id.* The court found that a Louisiana provision inhibiting the ability of women to serve on juries effectively removed over half of the eligible jury pool and, therefore, violated the fair cross section requirement of the Sixth Amendment. *Id.* at 531, 523 (citing LA. CONST. art. VII, § 41, which provided that a woman could only serve on a jury venire if she had filed a prior written statement indicating her desire to serve as a juror). The Court stated, however, that the fair cross section requirement did not extend to the ultimate composition of the petit jury. *Id.* at 538.

[55] *Holland*, 110 S. Ct. at 805. The venire consisted of 30 prospective jurors. *Id.* Both black venire members were eventually eliminated, however, through the prosecutor's peremptory challenges. *Id.* The petitioner objected to these challenges, asserting that his Sixth Amendment right to be tried by a jury representing a fair cross section of the community had been violated. *Id.*

[56] *Id.* at 805-06. Justice Scalia declared that the requirement under the Equal Protection Clause that the defendant and the excluded juror be members of the same racial group did not apply to the question of standing under the Sixth Amendment. *Id.* at 805. The majority added: "[T]he Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs." *Id.* (citations omitted). The Court found petitioner's attempt to extend this Sixth Amendment requirement to the petit jury irrelevant. *Id.* at 806. Authoring a contentious dissent, Justice Marshall asserted that the majority falsely concluded that the fair cross section requirement was premised solely on the concept of impartiality. *Id.* at 814 (Marshall, J., dissenting). The dissent countered that the fair cross section requirement had its roots in the notion that a panel would not satisfy the constitutional meaning of a jury unless it mirrored the elements of the community from which it was drawn. *Id.*

[57] *Id.* at 807. Professor Babcock argued that the Court has interpreted impartiality to mean employing a wide variety of biases rather than empaneling jurors without prejudices. *See* Babcock, *supra* note 4, at 551-52.

[58] *Holland*, 110 S. Ct. at 807. The Court maintained that despite the traditional notion that an impartial jury is one that is representative, representation does not

that the petitioner's claim only failed under a Sixth Amendment analysis,[59] and that its holding should not be interpreted as going beyond that application.[60]

The Court again addressed whether a white criminal defendant could object to the State's use of peremptory challenges to exclude black persons from the jury in *Powers v. Ohio*.[61] In *Powers*, the State used seven of its peremptory challenges to remove black jurors.[62] Relying largely on the Fourteenth Amendment's

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extend to the peremptory challenge. *Id.* Justice Scalia instructed that the right to an impartial jury had never been interpreted to preclude the use of peremptory challenges in a manner that would change the initial representation of the venire. *Id.* The Court emphasized that it had never required that the petit juries actually selected reflect every aspect of the community and all its individual and diverse elements. *Id.* at 808-09 (citing *Taylor*, 419 U.S. at 538).

59 In *Holland*, the Court explicitly declined to address the potential Fourteenth Amendment equal protection issue because the petitioner did not brief the issue or argue for its application. *Id.* at 811 n.3. Justice Scalia recognized that the *Batson* Court had raised the equal protection claim on its own accord, but treated that action as an aberration. *Id.* In a concurring opinion, Justice Kennedy agreed with the results of the Court's Sixth Amendment analysis. *Id.* at 811 (Kennedy, J., concurring). Justice Kennedy offered, however, that a Fourteenth Amendment claim would have had merit. *Id.* In a strong dissent, Justice Stevens argued that the *Batson* Court's action of raising the equal protection argument, *sua sponte*, should have been repeated in *Holland*. *Id.* at 820 (Stevens, J., dissenting). Justice Stevens further noted that the petitioner had raised the equal protection claim before the Illinois Supreme Court. *Id.* at 821 (Stevens, J., dissenting).

60 *Id.* at 811. Justice Scalia was careful to emphasize that only the Sixth Amendment claim was at issue, under which the petitioner's contention was insupportable. *Id.* Therefore, the majority explained, its decision should not be read to indicate that the petitioner was not unlawfully discriminated against, but only that his cause could not be maintained under the Sixth Amendment.

61 111 S. Ct. 1364, 1367 (1991). The Court relied heavily on *Peters v. Kiff*, for its discussion of the standing issue. Peters v. Kiff, 407 U.S. 493 (1972). *See* Carolyn Holtschlag, Recent Decision, 30 DUQ. L. REV. 1025, 1029 (1992). In *Peters v. Kiff*, the Court first addressed the issue of whether a white defendant could object to the exclusion of black veniremen from jury service. *Peters*, 407 U.S. at 496. Justice Marshall, joined by Justices Douglas and Stewart, declared that arbitrary and discriminatory jury selection violated a defendant's due process rights. *Id.* at 502. Similarly, Justice White, along with Justices Brennan and Powell, agreed that the Fourteenth Amendment allowed a white criminal defendant to challenge the exclusion of black jurors. *Id.* at 507 (White, J., concurring in judgment). The *Peters* decision has proven influential in the realm of standing doctrine. *See* Stanton D. Krauss, Peters v. Kiff *And The Debate About The Standing Of White Defendants To Object To The Exclusion Of Black Jurors After* Batson: *The Nonuse And Abuse Of Precedent*, 68 WASH. U. L.Q. 103, 111-19 (1990) (discussing how various courts have applied the *Peters* opinions to determine issues of standing).

62 *Powers*, 111 S. Ct. at 1366. Petitioner, a white man, was indicted on multiple counts of aggravated murder and attempted aggravated murder. *Id.* Powers requested that the court require the State to provide an explanation for each of its challenges. *Id.* The trial court rejected each of Powers's objections. *Id.* Powers was convicted on all counts and sentenced to 53 years in prison. *Id.*

Equal Protection Clause[63] and leaving the *Holland* Court's Sixth Amendment analysis untouched,[64] the *Powers* Court held that a prosecutor's exclusion of a juror from service because of race violated that juror's equal protection rights.[65] Moreover, the majority found that a criminal defendant had standing to raise the excluded juror's equal protection rights when making a *Batson*-type objection.[66] The Court added, however, that finding ex-

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[63] *Id.* at 1367. In addition to the Fourteenth Amendment, the petitioner also raised the fair cross section requirement of the Sixth Amendment and Article I, §§ 10 and 16 of the Ohio Constitution to support his claim. *Id.* at 1366. Additionally, the Court relied on federal statutory law and its prior decisions. *Id.* The majority pointed specifically to the Civil Rights Act of 1875, which criminalized a State's exclusion of jurors for reasons of race when the excluded juror was otherwise qualified. *Id.* at 1369 (quoting the Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336 (1875) (current version at 18 U.S.C. § 243 (1988)). The Civil Rights Act provided:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

18 U.S.C. § 243 (1988). Justice Kennedy also noted the Court's unswerving adherence to prohibiting racial discrimination in the courtroom for more than one century. *Powers*, 111 S. Ct. at 1367.

[64] *Powers*, 111 S. Ct. at 1370. The *Holland* Court stated that the Sixth Amendment was an inappropriate vehicle to challenge racial discrimination in the voir dire. *See supra* notes 53-60 and accompanying text (discussing *Holland*'s Sixth Amendment analysis). The Court also noted that the scope of its inquiry was limited to the Equal Protection Clause when it granted Powers's petition for *certiorari*. *Powers*, 111 S. Ct. at 1367.

[65] *Powers*, 111 S. Ct. at 1370. Specifically, the Court maintained that the Equal Protection Clause prohibited the State from exercising peremptory challenges against a jury solely because of race. *Id.* This practice, the Court asserted, would deny an "otherwise qualified and unbiased person . . . a significant opportunity to participate in civic life." *Id.* Justice Kennedy then summarily rejected the arguments that the Equal Protection Clause did not prohibit racially based peremptory challenges because veniremen were not stigmatized by being excluded on account of race, or because members of any race could be excluded. *Id.*

[66] *Id.* at 1373. The Court outlined a three-prong approach to determine whether a third party had standing to challenge the exclusion of a juror because of race. *Id.* at 1370-71. First, the Court articulated that the defendant must suffer an "injury-in-fact," which gives him a "sufficiently concrete interest" in the resolution of the dispute. *Id.* at 1370 (quoting Singleton v. Wulff, 428 U.S. 106, 112 (1976)). The Court opined that the litigant suffered such an injury because racial discrimination compromised the integrity of the judicial process. *Id.* at 1371 (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)). Second, the Court stated that the litigant must demonstrate a close relationship with the excluded juror. *Id.* at 1370 (citing *Singleton*, 428 U.S. at 114). Justice Kennedy argued that a "bond of trust" was formed between the juror and the litigant during the *voir dire* process. *Id.* at 1372. Moreover, the Court reasoned that both the litigant and the excluded juror had "a com-

cluded jurors to be members of the defendant's own race was not a material prerequisite to establish standing.[67]

The Court extended the Equal Protection Clause's prohibition against racially discriminatory peremptory challenges to private civil litigants in *Edmonson v. Leesville Concrete Co.*[68] In

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mon interest in eliminating racial discrimination from the courtroom." *Id.* The majority added that the litigant would be an effective advocate in attempting to vindicate the excluded juror's rights. *Id.* Third, the Court required that there be some obstacle to the excluded juror's capacity to bring suit on his or her own behalf. *Id.* at 1370-71 (citing *Singleton*, 428 U.S. at 115-16). While acknowledging that excluded jurors could vindicate their own rights, the Court found such actions to be rare. *Id.* at 1372 (citing Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 329-30 (1970)).

Justice Scalia, dissenting, argued that the litigant suffered an injury in perception, rather than an injury in fact. *Id.* at 1379 (Scalia, J., dissenting). Justice Scalia's blistering dissent charged: "Today's opinion makes a mockery of [the injury in fact] requirement. It does not even pretend that the peremptory challenges here have caused this defendant tangible injury and concrete harm . . . ." *Id.* Justice Scalia further criticized the Court's use of third party standing to overturn an adverse judgment because it simply violated the rights of an excluded juror. *Id.* at 1380 (Scalia, J., dissenting). Justice Scalia contended that even in cases in which a defendant sought reversal of a conviction based on a violation of a third party's Fourth Amendment rights, the Court did not recognize that party's rights. *Id.*

67 *Powers*, 111 S. Ct. at 1373. The Court rejected the argument that the defendant's race was a relevant factor in its analysis of defendant's third-party standing. *Id.* at 1368. Justice Kennedy declared that limiting a defendant's right to object was inconsistent with the Court's own rules for standing when raising a constitutional or federal statutory claim. *Id.* The Court added that "[t]o bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." *Id.* at 1373. Justice Scalia contended, on the other hand, that the Equal Protection Clause only prohibited racially discriminatory peremptory challenges when the defendant and the excluded juror were of the same race. *Id.* at 1377 (Scalia, J., dissenting).

68 111 S. Ct. 2077, 2088 (1991). In *Edmonson*, the Court based its decision on the equal protection element found in the Due Process Clause of the Fifth Amendment. *Id.* (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)). The Fifth Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. Although the Fifth Amendment does not explicitly contain an Equal Protection Clause, the Court has found that the Fifth Amendment contains similar protections. *Bolling*, 347 U.S. at 499. In *Bolling*, the Court held that racial segregation in District of Columbia public schools violated the Due Process Clause of the Fifth Amendment. *Id.* at 500. The Court reasoned that it would be unthinkable that the states would be prohibited from racial segregation but the federal government would not be held to those same restrictions. *Id.* For critical treatment of the *Edmonson* decision, see Bill K. Felty, Comment, *Resting Mid-Air, The Supreme Court Strikes The Traditional Peremptory Challenge And Creates A New Creature, The Challenge For Semi-Cause:* Edmonson v. Leesville Concrete Co., 27 TULSA L.J. 203, 221-22 (1991) (criticizing *Edmonson*'s effect on the voir dire process); Bruce L. Gelman, Note, 69 U. DET. L. REV. 323, 333-34 (1992) (outlining *Edmonson* Court's analysis of whether private litigant had standing to raise excluded juror's equal protection rights); Andrea K. Huston, Note, Edmonson v. Leesville Concrete Co.: *Pre-Empting Prejudice*, 25 AKRON L. REV. 439, 449-

Edmonson, a black civil litigant objected to the respondent's exclusion of two black venirepersons.[69] The Court explained that constitutional guarantees, with rare exception, constrained the conduct of state actors and not private individuals.[70] Relying on the two-prong state actor analysis set forth in *Lugar v. Edmondson Oil Co.*,[71] however, the *Edmonson* Court declared that a private civil litigant was a state actor while exercising peremptory challenges.[72] Having arrived at this conclusion,[73] the *Edmonson* Court

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50 (1991) (criticizing *Edmonson*'s potential impact on criminal defendants, and its failure to address prohibition of discriminatory challenges); Steven M. Puiszis, Note, Edmonson v. Leesville Concrete Co.: *Will The Peremptory Challenge Survive Its Battle With The Equal Protection Clause?* 25 J. MARSHALL L. REV. 37, 40-42 (1991) (discussing *Edmonson* Court's state actor analysis).

[69] *Edmonson*, 111 S. Ct. at 2080. Petitioner, a construction worker, was injured while working at a federal enclave in Louisiana. *Id.* Petitioner brought suit against the respondent, Leesville Concrete Co., in federal district court. *Id.* Petitioner alleged that his injury was the result of the negligent actions of one of Leesville's employees. *Id.* After the respondent used two of its three peremptory challenges to exclude black venire members, the petitioner's case was eventually heard before a jury of eleven white people and one black person. *Id.* at 2081.

[70] *Id.* at 2082 (citations omitted).

[71] 457 U.S. 922 (1982). The *Lugar* test asked "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority," and additionally, "whether the private party charged could be described in all fairness as a state actor." *Id.* at 939.

[72] *Edmonson*, 111 S. Ct. at 2082-87. The Court admitted that it could not prohibit racially discriminatory peremptory challenges unless the civil litigants were found to have exercised state power while using their respective peremptory strikes. *Id.* Justice Kennedy explained: "The Constitution's protections of individual liberty and equal protection apply in general only to action by the government." *Id.* (citing National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988)). The majority quickly found that the first prong of the *Lugar* test was satisfied, reasoning that the peremptory challenge enabled litigants to assist the government in producing an impartial jury. *Id.* at 2083. In analyzing the second prong, however, the Court relied on three additional factors: first, the degree of the actor's dependence on governmental support; second, whether the actor performed a traditional governmental activity; and third, whether the injury caused was exacerbated in a distinctive way by occurrences of governmental control. *Id.* (citations omitted).

Applying the first factor, the Court found that the government's involvement in the jury selection process, ranging from the promulgation of legislative qualifications for jury competency to the trial court's power to remove a juror, were enormous. *Id.* at 2084-85. Addressing the second factor, the majority found that the jury was a "quintessential governmental body" performing a critical governmental function. *Id.* at 2085. Examining the third factor, the Court concluded that the inherent nature of a public forum such as a courtroom aggravated the juror's injury. *Id.* at 2087.

[73] *Id.* at 2087. In a vigorous dissent, Justice O'Connor argued that the majority's examples of governmental assistance could not be equated with participation in the challenge. *Id.* at 2090 (O'Connor, J., dissenting). The Justice stated:

> That these actions may be necessary to a peremptory challenge—in the sense that there could be no such challenge without a venire from

determined that the opposing litigant in a civil trial had standing to raise an objection on behalf of an excluded juror.[74] The majority accordingly held that private civil litigants, like the State itself, were prohibited from exercising peremptory challenges in a racially discriminatory manner.[75]

Against this foundation of judicial precedent emerged the United States Supreme Court's decision in *Georgia v. McCollum*.[76] The issue before the Court was whether the Equal Protection Clause of the Fourteenth Amendment prohibited a criminal defendant's exercise of racially discriminatory peremptory challenges.[77] Justice Blackmun, writing for the majority, began by reiterating the Court's continued rejection of racially based criteria in the jury selection process.[78] The Justice immediately

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> which to select—no more makes the challenge state action than the building of roads and provision of public transportation makes state action of riding on a bus.

Id. Justice O'Connor added that the minimal state participation involved when a judge excused a juror did not rise to the level of participation found in the Court's decision in *Shelley v. Kraemer*. *Id.* (citing Shelley v. Kraemer, 334 U.S. 1, 13, 19-20 (1948), in which the Court decided that judicial enforcement of a racially restrictive covenant constituted state action and would deny equal protection rights).

Justice O'Connor noted that the restrictive covenants found in *Shelley* had been enforced even when the parties themselves did not want to discriminate. *Edmonson*, 111 S. Ct. at 2090-91 (O'Connor, J., dissenting). The majority's application of *Lugar*, Justice O'Connor criticized, was misplaced because peremptory challenges were not a traditional government function. *Id.* at 2092 (O'Connor, J., dissenting). Moreover, the Justice argued, peremptory challenges did not amount to state action simply because they occurred in the courtroom. *Id.* at 2095 (O'Connor, J., dissenting).

74 *Edmonson*, 111 S. Ct. at 2088. The Court determined that its decision in *Powers*, that a criminal defendant had standing to raise a *Batson*-type objection against the State's exclusion of a juror of another race, would also apply to civil litigants. *Id.*

75 *Id.*

76 112 S. Ct. 2348 (1992).

77 *Id.* at 2352. In a concurring opinion, Justice Thomas noted that the Court's decision impinged only on white criminal defendants' peremptory challenges of black jurors, not on black defendants' challenges of white jurors. *Id.* at 2360 (Thomas, J., concurring in judgment). Justice Thomas explained that the NAACP, as *amicus curiae*, contended that a minority criminal defendant's exclusion of a white juror presented different issues than when a white criminal defendant excluded minority jurors. *Id.* at 2360 n.2 (Thomas, J., concurring in judgment) (citing *Amicus Curiae* Brief for NAACP Legal Defense and Educational Fund, Inc., *reprinted in* Joint App. at 3-4, Georgia v. McCollum, 112 S. Ct. 2348 (1992)). While stating that the issue may be unsettled from a theoretical standpoint, Justice Thomas found this argument largely unpersuasive. *Id.*

78 *Id.* at 2352. Justice Blackmun declared that "[o]ver the last century, in an almost unbroken chain of decisions, this Court has abolished race as a consideration for jury service." *Id.* The Court cited several cases on point. *See, e.g.*, Norris v. Alabama, 294 U.S. 587, 588, 591, 599 (1935) (holding State's systematic exclusion

noted that the Court had prohibited the use of such discriminatory criteria in *Strauder v. West Virginia*.[79] Since *Strauder*, the majority asserted, the Equal Protection Clause had been applied to peremptory challenges in both the criminal and civil context.[80]

To determine whether the *Batson* prohibition against racially discriminatory peremptory challenges should be extended to a criminal defendant, the Court delineated a four-part test.[81] First, the Court asked whether a criminal defendant's exercise of racially based peremptory challenges inflicted the harms identified in *Batson*.[82] The Court concluded that the harm was the same

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of black grand and petit jurors, on the grounds that blacks, as a group, did not possess the requisite qualifications for jury service, was denial of defendant's equal protection rights); Neal v. Delaware, 103 U.S. 370, 397 (1881) (declaring State court indulged in "violent presumption" when finding blacks unqualified for jury service); Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (holding criminal defendant had constitutional right not to be tried by jury selected in racially discriminatory manner).

79 *McCollum*, 112 S. Ct. at 2352 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)). The majority maintained that the distinction between a defendant's right to be tried before a jury selected by nondiscriminatory means and the lack of an affirmative right to be tried by jurors who are members of the same race was first raised in *Strauder v. West Virginia*. *Id.* (citing Strauder v. West Virginia, 100 U.S. 303, 305 (1880)). For a discussion of *Strauder*, see *supra* notes 33-39 and accompanying text.

80 *McCollum*, 112 S. Ct. at 2352-53. Justice Blackmun surveyed the Court's application of the Equal Protection Clause to peremptory challenges, beginning with its decision in *Swain v. Alabama*. *Id.* (citing Swain v. Alabama, 380 U.S. 202 (1965)). Although the *Swain* Court rejected the defendant's claim, the majority pointed out that a defendant could demonstrate that the State had used its peremptory challenges in a racially discriminatory manner. *Id.* (citing *Swain*, 380 U.S. at 224-28). The Court noted, however, that *Swain's* evidentiary formulation was overruled in *Batson*. *Id.* at 2352. Justice Blackmun further recognized that the *Batson* Court specifically reserved the issue of whether a white criminal defendant could exclude a black juror on the basis of that juror's race. *Id.* at 2351, 2353 n.4. (citing Batson v. Kentucky, 476 U.S. 79, 89 n.12 (1986)). The Justice added that even the *Batson* dissent acknowledged that the prohibition against the State's use of racially discriminatory peremptory challenges should also be extended to a criminal defendant. *Id.* at 2353 n.4 (citing *Batson*, 476 U.S. at 125-26 (Burger, C.J., dissenting)). Justice Blackmun noted that several state courts had ruled that their respective state constitutions prohibited a criminal defendant from exercising racially discriminatory peremptory challenges. *Id.* at 2354 n.6 (citations omitted).

The Court concluded by discussing *Batson*'s extension to situations involving a criminal defendant and an excluded juror of different races, as well as to cases involving civil litigants. *Id.* at 2353 (citing Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991); Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2080 (1991)). At least one commentator has suggested that the Thirteenth Amendment may provide the Court with a rationale for the prohibition of racially discriminatory peremptory challenges. *See Colbert*, *supra* note 5, at 5-6.

81 *McCollum*, 112 S. Ct. at 2353.

82 *Id.* at 2353. These harms, according to the majority, included harm to the excluded juror and the community as a whole. *Id.* (citing *Batson*, 476 U.S. at 87).

regardless of whether a prosecutor, civil litigant or criminal defendant exercised the discriminatory challenge.[83] The Court maintained that permitting such challenges would seriously undermine the integrity of the judicial system.[84]

Turning to the second prong of its four-part test, the Court determined that a criminal defendant's exercise of racially discriminatory peremptory challenges was state action.[85] Relying on *Lugar v. Edmondson Oil Co.*,[86] the Court found that peremptory

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The Court found that the potential for harm inflicted upon the excluded juror had been recognized since *Strauder*. *Id.* (citing *Strauder*, 100 U.S. at 308). Specifically, Justice Blackmun stated that excluding a juror on the basis of race unconstitutionally discriminated against that juror. *Id.* (citing *Strauder*, 100 U.S. at 308). The majority found that the actual source of the discrimination was irrelevant for the purpose of determining whether an excluded juror was harmed. *Id.* Justice Blackmun charged that racially discriminatory jury selection undermined the community's confidence in the judicial system. *Id.* at 2353-54. For both the community and the defendant to perceive the judicial system as fair, the Court maintained, racial discrimination must not be part of the jury selection process. *Id.* at 2354. Such perceptions of fairness were absolutely vital, Justice Blackmun conveyed, particularly during racially divisive cases. *Id.* Goldwasser, on the other hand, asserted that a criminal defendant's faith in the judicial system was strengthened by an unfettered peremptory challenge. *See* Goldwasser, *supra* note 15, at 829.

83 *McCollum*, 112 S. Ct. at 2353.

84 *Id.* at 2354. The Court asserted that allowing racially discriminatory peremptory challenges would engage the judiciary as "a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it." *Id.*

85 *Id.* at 2354. Justice Blackmun asserted that an action must be attributed to the state before the Equal Protection Clause of the Fourteenth Amendment could apply. *Id.* (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972)). In *Moose Lodge*, the petitioner, a black man, was refused service at the respondent's private fraternal lodge. *Moose Lodge*, 407 U.S. at 164-65. Petitioner claimed that the respondent's actions contravened the Equal Protection Clause because the State of Pennsylvania issued a private club liquor license to the respondent. *Id.* at 165. The Court found that the respondent was not a state actor simply because the state regulated and granted benefits to the respondent. *Id.* at 173. The majority in *Moose Lodge* further asserted that the distinction between public and private entities would be completely eviscerated if every group that received some benefit from the State was deemed a state actor. *Id.* The *Moose Lodge* majority held that absent state influence in either the membership criteria of the lodge or state regulations that encouraged racism, the lodge's refusal was not state action. *Id.* at 175-77. In *Civil Rights Cases*, the Court asserted that "[t]he wrongful act of an individual, unsupported by [state] authority, is simply a private wrong . . . but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress." Civil Rights Cases, 109 U.S. 3, 17 (1883).

86 *McCollum*, 112 S. Ct. at 2354 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982)). Justice Blackmun acknowledged that before *Edmonson v. Leesville Concrete Co.*, the Court had no difficulty in finding that peremptory challenges were state action because every decision involved challenges made by prosecutors. *Id.* (citing Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077 (1991)). Goldwasser posited that the *Lugar* state actor test was inapplicable to a criminal defendant's

challenges were unquestionably based on state authority.[87]

The second part of *Lugar*, the Justice conveyed, concerned whether a private party accused of infringing on an excluded juror's equal protection rights could be deemed a state actor.[88] To answer this question, the Court referred to the analytical framework set forth in *Edmonson v. Leesville Oil Co.*[89] The Justice explained that the *Edmonson* analysis required consideration of the extent to which the private party's action depended on state assistance,[90] whether the private party was performing a function traditionally reserved for the government,[91] and whether the context of governmental authority aggravated the deprivation of the excluded juror's rights.[92]

Applying the *Edmonson* principles to the case at bar, the *McCollum* Court determined that a criminal defendant must rely on many aspects of government assistance to exercise a peremptory

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exercise of peremptory challenges because no state assistance was needed. Goldwasser, *supra* note 15, at 819.

87 *McCollum*, 112 S. Ct. at 2354-55. The Justice reasoned that the source of peremptory challenges must be state authority because such challenges can only arise from either statutory or decisional law. *Id.* (citing *Edmonson*, 111 S. Ct. at 2083). The majority largely rested its conclusion on the statutory provisions forming the basis of Georgia's peremptory challenge. *Id.* at 2355. The Court relied on GA. CODE ANN. § 15-12-165 (Michie 1990), which provided, in pertinent part: "Every person indicted for a crime or offense which may subject him to death or imprisonment for not less than four years may peremptorily challenge 20 of the jurors empaneled to try him. . . . The state shall be allowed one-half the number of peremptory challenges allowed to the accused." *Id.* (citing GA. CODE ANN. § 15-12-165 (Michie 1990)).

88 *McCollum*, 112 S. Ct. at 2355 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 941-42 (1982)).

89 *Id.* The majority asserted that the *Edmonson* Court's application of the second prong of the *Lugar* test would prove helpful in conducting the state-actor analysis. *Id.*

90 *Id.* (quoting *Edmonson*, 111 S. Ct. at 2083)). In Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988), appellants had an unsecured claim against appellee's husband, who died testate. *Tulsa*, 485 U.S. at 482, 485. Appellant's claim, however, was hindered because the appellant failed to file within the statutory deadline. *Id.* at 482. In a preliminary matter, the Court held that appellant's unsecured claim was property for purposes of the Due Process Clause of the Fourteenth Amendment. *Id.* at 485. The Court then determined whether the appellant's deprivation was the result of state action. *Id.* While acknowledging that the Oklahoma statute was similar to a statute of limitations, the Court found that the statute involved critical state action. *Id.* at 486-87. Noting the State's active involvement throughout the probate proceedings, Justice O'Connor maintained that appellant's action under the Oklahoma nonclaim statute was, indeed, state action. *Id.* at 487.

91 *McCollum*, 112 S. Ct. at 2355 (citing *Edmonson*, 111 S. Ct. at 2083)).

92 *Id.* at 2356.

challenge.[93] The State's role in selecting jurors, the Justice maintained, evidenced government assistance.[94] In light of this extensive involvement, the Court found that a criminal defendant's exercise of racially based peremptory challenges would create an impression that the court system supported racism.[95]

The majority next determined that peremptory challenges were a traditional government function.[96] The respective parties, the majority reasoned, merely assisted the government in selecting a suitable trier of fact.[97] The Court added that the jury's primary function was to guard each party's rights and to ensure community acceptance of the laws.[98] Justice Blackmun argued that the government could not simply delegate its constitutional obligations to a private party.[99]

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93 *Id.* at 2355. The majority pointed out that the *Edmonson* Court had reached the conclusion that state assistance was indispensable to a party's exercise of a peremptory challenge. *Id.* (citing *Edmonson*, 111 S. Ct. at 2084). Justice O'Connor's dissent in *Edmonson* countered, however, that "[t]he government erects the platform; it does not thereby become responsible for all that occurs upon it."

94 *McCollum*, 112 S. Ct. at 2355; Georgia statutes enumerated the State's participation in the jury trial process. *See, e.g.*, GA. CODE ANN. § 15-12-40 (Michie 1990) (establishing general juror requirements, as well as requiring Georgia Board of Commissioners to compile jury lists); GA. CODE ANN. § 15-12-42 (Michie 1990) (delineating specific process used to select jurors); GA. CODE ANN. § 15-12-120 (Michie 1990) (enabling jurors to be summoned by courts); GA. CODE ANN. § 15-12-9 (Michie 1990) (providing per diem for jurors); GA. CODE ANN. § 15-12-131 (Michie 1990) (creating jury panels for selection of jurors); GA. CODE ANN. § 15-12-132 (Michie 1990) (requiring administering an oath); GA. CODE ANN. § 15-12-164 (Michie 1990) (permitting questioning jurors' impartiality through *voir dire* process); GA. CODE ANN. § 15-12-163 (Michie 1990) (allowing parties to excuse juror for cause). In *Edmonson*, Justice O'Connor argued that the actions listed by the majority were established to satisfy the state's obligation to provide for a fair trial, rather than to support peremptory challenges. *Edmonson*, 111 S. Ct. at 2090 (O'Connor, J., dissenting). *Id.* Justice O'Connor added that "[a]ll of this activity, as well as the trial judge's control over *voir dire*, are merely prerequisites to the use of a peremptory challenge; they do not constitute participation *in* the challenge." *Id.*

95 *McCollum*, 112 S. Ct. at 2356. Justice Blackmun reasoned that an excluded juror's distrust of the judicial system could be intensified because the identity of the party that excluded that juror generally would remain unknown. *Id.* at 2356 n.8.

96 *Id.* at 2355. The *McCollum* Court reasoned that the purpose of peremptory challenges was to allow litigants to assist the State in selecting impartial jurors. *Id.* (citing *Edmonson*, 111 S. Ct. at 2083). *But see Edmonson*, 111 S. Ct. at 2093 (O'Connor, J., dissenting) (arguing that peremptory challenges were not a traditional function of government because they were not exclusively public). *Id.*

97 *McCollum*, 112 S. Ct. at 2355 (quoting *Edmonson*, 111 S. Ct. at 2083).

98 *Id.* (citing *Edmonson*, 111 S. Ct. at 2085).

99 *Id.* at 2355-56. In *Terry v. Adams*, the Court addressed the issue of whether a private political organization, the Jaybird Party, could exclude black people from membership based solely on race. Terry v. Adams, 345 U.S. 461, 462 (1953). The Jaybird Party, according to the majority, held its own primaries since 1889, with the

Edmonson, the Court maintained, established that the State's participation in jury selection aggravated an improperly excluded juror's injury.[100] The Justice contended that because the injury occurred in a courtroom, the harm to an excluded juror was greater than it would be absent the State's role.[101] The majority refused to find this harm less repugnant than if the prosecution itself had used racially discriminatory peremptory challenges.[102] The Court concluded its application of the *Edmonson* principles by declaring that a court's willingness to allow racially discriminatory peremptory challenges was attributable to the State regardless of which party made the challenge.[103]

The Court next turned to the respondents' contention that

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winner generally running unopposed in the Democratic primary and the general election. *Id.* at 463. Justice Black found that the Jaybird Party, together with permission from the State of Texas, was running elections to circumvent the prohibition against racial discrimination in the election process. *Id.* at 463-64. Justice Black declared that "it violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election." *Id.* at 469. The Court then held that the Jaybird Party and certain public political organizations were working together for the purpose of excluding black voters from participating in local elections, in violation of the Fifteenth Amendment. *Id.* at 469-70.

In *Nixon v. Condon*, the petitioner sought damages from Texas election officials after being refused the right to vote in a primary election solely because he was black. Nixon v. Condon, 286 U.S. 73, 81 (1932). The Texas legislature, in an attempt to circumvent an earlier Supreme Court ruling won by the same petitioner, enacted a statute that authorized a State Executive Committee to set voter qualifications. *Id.* at 81-82. The Committee subsequently passed a resolution permitting only white voters in Democratic primaries. *Id.* at 82. The Court held that the State's attempt to circumvent constitutional problems by delegating one of its official functions to a representative was barred. *Id.* at 89.

100 *McCollum*, 112 S. Ct. at 2356.

101 *Id.* In *Burton v. Wilmington Parking Auth.*, the petitioner was refused service in a private coffee shop, solely because he was black. Burton v. Wilmington Parking Auth., 365 U.S. 715, 715 (1961). The coffee shop was located in a public parking garage owned by the Wilmington Parking Authority of the State of Delaware. *Id.* Although the coffee shop was privately owned, its location in a public building afforded it public benefits. *Id.* at 720, 723-24. For example, the Authority agreed to furnish the coffee shop with heat, gas service and general maintenance services. *Id.* This relationship, the Court observed, suggested state involvement and participation in discrimination that the Fourteenth Amendment was designed to prevent. *Id.* at 724. The *Burton* Court held that a lessee of state public property had to comply with the Fourteenth Amendment just as if the lease agreement contained the found within the Amendment. *Id.* at 726.

102 *McCollum*, 112 S. Ct. at 2356.

103 *Id.* Justice Blackmun noted that the excluded jurors would not normally be told who had excused them. *Id.* at 2356 n.9. *Cf.* Barbara Underwood, *Ending Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 Colum. L. Rev. 725, 751 n.117 (1992) (emphasizing that the public nature of the jury selection process required a finding of state action).

an adversarial proceeding negated the governmental character of a criminal defendant's peremptory challenges.[104] Rejecting the respondents' reliance on *Polk County v. Dodson*,[105] the majority reasoned that the nature of an attorney's specific function, rather than that attorney's relationship to the State, was dispositive on the state actor question.[106] Justice Blackmun concluded that

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104 *Id.* at 2356.

105 454 U.S. 312 (1981). In *Polk County*, the respondent, a pro se plaintiff, sought injunctive and pecuniary relief from Polk County when one of the County's public defenders withdrew her representation of the respondent. *Id.* at 314, 315. Pursuant to state rules of procedure, the public defender withdrew on grounds that the respondent's claim was frivolous. *Id.* at 314 & n.2. Respondent argued that the public defender had acted "under color of state law" and had deprived him of his constitutional rights by withdrawing her representation. *Id.* at 315. Dismissing the respondent's contention, Justice Powell argued that the purpose of a public defender was to protect the interests of the client rather than to act on behalf of the state. *Id.* at 318-19. Moreover, the Justice continued, the role of a defense attorney was a private one that was "traditionally filled by retained counsel, for which state office and authority are not needed." *Id.* Accordingly, Justice Powell concluded that the public defender's withdrawal was permissible. *Id.* at 326-27. In arriving at this conclusion, the Court distinguished the case at bar with *O'Connor v. Donaldson* and *Estelle v. Gamble*, two prior cases involving state physicians. *Id.* at 319 (citing O'Connor v. Donaldson, 422 U.S. 563 (1975); Estelle v. Gamble, 429 U.S. 97 (1976)).

In *O'Connor*, the respondent remained a patient in a state mental hospital against his will for almost fifteen years. *Gamble*, 422 U.S. at 564. The petitioner, Dr. O'Connor, had been the superintendent of the hospital for most of the respondent's stay. *Id.* Despite the respondent's multiple requests to be released, the petitioner refused to release him. *Id.* at 567-68. The *O'Connor* Court determined that the respondent had been confined for custodial, rather than medical reasons. *Id.* at 569. The Court then concluded that the petitioner acted on behalf of the state when he violated the respondent's constitutional right to freedom. *Id.* at 576.

In *Estelle*, the Court determined that a state-employed prison physician acted "under color of state law" when treating an inmate for injuries. *Estelle*, 429 U.S. at 98 & n.1, 104-05 (quoting 42 U.S.C. § 1983 (1981)). Despite this finding, however, the Court concluded that the petitioner's treatment of the respondent was satisfactory and the respondent's claim was not valid. *Id.* at 107-08 & n.16.

In distinguishing *O'Connor* and *Estelle* from *Polk County*, the *Polk County* Court emphasized the custodial/supervisory function of a state-employed physician. *Polk County*, 454 U.S. at 320. The Court added that this function differed from a public defender's function because state physicians worked in concert with the state, whereas public defenders performed many functions aimed at thwarting the state's prosecution of criminal defendants. *Id.* at 320. For example, public defenders frequently "enter 'not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine . . . State witnesses, and make closing arguments in behalf of defendants." *Id.* (citation omitted). The *Polk County* Court implied, however, that a public defender could be viewed as acting "under color of state law" when making decisions regarding personnel or other administrative matters. *Id.* at 324-25.

106 *McCollum*, 112 S. Ct. at 2356. In *Branti v. Finkel*, the respondents, both Republicans, were discharged from their jobs as assistant public defenders when the Democrats gained control of the county legislature. Branti v. Finkel, 445 U.S.

when an attorney performed a function on behalf of the State, the attorney was bound by the same constitutional obligations as the State.[107]

Completing the state actor analysis, Justice Blackmun distinguished peremptory challenges from other actions that a criminal defendant exercised at trial.[108] The Court reasoned that because a defendant's peremptory challenges were used to create a government body—the jury—the defendant was bound to the same constitutional prohibitions against racial discrimination as the prosecutors.[109] Furthermore, the Court found that no conflict existed between a defendant's private motivations to select a favorable jury and a finding that such actions were state-actions.[110]

The third prong of the Court's analysis addressed whether the State had the capacity to object to a defendant's peremptory challenges on behalf of the injured jurors.[111] Adopting the standing analysis from *Powers v. Ohio*,[112] Justice Blackmun concluded that the State had standing to object to a criminal defendant's use of peremptory challenges.[113] Justice Blackmun

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507, 508, 509 (1980). The Court found that termination of the public defenders' employment because of their political beliefs contravened the First and Fourteenth Amendments. *Id.* at 508, 519. The majority maintained that assistant public defenders were charged with a nonpolitical duty that should remain free of political interference. *Id.* at 519-20. Accordingly, the Court held that the public defender's office was a state actor when making personnel decisions. *Id.* at 518-20.

107 *McCollum*, 112 S. Ct. at 2356 (citing Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2085 (1991)).

108 *McCollum*, 112 S. Ct. at 2356. This distinction, the Court asserted, was essential because the exercise of peremptory challenges gave a defendant "the power to choose a quintessential governmental body . . . on which our judicial system depends." *Id.*

109 *Id.* (citing *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991)).

110 *Id.* at 2356-57. In *Edmonson*, Justice O'Connor opined that a criminal defendant's exercise of peremptory challenges furthered the defendant's interests, rather than helped the government to fulfill its obligation to provide an impartial jury. *Edmonson*, 111 S. Ct. at 2094 (O'Connor, J., dissenting). Relying on *Polk County*, Justice O'Connor added that neither a criminal defense attorney nor an attorney representing a private civil litigant was a state actor when exercising peremptory challenges for a client. *Id.*

111 *McCollum*, 112 S. Ct. at 2357.

112 *Id.* at 2357 (citing Powers v. Ohio, 111 S. Ct. 1364, 1370-71 (1991)).

113 *McCollum*, 112 S. Ct. at 2357. For cases discussing standing, see Craig v. Boren, 429 U.S. 190, 191-92, 195 (1976) (finding that beer sellers could assert equal protection right of young men to buy beer at same age as young women); Barrows v. Jackson, 346 U.S. 249, 251-52, 257 (1953) (declaring that property sellers had standing to assert the rights of prospective buyers); Pierce v. Society of Sisters, 268 U.S. 510, 511, 535 (1925) (maintaining that private schools had standing to assert the rights of their students).

determined that the State was injured when the integrity of the court was damaged.[114] The State's relationship to the excluded juror, observed Justice Blackmun, was sufficiently close to justify third-party standing. [115] The majority found that regardless of the party exercising the peremptory challenge, the excluded juror faced the same barriers when objecting to their use.[116]

Shifting to the last prong of its four-part inquiry, the Court determined that extending *Batson*'s prohibition against racially discriminatory peremptory challenges would not frustrate a criminal defendant's right to an impartial jury.[117] While conceding the importance and tradition of the peremptory challenge, Justice Blackmun recalled the Court's long-standing view that peremptory challenges were not constitutionally protected.[118] The majority argued that its decision was not likely to eviscerate the peremptory challenge; but, in any event, the objective of impanelling a fair jury could not justify racial prejudice in the courtroom.[119]

Examining the goal of the Sixth Amendment, the Court con-

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114 *McCollum*, 112 S. Ct. at 2357. Specifically, Justice Blackmun opined, the integrity of the judicial system was harmed. *Id.* In *Batson v. Kentucky*, the Court observed that racial discrimination in the courtroom undermined the public's confidence in the criminal justice system. Batson v. Kentucky, 476 U.S. 79, 87 (1986). *But see* Powers v. Ohio, 111 S. Ct. 1364, 1379-80 (1991) (Scalia, J., dissenting) (criticizing the Court's willingness to weaken "injury-in- fact" standard in standing analysis).

115 *McCollum*, 112 S. Ct. at 2357. Justice Blackmun pointed out that the State's relationship to the excluded juror was even closer than the one between a criminal defendant, or a civil litigant, and an excluded juror. *Id.* The Court added that not only was the State the proper party to vindicate the rights of the excluded juror, but the State was compelled to do so under the Fourteenth Amendment. *Id.* The Court's position finds support in the fact that the government, as a litigant, has a legitimate interest in resolving cases fairly before a court. *See* Singer v. United States, 380 U.S. 24, 36 (1965).

116 *McCollum*, 112 S. Ct. at 2357 (citing *Powers*, 111 S. Ct. at 1373).

117 *Id.* at 2357-58.

118 *Id.* at 2358. The Court emphasized that the peremptory challenge should be viewed as only one specific means to achieve an impartial jury. *Id.* This point has been widely discussed. *See* Stilson v. United States, 250 U.S. 583, 586 (1919) (declaring nothing in the Constitution guaranteed criminal defendant the right to peremptory challenges); *cf.* Gurney, *supra* note 6, at 254-55 (asserting many of the traditional justifications for keeping the peremptory challenge no longer exist). *But see* Frazier v. United States, 335 U.S. 497, 505 n.11 (1948) (discussing defendant's right to use peremptory challenges in capital cases); Lewis v. United States, 146 U.S. 370, 376 (1892) (discussing importance of peremptory challenges in capital cases at common law).

119 *McCollum* 112 S. Ct. at 2358 (citing Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991)). The Court added that counsel for a criminal defendant "is limited to 'legitimate lawful conduct.' " *Id.* (quoting Nix v. Whiteside, 475 U.S. 157, 166 (1986)).

cluded that requiring counsel to articulate a racially neutral explanation for a questioned peremptory challenge would not compromise the defendant's right to effective assistance of counsel.[120] In the event that an explanation could expose a counsel's trial strategy or reveal privileged communications, the majority advised that an *in camera* discussion would effectively maintain confidentiality.[121] The Court pointed out that neither the Sixth Amendment nor attorney-client privilege would permit a defendant to engage in unlawful practices.[122]

Moreover, the majority found that the prohibition against racially discriminatory peremptory challenges would not violate a

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120 *Id.* In *Batson v. Kentucky*, the Court conceded that its holding, requiring the prosecution to provide a racially neutral explanation for excluding a black juror, was an obvious limit upon the exercise of peremptory challenges. Batson v. Kentucky, 476 U.S. 79, 97 (1986). The Court noted, however, that the State's explanation for a racially neutral peremptory challenge did not need to rise to the same level as an explanation for a cause challenge. *Id.* The Court indicated that there were a number of explanations that would suffice as "clear and reasonably specific." *Id.* at 98 n.20 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)). The *Batson* majority added, however, that the prosecutor's burden could not be overcome by simply resorting to racial stereotypes or claiming the challenge was made in good faith. *Id.* at 97-98 (citing Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

In a strong dissent, Chief Justice Burger pointed out that the Court's "neutral explanation" requirement would be extremely difficult to implement. *Id.* at 127-28. (Burger, C.J., dissenting). Chief Justice Burger stated: "I am at a loss to discern the governing principles here. A 'clear and reasonably specific' explanation of 'legitimate reasons' for exercising the challenge will be difficult to distinguish. Anything short of a challenge for cause may well be seen as an 'arbitrary and capricious' challenge . . . ." *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES * 346).

121 *McCollum*, 112 S. Ct. at 2358. An *in camera* judicial proceeding is "when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom." BLACK'S LAW DICTIONARY 760 (6th ed. 1990). The availability of an *in camera* proceeding, the Justice expressed, would avoid the potential disclosure of confidential communications. *McCollum*, 112 S. Ct. at 2358 (citing United States v. Zolin, 491 U.S. 554, 569 (1989)). At least one commentator has noted that it is unlikely that Sixth Amendment values, if implicated at all, would be infringed by *in camera* procedures. Swift, *supra* note 12, at 207-08 (1991); *cf.* United States v. Tindle, 860 F.2d 125, 132 (4th Cir. 1988) (approving *in camera Batson* submissions by prosecutor because of special need to protect sensitive information), *cert. denied*, 490 U.S. 1114 (1989). The question of attorney-client privilege poses no bar to the explanation requirement. *See In re* Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2d Cir. 1984) (asserting attorney-client privilege shields communications but does not extend to disclosure of information); Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) (declaring that "[attorney-client] privilege only protects disclosure of communications; does not protect disclosure of underlying facts by those who communicated with attorney"); Tanford, *supra* note 40, at 1054 (advocating that requiring defense counsel to articulate logical reasons for peremptory challenges did not violate the attorney-client privilege and instead helped counsel become better advocates by looking past stereotypes).

122 *McCollum*, 112 S. Ct. at 2358.

defendant's Sixth Amendment right to be tried by an impartial jury.[123] On this point, Justice Blackmun reminded that both parties have a right to an impartial jury.[124] Notably, the Court supported the use of the peremptory challenge to remove jurors who could not overcome their racial prejudices, but emphasized that this was distinguishable from use of the challenge to discriminate against jurors.[125]

Concluding that racially neutral motive was necessary for the exercise of peremptory challenges, the Court held that a criminal defendant was constitutionally prohibited from intentionally discriminating against a potential juror based on race.[126] The Court declared, therefore, that if the State established a prima facie case of racial discrimination, the defendants had to articulate a nondiscriminatory explanation for their challenge.[127] The Court then reversed the Supreme Court of Georgia's decision, remanding it for further proceedings.[128]

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123 *Id.* The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

124 *McCollum*, 112 S. Ct. at 2358. This point has been well settled: "It is to be remembered that such impartiality 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." Hayes v. Missouri, 120 U.S. 68, 70 (1887); *cf.* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3, at 736 (1984) (discussing symmetry between prosecution and defense in use of peremptory challenge).

The *Amicus Curiae* Brief for the National Association of Criminal Defense Lawyers at 5, 17, Georgia v. McCollum, 112 S. Ct. 2348 (1992) maintained that allowing criminal defendant's to make peremptory challenges on the basis of race should be permitted because defendants already enjoy other rights not afforded to the state. For example, a state must provide all potentially exculpatory evidence to the defendant. Brady v. Maryland, 373 U.S. 83, 87 (1963). Additionally, the state must disclose promises of leniency to state witnesses. Giglio v. United States, 405 U.S. 150, 150-51, 154-55 (1972). Finally, the government must prove its case beyond a reasonable doubt. *In re* Winship, 397 U.S. 358, 368 (1970); *see also* Williams v. Florida, 399 U.S. 78, 111 (1970) (Black, J., concurring in part and dissenting in part) (claiming tactical advantages favoring defendant are inherent in constitutionally protected criminal trial).

125 *McCollum*, 112 S. Ct. at 2358-59.

126 *Id.* at 2359. The majority imparted that it had consistently rejected the argument that the assumption of racial bias was a legitimate reason for disqualifying a person as a juror. *Id.* In *Powers v. Ohio*, the Court declared that racial stereotypes were unacceptable as a defense to racial discrimination. Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991). *See also* Batson v. Kentucky, 476 U.S. 79, 87 (1986) (Frankfurter, J., dissenting) (emphasizing that juror's competence is unrelated to juror's race).

127 *McCollum*, 112 S. Ct. at 2359.

128 *Id.*

In a brief concurrence, Chief Justice Rehnquist pointed out that the majority's decision was a logical extension of the principles set forth in *Edmonson v. Leesville Concrete Co.*[129] Although disagreeing with the Court's holding in *Edmonson*, the Chief Justice nevertheless recognized *Edmonson* as the controlling law.[130]

Concurring in the judgment,[131] Justice Thomas declared his dissatisfaction with using the Constitution to regulate the exercise of peremptory challenges.[132] The Justice warned that the regulation of peremptory challenges would not produce the anticipated results.[133] Specifically, the Justice recognized that the racial makeup of a jury can have an impact on the outcome reached.[134] Justice Thomas added that a defendant's ability to have members of the defendant's race on the jury may enhance that defendant's opportunity to receive a fair trial.[135] The Justice cited the general belief of the public, as reflected in the news media, that the racial makeup of juries in criminal trials is a material issue.[136]

Criticizing the Court's decision as a further departure from *Strauder v. West Virginia*,[137] Justice Thomas maintained that *Strauder* was premised on the supposition that, based solely on race, a particular juror may be inclined one way or another.[138] As

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129 *Id.* (Rehnquist, C.J., concurring).

130 *Id.* Chief Justice Rehnquist declared: "But so long [as *Edmonson*] remains the law, I believe that it controls the disposition of this case on the issue of 'state action' under the Fourteenth Amendment." *Id.*

131 Justice Thomas noted that had he been on the Court, he would have voted with the minority in *Edmonson*. *Id.* (Thomas, J., concurring in judgment). Agreeing with the Chief Justice, Justice Thomas conceded that the Court's decision in *Edmonson* controlled *McCollum*. *Id.* The Justice reasoned that because the respondents did not contest *Edmonson*, its consequences must be accepted. *Id.* Justice Thomas concurred, however, only to reflect his dissatisfaction with the Court's attempts to uphold the limitations on the use of the peremptory challenge. *Id.*

132 *Id.*

133 *Id.* at 2359-60 (Thomas, J., concurring in judgment).

134 *Id.* Commentators have suggested that the racial composition of a jury may affect the outcome of a trial. *See, e.g.*, COOKIE STEPHAN, THE JURY SYSTEM IN AMERICA 105-06 (Rita J. Simon ed. 1975).

135 *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring in judgment).

136 *Id.* at 2360 & n.1 (Thomas, J., concurring in judgment). Justice Thomas declared that a computer search for the phrase "all white jury" produced over two hundred citations in three major newspapers alone. *Id.* at 2360 n.1 (Thomas, J., concurring in judgment).

137 *Id.* at 2360.

138 *Id.* Justice Thomas noted that, beginning with *Batson*, the Court took the position that the possibility for a juror's hidden bias to surface during trial was unfounded. *Id.* Justice Thomas noted that this was a departure from the *Strauder* assumption that all-white juries may not be impartial toward black defendants. *Id.*

a result of the majority's holding, the Justice posited, the rights of a criminal defendant had become secondary to the rights of a juror excluded because of race.[139] Moreover, Justice Thomas warned that the majority's decision signaled the beginning of a gradual elimination of the peremptory challenge.[140]

In a stinging dissent, Justice O'Connor declared that criminal defendants and their counsel were not acting on behalf of the state when exercising peremptory challenges.[141] While conceding that the Court's decision in *Batson* correctly determined that a prosecutor may not racially discriminate, Justice O'Connor emphasized that a private actor was under no such obligation.[142]

Justice Thomas asserted that *Strauder* "surmised, without direct evidence in any particular case, that all-white juries might judge black defendants unfairly." *Id.*

139 *Id.* Justice Thomas stated that "we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death." *Id.* For a contrary view, see Carter v. Jury Commissioners of Greene County, 396 U.S. 320, 329 (1970), in which the Court declared that jurors excluded for racially discriminatory reasons were injured as much as criminal defendants indicted and tried in a racially discriminatory system.

140 *McCollum*, 112 S. Ct. at 2360-61 (Thomas, J., concurring in judgment). Justice Thomas opined that "black criminal defendants will rue the day that this [C]ourt ventured down this road that inexorably will lead to the elimination of peremptory strikes." *Id.* at 2360 (Thomas, J., concurring in judgment). Expressing similar concerns in *Batson*, Chief Justice Burger feared that any peremptory challenge that discriminated against any "cognizable" group could eventually be prohibited. Batson v. Kentucky, 476 U.S. 79, 124 (1986) (Burger, C.J., dissenting). One commentator has argued, however, that although the prohibition against the discriminatory use of peremptory challenges will likely extend to include considerations of religion, national origin and gender, the prohibition will not likely extend to consideration of age, occupation, disability, wealth or education. Underwood, *supra* note 103, at 764-66.

141 *McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting).

142 *Id.* Justice O'Connor referenced the Court's decision in *National Collegiate Athletic Ass'n v. Tarkanian* for the view that, although the use of racially discriminatory peremptory challenges could be unfair, it was not conduct subject to constitutional scrutiny. *Id.* (quoting National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988)). In *United States v. Turkish*, the Court rejected the argument that fairness required identical treatment between the parties in a criminal case. United States v. Turkish, 623 F.2d 769, 774 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981). Specifically, the United States Court of Appeals for the Second Circuit stated:

> A criminal prosecution, unlike a civil trial, is in no sense a symmetrical proceeding. The prosecution assumes substantial affirmative obligations and accepts numerous restrictions, neither of which are imposed on the defendant. . . .[I]n the context of criminal investigation and criminal trials, where accuser and accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle . . . .

Turkish, 623 F.2d at 774-75; *see also* Dunham v. Franks Nursery & Crafts, Inc., 919

Justice O'Connor declared that the majority's conclusion that a criminal defendant was a state actor was not only peculiar, but also unsupported by precedent.[143]

As had the majority, Justice O'Connor employed the state actor analysis set forth in *Lugar v. Edmondson Oil Co.*.[144] The Justice did not contest the conclusion that a peremptory challenge had its origins in state power.[145] Justice O'Connor vigorously denounced, however, the proposition that criminal defendants were agents of the state that brought them to trial.[146] Reviewing the Court's decision in *Polk County v. Dodson*,[147] the Justice stated that the *Polk County* Court found no state action existed when a public defender was performing the same obligations as a private attorney.[148] Justice O'Connor also pointed out the structural inconsistencies that would exist if the Court were to define a defense attorney as a state actor.[149] The independent nature of defense attorneys, the Justice posited, was firmly rooted in the Constitution.[150]

F.2d 1281, 1292 (7th Cir. 1990) (Ripple, J., dissenting) (discussing ways in which civil and criminal trials are "simply different"), *cert. denied*, 111 S. Ct. 2797 (1991).

143 *McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting).

144 *Id.*

145 *McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting) (citing *Edmonson*, 111 S. Ct. at 2084).

146 *Id.* at 2363 (O'Connor, J., dissenting). Instead, Justice O'Connor declared that the appropriate analysis should focus on the relationship between the defendants and the government who had instituted the action. *Id.* at 2361 (O'Connor, J., dissenting).

147 In *Polk County*, the Court held that a public defender did not act under color of state law when performing typical defense-related duties. Polk County v. Dodson, 454 U.S. at 312, 325 (1981).

148 *McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting) (citing *Polk County*, 454 U.S. at 325). The Justice added that although attorneys were often referred to as "officers of the court," that label had never been used to deem a lawyer a "state actor." *Id.* at 2362 (O'Connor, J., dissenting) (quoting *Polk County*, 454 U.S. at 318). Under the officer of the court doctrine, an attorney is considered an employee of the court required to perform certain legal tasks. Howard A. Matalon, Note, *The Civil Indigent's Last Chance for Meaningful Access to the Federal Courts: The Inherent Power to Mandate Pro Bono Publico*, 71 B.U. L. REV., 545, 563 (1991). For the Supreme Court's acceptance of the officer of the court doctrine, see Powell v. Alabama, 287 U.S. 45, 73 (1932).

149 *McCollum*, 112 S. Ct. at 2362 (O'Connor, J., dissenting). Justice O'Connor declared that the adversarial nature between the state and a defense lawyer rested on the premise that a defense attorney would best serve the public when promoting his client's interests rather than the state's. *Id.* (quoting *Polk County*, 454 U.S. 312, 318-19 (1982) (internal quotations omitted)).

150 *Id.* Justice O'Connor added that the right to counsel implied that counsel would be free from state control. *Id.* (quoting *Polk County*, 454 U.S. at 322). Moreover, the Justice asserted, a defendant could not receive a fair trial without an independent and effective advocate. *Id.* (quoting *Polk County*, 454 U.S. at 322).

Justice O'Connor maintained that the majority's faulty reasoning could be traced to a misinterpretation of *Polk County*.[151] The dissent argued that the majority incorrectly distinguished *Polk County* on the basis that *Polk County* concerned a public defender.[152] Justice O'Connor then ridiculed the majority's attempt to transform, temporarily, defense attorneys into state actors solely for the purpose of the peremptory challenge.[153] The dissent also reasoned that because peremptory challenges were routine defense counsel measures, a proper application of *Polk County* demanded a finding of no state action.[154]

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151 *Id.* Justice O'Connor opined that the majority had confused the "under color of state law" requirement with the state action requirement under the Fourteenth Amendment. *Id.* In *Lugar v. Edmondson Oil Co.*, the Court held that conduct satisfying the Fourteenth Amendment's state-action requirement also constituted the "under the color of state law" statutory requirement. Lugar v. Edmondson, 457 U.S. 922, 935 & n.18 (1982). The Court noted, however, that all action that satisfied the "under the color of state law" requirement did not necessarily constitute state action under the Fourteenth Amendment. *Id.* at 935 n.18. Action "under color of state law," the Court clarified, simply meant that an individual acted "with knowledge of and pursuant to that statute." *Id.* (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 162 n.23 (1970)). Conversely, the Court noted, state action under the Fourteenth Amendment focused on whether the conduct could be attributed to a government decision. *Id.* at 937-38.

152 *McCollum*, 112 S. Ct. at 2362 (O'Connor, J., dissenting). The Justice reminded that *Polk County* found the defense of an accused was essentially a private function, rather than state action. *Id.* (quoting *Polk County*, 454 U.S. at 319). Justice O'Connor argued that an action was not state action when it was exercised independently of state influence. *Id.* at 2363 (O'Connor, J., dissenting) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974)). *Id.* at 2363. In *Jackson*, the Court found that the respondent, a privately owned utility, did not act "under color of state law" when it discontinued the petitioner's delinquent electric service account without notice or a hearing. *Jackson*, 419 U.S. at 346, 347, 358-59. Petitioner argued that the respondent was a state actor because of its monopoly status and because it performed a vital "public function." *Id.* at 351-52. Regarding the monopoly status argument, the *Jackson* Court determined that this status was not sufficiently related to the actions challenged by the petitioner. *Id.* at 352. The Court similarly disposed of the petitioner's "public function" argument, finding that the State never delegated power, which was normally associated with state sovereignty, to the utility. *Id.* at 352-53. The majority reasoned that while State law regulated utilities, the State was not required to furnish utility service. *Id.* at 353. The Court was equally unpersuaded by the petitioner's claim that state action must be found because the State authorized the utility's termination procedure. *Id.* at 354. The State's failure to reject the respondent's termination procedure, the Court asserted, did not render the respondent's decision to disconnect the petitioner's electric service "state action." *Id.* at 357.

153 *McCollum*, 112 S. Ct. at 2362 (O'Connor, J., dissenting). Justice O'Connor stated: "The Court also seeks to evade [*Polk County*'s] logic by spinning out a theory that defendants and their lawyers transmogrify from government adversaries into state actors when they exercise a peremptory challenge, and then change back to perform other defense functions." *Id.*

154 *Id.* The dissent argued that *Polk County* stood for the proposition that a public

Justice O'Connor next argued that absent state coercion, a private actor's exercise of peremptory challenges was not state action.[155] The dissent asserted that the majority failed to distinguish between an act allowed by the state from an act compelled by the state.[156] The Justice further emphasized that a peremptory strike was, by definition, a strike made without articulating a reason.[157]

The dissent posited that the nature of the adversarial system rendered the state's interest in direct conflict with a criminal defendant.[158] Justice O'Connor emphasized that the Court had

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defender was a private actor when performing traditional counsel functions. *Id.* Moreover, the Justice stated, the Court had continually held that peremptory challenges were such a "traditional function." *Id.* (citing Swain v. Alabama, 380 U.S. 202, 212-19 (1965); Lewis v. United States, 146 U.S. 370, 376 (1892)).

155 *Id.* at 2362 (O'Connor, J., dissenting) (citing Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)). In *Blum*, the respondents sought to hold state officials responsible for a private party's involuntary release of Medicaid patients from their nursing homes without certain procedural protections. *Blum*, 457 U.S. at 1003 (1982). The Court reiterated its finding in *Jackson* that mere state regulation of a private party did not render such party a state actor. *Id.* at 1004 (quoting *Jackson*, 419 U.S. at 350). The Court stated that a private party was a state actor when the state had exercised coercive power over, or had a close relationship to, that party. *Id.* (citations omitted). According to the Court, mere acquiescence over the private party would not be enough to find state action. *Id.* at 1004-05. The *Blum* Court determined that the State's adjustment of benefits to these involuntarily discharged patients did not render the State responsible for the private party's actions. *Id.* at 1005. Finally, because private physicians and nursing home administrators discharged the patients, the *Blum* Court concluded that the respondent failed to establish that the State participated in the decision to discharge those patients. *Id.* at 1005, 1011-12. In dissent, Justice Brennan argued that the nature of the State's benefits system provided the necessary encouragement needed to find the private nursing home a state actor. *Id.* at 1014-15 (Brennan, J., dissenting).

Similarly, in *Flagg Bros., Inc. v. Brooks*, the Court considered whether state action existed when a state statute permitted a warehouseman to sell goods consigned for storage to recoup unpaid storage charges. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 151-52, 153 (1978). After the warehouse threatened to sell the respondent's belongings pursuant to New York Uniform Commercial Code § 7-210, the respondent charged that the sale was state action that contravened the Due Process and Equal Protection Clauses. *Id.* at 156. In determining that the petitioner's actions were not state action, the Supreme Court distinguished those cases in which the state courts played a role in withholding property from cases that involved a statute that merely provided a private actor with traditional relief. *Id.* at 161 & n.10 (citations omitted). Thus, the Court concluded that the petitioner's action was permissible under state law. *Id.* at 166.

156 *McCollum*, 112 S. Ct. at 2363 (O'Connor, J., dissenting). Justice O'Connor reasoned that the state did not compel a criminal defendant's exercise of a peremptory challenge, but merely allowed for their use. *Id.*

157 *Id.* (citing Swain v. Alabama, 380 U.S. 202, 220 (1965)).

158 *Id.* In Branti v. Finkel, the Court stated that a public defender's only function was to represent defendants accused by the state. Branti v. Finkel, 445 U.S. 507, 519 (1980). Although an actor's public employment status is normally sufficient to

also recognized this distinction in *Edmonson*.[159] The Justice cited specific language used in *Edmonson*, noting that the government was not ordinarily in an adversarial position with civil litigants.[160] Concluding the first part of Justice O' Connor's dissent, the Justice reiterated that *Polk County* demanded that the distinction between criminal defendants and the state be maintained.[161]

In the second part of the dissent, Justice O'Connor speculated that the desire to remove all prejudices from the courtroom motivated the majority's decision.[162] The Justice reminded the Court that the Constitution demanded only that the government act without racial prejudice.[163] The state's standards must be higher in criminal cases, the Justice cautioned, because the state's goal is to achieve justice, rather than to attain victory at any cost.[164]

On a pragmatic note, Justice O'Connor further warned the Court that its decision would not eliminate racism from juries.[165] Moreover, the Justice declared that the defendant's ability to empanel jurors of the defendant's own race and backgrounds would

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constitute state action, the analysis is different in the case of a public defender because the public defender's function is adversarial to the state's. Underwood, *supra* note 103, at 753.

159 *McCollum*, 112 S. Ct. at 2363. (O'Connor, J., dissenting) (citing Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2086 (1991)).

160 *Id.* (citing *Edmonson*, 111 S. Ct. at 2086). Justice O'Connor stated that " 'an adversarial relation does not exist between the government and a private litigant' to 'the ordinary context of *civil litigation in which the government is not a party*.' " *Id.* (quoting *Edmonson*, 111 S. Ct. at 2086). In Ferri v. Ackerman, the Court noted that Congress intended to hold court-appointed attorneys to the same standards as defense attorneys not paid by the state. Ferri v. Ackerman, 444 U.S. 193, 199-200 (1979). In *West v. Atkins*, the petitioner, an inmate at a correctional facility, brought a claim against a private physician who was working under contract to provide medical services to the state prison hospital. West v. Atkins, 487 U.S. 42, 43-45 (1988). The *Atkins* Court distinguished *Polk County* because unlike a public defender, a physician's independent medical judgments were not adversarial to the state. *Id.* at 51. The Court added that the physician's role in the state system, not the specific terms of employment, was determinative in whether the actions could be ascribed to the state. *Id.* at 55-56.

161 *McCollum*, 112 S. Ct. at 2363 (O'Connor, J., dissenting).

162 *Id.* at 2363-64 (O'Connor, J., dissenting).

163 *Id.* at 2364 (O'Connor, J., dissenting). The dissent further implied that the majority had attempted to circumvent this most basic tenet in its decision. *Id.*

164 *Id.* (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)); Berger v. United States, 295 U.S. 78, 88 (1935)). Goldwasser proposed that the purpose of the peremptory challenge is to protect defendants from overzealous prosecutors. Goldwasser, *supra* note 15, at 826-27.

165 *McCollum*, 112 S. Ct. at 2364 (O'Connor, J., dissenting). Justice O'Connor stated that white jurors' perceptions, whether conscious or unconscious, could influence a verdict. *Id.* (citations omitted).

more effectively improve the chances of selecting an impartial jury.[166] While acknowledging the majority's good intentions, the dissent was, nevertheless, skeptical about the likely consequences of the Court's decision.[167] Justice O'Connor disagreed, finally, with the Court's decision to expand the government's responsibility to eliminate private racism.[168]

Dissenting separately, Justice Scalia agreed that the Court's decision followed logically from *Edmonson*.[169] The Justice expressed the view, however, that *Edmonson* was wrongly decided.[170] Justice Scalia belittled the majority's finding that a criminal defendant was a state actor when exercising a peremptory challenge.[171] While agreeing in principle with Justice O'Connor's dissent,[172] Justice Scalia extended the argument, deducing that the issues in *Edmonson* were indistinguishable from the present case.[173] Finally, Justice Scalia declared that the present case demonstrated the falsity of the notion that an activist court's jurisprudence tends always to advance the interest of greater individual rights.[174]

Justice O'Connor's dissent correctly points out the absurdity of finding a criminal defendant to be a state actor in the jury selection process.[175] While the *Edmonson* Court concluded that a civil litigant was a state actor when exercising peremptory challenges, it based this finding on the lack of an adversarial relationship between the litigants and the government.[176] In a criminal

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166 *Id.* Justice O'Connor reasoned that a racially mixed jury was less likely to succumb to the distorting influence of race. *Id.*

167 *Id.*

168 *Id.*

169 *Id.* at 2364 (Scalia, J., dissenting).

170 *McCollum*, 112 S. Ct. at 2364 (Scalia, J., dissenting).

171 *Id.*

172 *Id.* at 2364-65 (Scalia, J., dissenting). Justice Scalia agreed with Justice O'Connor that a criminal defendant could not be considered a state actor. *Id.*

173 *Id.* at 2365.

174 *Id.* The Court's decision, stated Justice Scalia, sought to promote the importance of race relations by destroying a criminal defendant's long-standing right to exercise peremptory challenges to obtain a fair jury. *Id.*

175 Brent D. Stratton, *New Decision Requires Criminal Defendants To Explain Peremptory Challenges*, CBA RECORD, Sept. 1992, at 30 (questioning *McCollum*'s conclusion that prospective juror has constitutional right not to be excluded from specific case by peremptory challenge and finding Court's decision that criminal defendant was state actor disturbing); Stuart Taylor Jr., *Race-Based Peremptories Curb Will Hurt Blacks*, 131 N.J.L.J. 768 (1992) (arguing that *McCollum* will increase the likelihood that black defendants will be tried before all-white juries).

176 Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2086 (1991). The Court reasoned that when selecting jurors, both parties strive for the same goal. *Id.* Justice O'Connor argued, however, that the majority had implied that the *Edmonson*

trial, however, defense counsel best serves the public by staunchly advocating the defendant's, rather than the State's, interest.[177] The defense counsel's vigorous advocacy should be limited only by the rules governing professional conduct.[178] The Equal Protection Clause of the Fourteenth Amendment should not be interpreted to circumscribe the use of peremptory challenges for any reason, no matter how abhorrent, unless the strike is patently attributable to the state.[179]

While the Court's desire to eliminate racism in the courtroom is indeed noble, the *McCollum* decision tends to blur the distinction between public and private conduct.[180] Moreover, prohibiting defendants from exercising race-based peremptory challenges will not produce the intended results.[181] Instead, the decision will likely reduce the number of such challenges needed to establish a prima facie case of discrimination.[182] This will re-

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holding applied only to civil matters in which the government was not a party. *McCollum*, 112 S. Ct. at 2363 (O'Connor, J., dissenting).

177 *See* Polk County v. Dodson, 454 U.S. 312, 318-19 (1981) (citing Ferri v. Ackerman, 444 U.S. 193, 204 (1979)). In addition, the *Polk County* Court distinguished a public defender's function in the judicial system from that of a state-employed physician, reasoning that the public defender's mission, unlike the physician's, was contrary to the State's. *Id.* at 320. To illustrate the differences between a state physician and a public defender, the *Polk County* Court cited specific actions a public defender takes that are directly contrary to state interests. *Id.* (citing Polk County v. Dodson, 628 F.2d 1104, 1110 (1980), *rev'd*, 454 U.S. 312 (1981)). Similarly, in *McCollum*, Justice O'Connor asserted that a defense counsel's peremptory challenge was precisely the type of function that was contrary to the State's interests at trial. *McCollum*, 112 S. Ct. at 2362 (O'Connor, J., dissenting). In *Edmonson*, Justice O'Connor advocated that a defendant's and state's reasons for exercising peremptory challenges may be different and a defendant should be given "unfettered discretion in the use of those strikes." *Id.*

178 *Cf. McCollum*, 112 S. Ct. at 2358 (providing that unrestricted peremptory challenges may constitute an affront to justice when their exercise is based on race).

179 *See McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting) (advocating that racially discriminatory peremptory challenges do not violate the Fourteenth Amendment in absence of state action); *see also* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988); Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3, 17 (1883).

180 *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972). In *Moose Lodge*, the Court pointed out that absent governmental benefit, a private entity's acts did not violate the Equal Protection Clause. *Id.* To hold otherwise, the Court maintained, would eliminate the distinction between private and state conduct. *Id.*

181 *See* Batson v. Kentucky, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring); *McCollum*, 112 S. Ct. at 2359-60 (Thomas, J., concurring in judgment); *id.* at 2364 (O'Connor, J., dissenting) (asserting that prohibition against racially informed peremptory challenges may reduce a black criminal defendant's ability to be tried before an impartial jury).

182 *See Batson*, 476 U.S. at 105 (Marshall, J., concurring). For example, in Commonwealth v. Robinson, 415 N.E.2d 805 (1981), the court found that a prima facie case of racial discrimination did not exist when a prosecutor peremptorily chal-

double the courts' already difficult, if not impossible, task of determining the motivations behind counsel's peremptories.[183]

The limitations imposed upon the peremptory challenge by *Swain* and its progeny raise the question of whether peremptory challenges are worth saving at all.[184] The peremptory challenge has traditionally been a challenge requiring no explanation.[185] Since *Batson*, however, counsel must articulate a racially neutral explanation for each challenge.[186] As a result, courts may logically extend *Batson* claims to protect any number of identifiable groups.[187] Thus, the complete elimination of peremptory challenges would provide a less cumbersome method of furthering

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lenged one Puerto Rican and three African-American prospective jurors from the venire during the trial of a black defendant. *Robinson*, 415 N.E.2d at 809-10. Similarly, in a California case, the defendant failed to establish a prima facie case of discrimination when the prosecutor exercised two peremptory challenges to remove the only two black members of the venire. People v. Rousseau, 179 Cal. Rptr. 892, 897-98 (1982). Relying on *Robinson* and *Rousseau*, Justice Marshall reasoned that it would be difficult to establish a prima facie case of discrimination when only a small number of black jurors survived the challenges for cause. *Batson*, 476 U.S. at 105 (Marshall, J., concurring).

183 *Batson*, 476 U.S. at 105 (Marshall, J., concurring). Justice Marshall argued that the courts would be forced to decide whether an explanation offered by counsel was sufficient to rebut the prima facie case of racial discrimination. *Id.* at 105-06. Moreover, Justice Marshall articulated that counsel's reasons could be unconsciously influenced by race. *Id.* at 106. Whether conscious or unconscious, Justice Marshall opined, a prosecutor's own racism may lead him to believe that a prospective black juror was not impartial when that same characterization would not have occurred if the juror had been white. *Id.*

184 Underwood, *supra* note 103, at 761. Professor Underwood argued that *Batson* had effectively eliminated the peremptory challenge whenever race appeared to have motivated the decision to excuse a potential juror. *Id.* Despite this limitation on peremptories, Underwood contended that there were several areas in which the peremptory apparently thrived. *Id.* at 762-63. For example, a juror who expressed certain biases toward a defendant or the state may be peremptorily removed, even if the juror promised to put those biases aside during the trial. *Id.* at 762. Another protected area involved challenging jurors on the basis of their occupation or membership in a particular group, provided that the occupation or group was not cognizable under *Batson*. *Id.* Professor Underwood maintained, therefore, that peremptory challenges were still important in producing an unbiased jury and improving the accuracy of the factfinding. *Id.* at 771.

185 Swain v. Alabama, 380 U.S. 202, 220 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). The *Swain* Court declared that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.* (citations omitted).

186 *McCollum*, 112 S. Ct. at 2353 (citing *Batson*, 476 U.S. at 97).

187 *Id.* at 2360-61 (Thomas, J., concurring in judgment). Justice Thomas forecasted that the Court would eventually face questions regarding the ability of a black criminal defendant to exercise racially motivated peremptory challenges, and encounter cases involving gender discriminatory peremptory challenges. *Id.* In *Batson*, Chief Justice Burger argued in dissent that the logical extension of the majority's decision would effectively subsume peremptories into challenges for cause

the Court's goal of eliminating prejudice in the courtroom.[188]

Strengthening the challenge for cause would achieve greater racial equity and community support.[189] A strengthened challenge for cause could significantly reduce racism in the courtroom, drastically diminish the administrative burden[190] on the courts and satisfy the needs of both parties and the community to impanel an impartial jury. The Court itself could abolish the peremptory challenge as a violation of the Equal Protection Clause of the Fourteenth Amendment.[191] Whatever the method used to eliminate the peremptory challenge, its elimination would pro-

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because the decision would eventually be extended to numerous cognizable groups. *Batson*, 476 U.S. at 124.

188 *See* Gurney, *supra* note 6, at 252-53 (asserting the justice system would best be served through the elimination of peremptory challenge); *Batson*, 476 U.S. at 107 (Marshall, J., concurring). Concluding that peremptories were inherently susceptible to racially discriminatory abuse, Justice Marshall asserted that the peremptory challenge should be abolished. *Id.* Justice Marshall added that it would be unfair to apply the prohibition against racially discriminatory peremptory challenges only to the states. *Id.* at 107-08. The Justice endorsed the notion that state legislatures should eliminate a criminal defendant's peremptories to overcome the imbalance created when only the State was prohibited from exercising peremptory challenges in a racially discriminatory manner. *Id.*

189 *See* Gurney, *supra* note 6, at 257, 283. Gurney argued that racially discriminatory peremptory challenges ensure racial partiality and lack of representation. *Id.* at 274. Moreover, the community's perception of an unrepresentative jury reduces confidence in a jury's verdict. *Id.* at 236. The elimination of the peremptory challenge ensures that a broader segment of the population would serve on juries. *Id.* at 256. Before eliminating peremptories, however, legislatures must take steps to strengthen the challenge for cause. *Id.* at 266. For example, the legislature should expand the jury pool source and the scope of *voir dire*. *Id.* at 257. An improved *voir dire* would enable judges to carefully scrutinize prospective jurors for any hidden biases. *Id.* at 270. Additionally, the expansion of the jury pool would result in more impartial verdicts. *Id.* at 274.

190 The Court's attempts to eliminate racially discriminatory peremptory challenges have forced trial courts to assess prima facie showings, consider explanations for questioned challenges and order costly remedies in individual cases. Alshuler, *supra* note 9, at 209.

191 *See* Batson v. Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., concurring). Justice Marshall advocated that the Court abolish a prosecutor's peremptory challenges. *Id.* at 107-08 (Marshall, J., concurring). The Justice noted, however, that states should initiate the elimination of a defendant's peremptory challenge. *Id.* at 108 (Marshall, J., concurring). The Justice based this conclusion on the inherent potential for peremptory challenges to be used to eliminate jurors on racially discriminatory grounds. *Id.* at 107 (Marshall, J., concurring); *cf. id.* at 124 (Burger, C.J., dissenting) (asserting that conventional equal protection analysis would logically prohibit peremptory challenges that discriminate against other cognizable groups).

duce verdicts that are more fair, more acceptable to the community, and would reinvigorate the democratic process.

Salvatore Picariello