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State Action and the Peremptory Challenge: Evolution of the Court’s Treatment and Implications for Georgia v. McCollum

I. INTRODUCTION

As a part of our common law heritage, “[t]he peremptory challenge has very old credentials.” Beginning in the early 1960s, however, the peremptory challenge was attacked on the grounds that litigants used it to exclude blacks from juries, thereby perpetuating racial discrimination in the courtroom. Legal attacks on the peremptory challenge culminated in a series of Supreme Court cases. In these cases, the Court addressed claims that the discriminatory use of peremptory challenges by the prosecution in a

1 Swain v. Alabama, 380 U.S. 202, 212 (1965) overruled by Batson v. Kentucky, 476 U.S. 79 (1986). During jury selection, two types of challenges are used. The first, challenges for cause, allow a party to remove a person from the venire upon showing that he or she will be unable to fairly decide the case for some articulable reason. The parties have an unlimited number of challenges for cause. The second type, peremptory challenges, have traditionally allowed a party to remove a person from the venire without stating a reason. Generally, parties have a limited number of peremptory challenges.

The peremptory challenge was first used in early England, where the crown had an unlimited number and could virtually “hand-pick” juries. JON M. VAN DYKE, JURY SELECTION PROCEDURES 147 (1977) (footnote omitted). In 1305, however, this practice was abolished by a statute “that limited the crown to challenges for ‘cause certain’ and eliminated completely the right of the king’s attorney to exercise peremptory challenges. Criminal defendants were, however, still allowed to challenge jurors peremptorily.” Id.

The 1305 statute was incorporated into the common law by the first American courts, although the prosecution was eventually allowed peremptory challenges as well. Id. at 148. In 1790, Congress codified the right of criminal defendants to use peremptory challenges in trials for treason and capital cases. Act of April 30, 1790, ch. 9, § 30, 1 Stat. 119. While there was some debate as to the prosecution’s right to exercise peremptory challenges, “[b]y the beginning of the twentieth century, the government’s right . . . was firmly established.” VAN DYKE, supra, at 150. In 1872, Congress codified the civil party’s right to peremptory challenges. Act of June 8, 1872, ch. 382, 17 Stat. 282.

Today, the right of parties to use peremptory challenges in federal court is governed by FED. R. CIV. P. 47(b) and FED. R. CRIM. P. 24(b). For additional information on peremptory challenges, see JAMES J. GOBERT & WALTER E. JORDAN, JURY SELECTION ch. 8 (2d ed. 1990).

2 Any exercise of a peremptory challenge is “discriminatory” in that it allows the
criminal case and by private parties in a civil case violates the Equal Protection Clause of the Fourteenth Amendment. Part II of this Note reviews these cases. Part III discusses the facts and procedural history of Georgia v. McCollum, in which the Supreme Court will decide the remaining question in this area of the law: whether the discriminatory use of peremptory challenges by a criminal defendant violates the Equal Protection Clause. Part IIIA outlines the framework under which the Court should decide McCollum, applies the analysis to its facts, and concludes that the discriminatory use of peremptory challenges by a criminal defendant violates the Equal Protection Clause. Part IIIB examines the possible effects such a holding would have on the rights of a criminal defendant.

party exercising it to choose between the juror removed and the ones eventually seated. For purposes of this Note, however, the term "discriminatory use of peremptory challenges" means exercising those challenges on the basis of race.


Another case in this line is Holland v. Illinois, 110 S. Ct. 803 (1990), in which the Court considered a claim by a white man that the prosecution's discriminatory use of peremptory challenges violated his Sixth Amendment right to trial by an impartial jury: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. (The Sixth Amendment right to a jury trial in criminal cases is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).)

Although the defendant had standing to bring the claim, Holland, 110 S. Ct. at 805-06, the Court held that the Sixth Amendment guarantees a fair cross section of the community on the venire, not on the petit jury. Accordingly, the discriminatory use of peremptory challenges does not violate the Sixth Amendment. Id. at 807-09. The Court did not address the issue of whether the defendant would have standing to bring an equal protection challenge, or whether such a claim would be successful. Id. at 811.


In addition, the Ninth Circuit Court of Appeals recently held that a criminal defendant's gender-based use of peremptory challenges violates the Fifth Amendment. United States v. DeGross, No. 87-5226, 1992 U.S. App. LEXIS 5645 (9th Cir. April 2, 1992) (en banc). DeGross is discussed infra note 123.
II. DISCRIMINATORY USE OF PEREMPTORY CHALLENGES: JUDICIAL EVOLUTION

A. Prosecutorial Misuse of Peremptories

The Supreme Court first addressed the discriminatory use of peremptory challenges in Swain v. Alabama. In Swain, an all-white jury convicted a black man of rape and sentenced him to death. During the jury selection process, the prosecutor used his peremptory challenges to strike all six blacks on the venire. The defense objected to these strikes, claiming that the prosecution's strikes were racially-motivated and that such a use of peremptory challenges violated the Equal Protection Clause. The objections were overruled, and the Alabama Supreme Court subsequently affirmed.

On appeal, the United States Supreme Court affirmed the defendant's conviction. The Court outlined stringent requirements for proving that a prosecutor's use of peremptory challenges violated the Fourteenth Amendment. The Court held that it must be presumed that a prosecutor's purpose in using peremptory challenges was to strike racial minorities from the jury pool.
ry challenges is to seat a "fair and impartial jury."\textsuperscript{12} In order to rebut this presumption, a defendant would have to "show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time."\textsuperscript{13} The Court refused to find that "the striking of Negroes in a particular case is a denial of equal protection of the laws," since this would have worked "a radical change in the nature and operation of the [peremptory] challenge."\textsuperscript{14}

Immediate reaction to Swain was negative. One commentator noted that "it may prove virtually impossible for a defendant to make the required showing of discrimination even if the prosecution has in fact consistently abused its right of peremptory challenge."\textsuperscript{15} Another stated that the Court had "for the time being effectively isolated from judicial review a device susceptible of extraordinarily efficient use... to perpetuate the all-white jury."\textsuperscript{16}

Indeed, the Swain rule of "systematic exclusion" proved to be of little help in eliminating prosecutors' discriminatory use of peremptory challenges. Given the nearly impossible prima facie showing required to prove discrimination, prosecutors were virtually immune from inquiry into their motives for exercising peremptory challenges.\textsuperscript{17}

This situation remained unchanged until 1986 when the Supreme Court overruled Swain's evidentiary requirement and considerably lessened the defendant's burden in making a prima facie showing of purposeful discrimination by a prosecutor through the

\textsuperscript{12}Id.

\textsuperscript{13}Id. at 227. It was immediately clear that this would be an extremely difficult standard to meet. The Swain Court held that the record was insufficient to make out a prima facie case, even though it was shown that no black person had served on a petit jury since 1950 in the county where the trial took place. Id. at 205.

\textsuperscript{14}Id. at 221-22. The Court conducted an extensive review of the history of peremptory challenges, explaining that they are deeply rooted in our legal system and necessary to the elimination of bias in juries. Id. at 212-19.


\textsuperscript{17}One commentator noted that after Swain, "[n]ost courts... accepted the principle that we cannot inquire into the motives of any peremptory challenge exercised by the prosecutor." VAN DYKE, supra note 1, at 166.
use of peremptory challenges. In *Batson v. Kentucky*, the defendant, a black man, was indicted for second degree burglary and receipt of stolen goods. During jury selection, the prosecutor used his peremptory challenges to strike the only four black persons on the venire. The defendant moved to discharge the jury, arguing that the prosecutor's actions violated his Sixth Amendment right to a jury composed of a fair cross-section of the community and his Fourteenth Amendment right to equal protection of the laws. The trial judge denied these motions, noting that the parties were entitled to "strike anybody they want to" and that "the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself." The defendant was convicted on both counts. Relying on *Swain*, the Supreme Court of Kentucky affirmed.

Outlining a new standard for reviewing the alleged discriminatory use of peremptory challenges by a prosecutor, the United States Supreme Court reversed. The Court rejected the *Swain* standard of systematic exclusion because it had "placed on defendants a crippling burden of proof . . . ." The Court noted that new standards had evolved since *Swain*, necessitating this reevaluation; recent decisions had recognized that systematic discrimination need not be shown to prove an equal protection violation.

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19 Id. at 83. Although the defendant asserted his own rights, the Court later noted in its holding that the rights of the excluded juror were also implicated:

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at trial . . . . As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.

Id. at 87 (citations omitted).
20 Id. at 83.
21 Id. at 83-84.
22 The Court agreed with the State that the defendant's claim turned on equal protection grounds. The Court believed that defendant's Sixth Amendment argument was an attempt to avoid the *Swain* holding and, therefore, did not reach the Sixth Amendment issue. Id. at 84-85 n.4.
23 Id. at 92.
24 Id. at 93. See, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976) (Discriminatory impact of District of Columbia employment test for police officers is not sufficient to establish a Fifth Amendment violation; discriminatory intent must also be shown. However, "[i]t is also not infrequently true that the discriminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury veni-
As a result, the *Batson* Court held that a defendant could rely solely on the facts of his case to make a prima facie showing of purposeful discrimination by the prosecutor in the selection of the petit jury.\(^{25}\)

The Court established a three-prong test for defendants seeking to make a prima facie showing of purposeful discrimination in the selection of the jury. First, the defendant must "show that he is a member of a cognizable racial group\(^{26}\) ... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."\(^{27}\) Second, the defendant "may rely on the fact ... that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"\(^{28}\) Finally, the Court stated that a "defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."\(^{29}\) The Court did not specify the quantum of proof necessary to make the requisite showing. Instead, much discretion was left to trial judges, who the Court felt were experienced in voir dire procedures and capable of making these determinations.\(^{30}\)

The Court further held that once a defendant makes a prima facie showing, the burden shifts to the prosecutor "to come for-
ward with a neutral explanation for challenging black jurors.\textsuperscript{31} The Supreme Court gave little guidance as to the exact nature of the explanation the prosecutor would need to give in order to rebut the prima facie showing. The Court held that while the explanation need not "rise to the level" of one justifying a challenge for cause, it would not be enough for the prosecutor to rely on the assumption that the juror "would be partial to the defendant because of their shared race."\textsuperscript{32} The Court also stated that a mere denial of discriminatory purpose or an assertion of good faith would not serve as a suitable explanation.\textsuperscript{33}

\subsection*{B. Misuse of Peremptories in Civil Trials}

After Batson, it was inevitable that the courts would face the question of whether a civil litigant's discriminatory use of peremptory challenges in a civil trial implicated the Fourteenth Amendment. When this question eventually reached the federal appellate courts, no consensus of opinion emerged.\textsuperscript{34} The main point of contention among the circuits was whether state action was present, as required by the Fourteenth Amendment.\textsuperscript{35}

The Supreme Court resolved this question in Edmonson v. Leesville Concrete Co.\textsuperscript{36} In Edmonson, a black construction worker brought a negligence action against the defendant construction company for injuries he sustained while at work.\textsuperscript{37} During the jury selection process, the defendant used its peremptory challenges to strike two of the three black persons on the venire. Invoking Batson, the plaintiff asked that the trial court require the defen-

\textsuperscript{31} Id.

\textsuperscript{32} Id. For a discussion of explanations that have been accepted and denied as racially neutral reasons for exercising a peremptory challenge, see Steven M. Puiszis, Edmonson v. Leesville Concrete Co.: Will the Peremptory Challenge Survive its Battle with the Equal Protection Clause?, 25 J. MARSHALL L. REV. 37, 58-69 (1991).

\textsuperscript{33} Id. at 98. For a discussion of how the lower courts have dealt with a prosecutor's rebuttal of a prima facie case under Batson, see GOBERT & JORDAN, supra note 1, § 8.07; Puiszis, supra note 32, at 69-72.

\textsuperscript{34} See Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281 (7th Cir. 1990) (Batson holding applies to private litigants in civil cases), \textit{cert. denied}, 111 S.Ct. 2797 (1991); Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990) (en banc) (Batson holding does not restrict private parties' use of peremptory challenges in civil trial), \textit{rev'd}, 111 S. Ct. 2077 (1991); Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989) (Batson applies in civil trial context), \textit{cert. denied}, 110 S.Ct. 201 (1989).

\textsuperscript{35} Unlike a criminal trial such as Batson, where the prosecutor is clearly a state actor, a civil trial presented a much more complicated state action question.

\textsuperscript{36} 111 S.Ct. 2077 (1991).

\textsuperscript{37} Id. at 2080-81.
The court denied the plaintiff's request, ruling that Batson only applied to criminal cases. At trial, a jury composed of eleven whites and one black returned a verdict for the plaintiff. He was awarded $90,000 in damages, but this was reduced to $18,000 because the jury found that he had been contributorily negligent.

A panel of the Fifth Circuit reversed. The panel held that state action existed because peremptory challenges are a statutorily created right and because the court's significant "oversight and administration" of the jury selection process was sufficient to "trigger state action" under Supreme Court precedent. The court found that Batson's underlying policy was not limited to curing discrimination in criminal proceedings.

On rehearing en banc, the Fifth Circuit overturned the panel's decision, finding that Batson did not apply to civil trials. Following the two-step analysis of Lugar v. Edmonson Oil Co., the court

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38 Id. at 2081. As noted above, the Batson Court did not clearly indicate whose equal protection rights were violated, but explained that the rights of both the defendant and excluded juror were affected. See supra note 19. Edmonson, however, clearly addressed itself to the rights of the excluded jurors.

39 Id.

40 860 F.2d 1308 (5th Cir. 1988).

41 Id. at 1312.

42 Id. at 1313.

43 895 F.2d 218 (5th Cir. 1990) (en banc).

44 457 U.S. 922 (1982). The Court's analysis of the state action question in Lugar represents a synthesis of its prior state action jurisprudence. Lugar was the lessee-operator of a truckstop, and Edmonson was one of his suppliers. Edmonson sued on a debt owed by Lugar. Under a Virginia statute, Edmonson was able to obtain a prejudgment attachment of Lugar's property by alleging in an ex parte proceeding that he believed that Lugar was disposing of or might dispose of his property. Edmonson obtained a writ of attachment, which was executed by the sheriff. The attachment was later dismissed for failure to establish the appropriate statutory grounds. Id. at 924-25. Lugar sued Edmonson and its president under § 1983, alleging deprivation of property without due process of law. The district court held that there was no state action; therefore, the complaint did not state a claim under 42 U.S.C. § 1983 upon which relief could be granted. The Fourth Circuit, sitting en banc, affirmed. It held

that a private party acts under color of state law within the meaning of § 1983 only when there is a usurpation or corruption of official power by the private litigant or a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree.

Id. at 926. Finding none of these elements in the case, the Fourth Circuit concluded that the complaint did not state a cause of action under § 1983. The court also found the Supreme Court's cases dealing with state action inapplicable because the issue was whether there was action under color of state law within the meaning of § 1983. Id. at
concluded that no state actor was present. The court rejected the argument that the trial judge was a state actor, characterizing his role in the exercise of peremptory challenges as "ministerial." The court also held that the private attorney was not a state actor. Thus, finding no state actor, the court held that the Equal Protection Clause was not implicated.

On appeal, the Supreme Court first rejected the Fourth Circuit's determination that conduct which would be state action under the Fourteenth Amendment is not necessarily action under color of state law for purposes of §1983. On the contrary, the Court held that conduct sufficient to establish state action also established action under color of state law. Id. at 935. The Court then addressed the proper standard for determining whether or not state action exists. The Court stated that the proper inquiry is whether "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." Id. at 937. This inquiry has two parts:

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

The Court noted that these two inquiries merge when the actor's official character gives the weight of the state to his decision; they diverge when the actor is a private party. Id.

Applying the standard to Lugar's case, the Court found that Edmonson Oil Company's use of a state created procedure, the writ of attachment, satisfied the first prong of the test. Id. at 941. Edmonson's use of the sheriff consulted joint action with a state official, satisfying the second prong. Id. Accordingly, Lugar was deprived of his property through state action, and, therefore, under color of state law. Id. at 942.

Edmonson, 895 F.2d at 221. The court was also concerned that characterizing the trial judge as a state actor in such a situation would serve to constitutionalize "every aspect" of civil trials. Id. at 222.

Edmonson, 895 F.2d at 221. The court also examined "a few underlying considerations of logic and policy" that supported its holding. The court noted the importance of the peremptory challenge in assuring a fair trial and stated that courts should be hesitant to tamper with it unless Batson so mandates. Id. at 222-23. The court further explained that neither Batson's authority nor its reasoning required that it be extended to civil trials. The court focused on the "greatly different" contexts of criminal and civil proceedings. Id. at 223-26. With these differences in mind, the court refused to extend Batson into the civil area, "where the considerations on which Batson is based are, if present at all, far weaker than in the criminal field." Id. at 226.

Underlying the Fifth Circuit's opinion seems to be a fundamental disagreement with the Supreme Court over whether any real discrimination is involved when an attorney strikes black veniremen because he believes they may be inclined to favor an individual of their own race. Id. at 224-25. Nonetheless, the court conceded that because of the
The Supreme Court reversed. Writing for the majority, Justice Kennedy found state action under the two-prong test of *Lugar v. Edmonson Oil Co.* In addressing *Lugar's* first prong—whether the constitutional deprivation was caused by the exercise of a State-created right or privilege—the Court found that the peremptory challenge clearly meets this requirement because it is a statutory device, created by the State.

The majority of the Court's analysis was devoted to *Lugar's* second prong, which requires that "the party charged with the deprivation must fairly be said to be a state actor." In its analysis, the Court noted that the government's significant involvement in the jury selection process made it possible for private parties to exercise peremptory challenges. The Court explained that

> [t]he government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the "final and practical denial" of the excluded individual's opportunity to serve on the petit jury.

The Court further found that the peremptory challenge is a tool used for choosing the jury, "a quintessential government body, having no attributes of a private actor." The Court explained that the jury performs duties that are government functions, including fact-finding, weighing evidence, assessing the credibility of witnesses, and delivering a verdict.

Finally, the Court noted that the government's participation in the jury selection process serves to aggravate the injury of discrimination:

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greater degree of state involvement in criminal proceedings and the likelihood of higher stakes in a criminal trial, it was understandable that the Supreme Court would strike the balance in favor of eliminating the "actuality or even the appearance of racially motivated strikes" as opposed to preserving the "any reason or no reason" rule for peremptory challenges" in the criminal context. *Id.* at 225.

48 See *supra* note 44.
49 *Edmonson*, 111 S. Ct. at 2083.
50 *Lugar*, 457 U.S. at 937.
51 *Edmonson*, 111 S. Ct. at 2084. The Court noted that, in the federal system, Congress has statutorily provided for the qualifications of jurors as well as the procedure for their selection. In addition, the court's officers summon and assemble the jurors, and the trial judge oversees the selection process, including voir dire, challenges for cause, peremptory challenges, and the actual dismissal of jurors. *Id.*
52 *Id.* at 2085 (quoting *Virginia v. Rives*, 100 U.S. 313, 322 (1880)).
53 *Id.*
54 *Id.*
Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality . . . To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.55

As a result of these considerations, the Court found that Lugar's second prong was satisfied, and therefore, the discriminatory use of peremptory challenges in a civil trial violates a potential juror's Fourteenth Amendment equal protection rights.56

The final issue the Court considered was whether a private litigant could assert the Fourteenth Amendment rights of an excluded juror. Relying on its recent decision in Powers v. Ohio,57 the Court held that a private litigant could assert the rights of the excluded juror.58 While an individual usually cannot assert the rights of a third party, the Court explained that third-party standing does exist when a "litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests."59 The Court held that its conclusion in Powers that a party in a criminal trial satisfied these requirements and could seek to protect the rights of an excluded juror was also applicable to a civil trial.60

55 Id. at 2087.
56 Id.
57 111 S. Ct. 1364 (1991). In Powers, a white man accused of murder made a Batson objection to the prosecutor's removal of seven black venirepersons through the use of peremptory challenges. Id. at 1366. The Ohio Court of Appeals and the Ohio Supreme Court affirmed the defendant's conviction, finding no constitutional violation. Id. at 1366-67. The United States Supreme Court reversed and remanded, holding that "the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race . . . ." Id. at 1370. Such a use of peremptory challenges violates the excluded juror's Fourteenth Amendment rights. Id. The Court went on to hold that the criminal defendant could assert the excluded juror's equal protection rights under principles of third-party standing. Id. at 1370-73. See infra text accompanying note 59. Finally, the Court held that it was irrelevant that the defendant's race differed from that of the juror since "the utility of the peremptory challenge system must be accommodated to the command of racial neutrality." Id. at 1373.
58 Edmonson, 111 S. Ct. at 2087-88.
59 Id. at 2087.
60 Id.
The Court remanded the case so that the trial court could
determine whether the plaintiff had established a prima facie case
of racial discrimination. In making this determination, the Court explained, the trial court should follow the framework set out in
 Batson.61

III. PEREMPTORY CHALLENGES, CRIMINAL DEFENSE DEFENDANTS,
AND THE EQUAL PROTECTION CLAUSE:
 GEORGIA V. MCCOLLUM

Although Batson and Edmonson have done much to eliminate
jury selection based on race, one question remains unanswered: whether criminal defendants can use peremptory challenges in a
discriminatory manner. The Supreme Court will resolve the issue
this term, in Georgia v. McCollum.62

In McCollum, the defendant was indicted after an alterca-
tion.63 The state filed a motion seeking to prevent the defendant
from exercising peremptory challenges in a discriminatory manner.
The trial court denied the motion.64 On appeal, the Supreme
Court of Georgia affirmed the trial court, noting that Edmonson
was a civil trial, and thus did not apply here.65 In a rather short
opinion, the court explained:

While it may be that the United States Supreme Court may, in
another case, prohibit a criminal defendant from exercising
peremptory challenges to exclude jurors on the basis of race, it
has not yet done so. Bearing in mind the long history of jury
trials as an essential element of the protection of human rights,
this court declines to diminish the free exercise of peremptory
strikes by a criminal defendant.66

61 Id. at 2088-89. The Batson framework is discussed supra notes 26-33 and accompa-
nying text.

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented.
Justice O'Connor's dissent is discussed infra at note 84 and notes 117-22 and accompany-
ing text.

Justice Scalia also wrote a separate dissenting opinion describing what he saw as the
unfortunate results of the Court's holding. He claimed that peremptory challenges can be
used "to assure rather than to prevent a racially diverse jury." Id. at 2095. Justice Scalia
also claimed that the majority's decision would logically have to apply to criminal defen-
dants. Accordingly, a minority defendant would not be able to use peremptory challenges
to avoid an all-white jury. Additionally, the Court's holding would result in more time be-
ing devoted "to sideshows and less and less to the merits of the case." Id. at 2096.

63 Id. at 689.
64 Id.
65 Id.
66 Id. Three justices dissented, arguing that the line of cases from Strauder v. West
A. Criminal Defendants and State Action

As in Edmonson, the Court's holding in McCollum will turn on the state action question. Here, the State will have to show that the criminal defendant's discriminatory use of peremptory challenges constitutes state action.67

When a public official acts within the scope of his duties, state action is clearly established.68 Conversely, wholly private activity taken for private purposes and without invoking the aid of the State does not come within the scope of the Fourteenth Amendment.69 These two categories of cases are relatively easy to decide.

The more difficult cases, however, involve activity that appears to be primarily private because the actor is a private citizen, such as the defendant in McCollum, but may also be viewed as aided or sanctioned by the State. In such cases, the Court must decide whether or not the State's involvement with the private party is sufficient to subject the activity to equal protection scrutiny. This has not been an easy task; the Court has struggled to create an appropriate standard by which to evaluate such cases.70

Virginia 100 U.S. 303 (1879) through Edmonson demonstrate that race is an improper consideration for choosing jurors, regardless of the type of trial or party exercising the peremptory challenge. McCollum, 405 S.E.2d at 689-93.

67 As in Edmonson, it is the excluded juror's equal protection rights that are at issue in McCollum. There should be little question as to the prosecution's standing to assert the excluded juror's rights under the Court's prior holdings in Powers and Edmonson. See supra notes 57-60 and accompanying text.

68 See, e.g., United States v. Raines, 362 U.S. 17, 25 (1960) ("[E]very state official . . . is bound by the Fourteenth . . . Amendment[.]"); RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW, §16.1, at 157 (1986) ("When a legislature, executive officer, or a court takes some official action against an individual, that action is subjected to review under the Constitution, for the official act of any governmental agency is direct governmental action and therefore subject to the restraints of the Constitution."). But cf. Polk County v. Dodson, 454 U.S. 312 (1981) (holding that a public defender is not a state actor when performing traditional duties as an adversary of the state). Polk County is discussed infra notes 87-103 and accompanying text.

69 Since the decision of this Court in the Civil Rights Cases, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (citation omitted).

70 "[T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This court has never at-
In the area of equal protection jurisprudence, the three principle decisions regarding private parties and state action are the well-known cases of Shelley v. Kraemer, Burton v. Wilmington Parking Authority, and the well-known cases of Shelley v. Kraemer, Burton v. Wilmington Parking Authority, and the well-known cases of Shelley v. Kraemer, Burton v. Wilmington Parking Authority.

Indeed, the Court has formulated several tests for determining when primarily private conduct is attributable to the state. These tests may be characterized as the "nexus" test, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) ("The inquiry must be whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action . . . may be fairly treated as that of the State itself."); the "state compulsion" test, Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970) ("A State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act."); the "public function" test,Marsh v. Alabama, 326 U.S. 501 (1946) (private parties performing public functions are state actors); the "symbiotic relationship" test, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (see infra note 72); and the "state enforcement" test, Shelley v. Kraemer, 334 U.S. 1 (1948) (see infra note 71). The Court has suggested that these various formulations may merely be different ways of performing the same fact bound inquiry. Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982).

71 334 U.S. 1 (1948). The facts of Shelley are well known. A white property owner attempted to sell her property to the Shelleys, a black couple. The property was subject to a restrictive covenant which prohibited occupancy by, or transfer to, people other than whites. Id. at 5. The Kraemers, who owned nearby property subject to these restrictions, brought suit to prevent the sale to the Shelleys. The trial court found for the Shelleys, holding that the covenant was ineffective because it had not been signed by all of the property owners in the area, as intended by the parties. Id. at 6. The Supreme Court of Missouri reversed, holding that the agreement was effective and that none of the Shelleys' constitutional rights had been violated. 198 S.W.2d 679 (Mo. 1946). On appeal to the United States Supreme Court, the Shelleys argued that the enforcement of the covenant by the state courts violated their equal protection rights, deprived them of property without due process of law, and denied them privileges and immunities guaranteed to citizens of the United States. Shelley, 334 U.S. at 7-8.

The primary issue for the Court was whether judicial enforcement of private agreements was sufficient involvement by the state to constitute state action. Id. at 13. The Court had faced challenges to similar agreements twice before, but did not reach the merits of the cases. Corrigan v. Buckley, 271 U.S. 323 (1926) (dismissed for lack of jurisdiction); Hansberry v. Lee, 311 U.S. 32 (1940) (lower court's inappropriate use of doctrine of res judicata violated petitioners' due process rights). The Shelley Court found both of these cases inapplicable. Shelley, 334 U.S. at 8-9.

Turning to the issue in Shelley, the Court first made a lengthy review of cases that held that action by a court is state action. Id. at 14-18. Interestingly, none of the approximately 35 cases held that judicial enforcement of a private agreement is state action. Rather, the cases broke down into two groups: procedurally unfair cases, such as Brown v. Mississippi, 297 U.S. 278 (1936) (conviction obtained by coerced confession); and cases of judicial enforcement of common law rules, such as Cantweell v. Connecticut, 310 U.S. 296 (1940) (conviction of common law crime of breach of the peace violated right to free exercise of religion). Shelley, 334 U.S. at 16-18.

The Court then examined the relationship between the parties to the suit and the action of the state courts. The Court found that the Shelleys were willing purchasers and that the owners were willing sellers. The only thing standing between the buyers and sellers was "the active intervention of the state courts, supported by the full panoply of state power . . . ." Id. at 19. Therefore, enforcement of the covenant violated the Equal
ing Authority,72 and Moose Lodge No. 107 v. Irvis.75 As noted

Protection Clause. Id. at 20. Having found an equal protection violation, the Court did not address the due process or privileges and immunities claims. Id. at 23.

The Shelley Court's holding represents the outer limits of the state action doctrine: "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms." Id. at 20. Indeed, the Court noted that the case was one "in which the States have made available . . . the full coercive power of government . . . ." Id. at 19. So stated, it appears that all cases brought before the bench involve state action, and, therefore, are subject in every way to constitutional limits. At least one commentator has argued this position. William R. Ming, Jr., Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases, 16 U. CHI. L. REV. 203, 234-38 (1949).

Other commentators have tried to identify a limiting principle for Shelley. See, e.g., Louis Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. PA. L. REV. 473 (1962) (Equal protection clause generally prohibits state enforcement of private discrimination, but there is a small area of liberty that the Constitution values more highly than equal protection. In these cases, the state may enforce the discrimination.); Louis H. Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. PA. L. REV. 1, 13 (1959) (State cannot "assist[] a private person in seeing to it that others behave in a fashion which the state could not itself have ordained."). Professor Wechsler has concluded that Shelley does not have a generally applicable principle. Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 31 (1959).

Burton was whether the actions of a party renting space in a city-owned building constituted state action. The city of Wilmington had created the Wilmington Parking Authority to provide parking facilities for the city. Id. at 717. To help defray the cost of the projects, the Authority leased space in its garages. One of the lessees was the Eagle Coffee Shop. Id. at 719. In August 1958, Burton parked his car in one of the Authority's garages and entered the Eagle Coffee Shop, where he was denied service because he was black. Id. at 720.

Burton filed a declaratory judgment action in the Delaware Court of Chancery claiming that his Fourteenth Amendment rights had been violated. That court granted his motion for summary judgment. 150 A.2d 197, 198 (Del. Ch. 1959). The Delaware Supreme Court reversed, holding that Eagle's actions constituted purely private conduct. 157 A.2d 894 (Del. 1960). The court also denied a related state statutory claim. Id. at 902.

On appeal, the Supreme Court first determined that the Delaware court's decision was ultimately based on the finding of private action, not the state statutory claim. Accordingly, the Supreme Court had jurisdiction over the appeal. Burton, 365 U.S. at 721. The Supreme Court's analysis began by stating "that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." Id. at 722. The Court recognized that it could not fashion a precise formula to evaluate the extent of state involvement and that "[only] by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Id. (The Court would continually return to this process. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972).) In performing this "sifting and weighing," the Court noted that the building and land were publicly owned, that the building was dedicated to public use, and upkeep and maintenance were paid for out of public funds, and that the state and Eagle derived mutual benefit from the arrangement. For example, the state gained revenue from Eagle's rent payments, and Eagle's customers had convenient parking in the city garage. Burton, 365 U.S. at 723-24. From these facts, the Court concluded that
above, the holding in *Lugar v. Edmonson Oil Co.* is a synthesis of the Court's earlier equal protection jurisprudence. \(^{74}\) *Lugar* is the standard relied on in *Edmonson*.

Although the general principles enunciated in these cases are applicable to state action questions involving private parties, they are qualified when the alleged state actor is a criminal defense attorney. In *Polk County v. Dodson*, \(^{75}\) the Court held that criminal defense attorneys are not state actors when performing the traditional functions of defense counsel as an adversary of the state. If exercising peremptory challenges is one of these functions, no

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\(^{74}\) See supra note 44.

\(^{75}\) 454 U.S. 312 (1981).
state action would exist when a criminal defendant uses the challenge.\textsuperscript{76} Accordingly, whether or not there is state action in \textit{McCollum} depends upon the application of both \textit{Lugar} and \textit{Polk County}.

1. The \textit{Lugar} Test

In light of \textit{Edmonson v. Leesville Concrete Co.}, there is little doubt that a criminal defendant's discriminatory use of peremptory challenges satisfies the two-prong state action test of \textit{Lugar v. Edmonson Oil Co.} When this test is applied to \textit{McCollum}'s facts, a finding of state action should follow.

The first prong of the \textit{Lugar} test requires that the alleged deprivation of a right "must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible."\textsuperscript{77} As in \textit{Edmonson}, "[t]here can be no question that the first part of the \textit{Lugar} inquiry is satisfied here."\textsuperscript{78} Peremptory challenges are statutorily or judicially created devices. Without the government's sanction, through the legislature or the judiciary, there would be no peremptory challenges.\textsuperscript{79}

The second prong of the \textit{Lugar} test requires that "the party charged with the deprivation must be a person who may fairly be said to be a state actor."\textsuperscript{80} Just as in \textit{Edmonson}, more attention must be given to this second prong. In \textit{Edmonson}, the Court identified three factors that shed light on whether an individual is a state actor under \textit{Lugar}'s second prong: "the extent to which the actor relies on governmental assistance and benefits, whether the

\textsuperscript{76} \textit{Polk County} was a § 1983 action brought by a criminal defendant against his court appointed attorney. The defendant claimed that the public defender's failure to pursue an appeal violated several of his constitutional rights. Because the accused was suing his attorney, the Supreme Court necessarily focused on the attorney's status as a state actor. When the prosecution claims that state action results from the action of a criminal defense attorney on behalf of his client, a finding that the attorney is not a state actor will necessarily apply to the defendant as well. Logically, the rationale of \textit{Polk County} would have to apply to pro se defendants as well. \textit{Polk County} is discussed infra notes 87-103 and accompanying text.

\textsuperscript{77} \textit{Lugar}, 457 U.S. at 937.

\textsuperscript{78} \textit{Edmonson}, 111 S. Ct. at 2083.

\textsuperscript{79} "Peremptory 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 otherwise would satisfy the requirements for service on the petit jury." \textit{Id.}

\textsuperscript{80} \textit{Lugar}, 457 U.S. at 937.
actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority. 81

Clearly, the criminal defendant relies on the government's assistance in exercising peremptory challenges; throughout every stage of the jury selection process, the government is inextricably involved through its oversight and enforcement. 82

As to the second factor, the criminal defendant's use of peremptory challenges assists the government in performing one of its traditional functions. The Court in Edmonson noted that "[t]he peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor." 83 By using peremptory challenges to assist in choosing the jury, the criminal defendant is performing a governmental function, delegated to it by the State. 84

81 Edmonson, 111 S. Ct. at 2083 (citations omitted).
82 In Edmonson, the Court stated:

As we have outlined here, a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the "final and practical denial" of the excluded individual's opportunity to serve on the petit jury.

Id. at 2084-85 (quoting Virginia v. Rives, 100 U.S. 313, 322 (1880)).
83 Id. at 2085.
84 "If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race-neutrality." Id.

Justice O'Connor takes issue with the majority on this point. Justice O'Connor claims that "[t]he Court errs . . . when it concludes that the exercise of a peremptory challenge is a traditional government function." Id. at 2092 (O'Connor, J., dissenting). The problem with Justice O'Connor's conclusion is that it reads the majority opinion too narrowly. The majority did not determine that exercising peremptory challenges is a traditional government function; rather, it concluded that providing an impartial jury is a traditional function of the government. Id. at 2085. Accordingly, actions taken through the process chosen by the government to perform that function are state action.

Even if Justice O'Connor's position in Edmonson is accepted, her own dissent shows that a different result would be reached in McCollum. In West v. Atkins, 487 U.S. 42 (1988), the Court held that a private physician hired by the State to provide medical care to prisoners was a state actor. (West is discussed infra notes 95-103 and accompanying text.) In her dissent in Edmonson, Justice O'Connor distinguished West because in that case "the State hired the doctor in order to fulfill the State's constitutional obligation to attend to the necessary medical care of prison inmates. The doctor's relation to the State, and the State's responsibility, went beyond mere performance of an important job." Edmonson, 111 S.Ct. at 2093 (O'Connor, J., dissenting) (citations omitted). In civil cases, such as Edmonson, states do not have a constitutional obligation to provide a jury trial. Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916). However, both the states
Finally, as to the third factor, the injury caused when a criminal defendant exercises a peremptory challenge in a discriminatory manner is certainly aggravated by the government's involvement. The discrimination occurs in the State's courtroom in the presence of the State's judge. As a result, the discrimination may be deemed to occur with the tacit approval of the State when the judge, who oversees the administration of the challenges, eventually dismisses the challenged juror. Such "discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there."^85

Thus, as in Edmonson, the second prong of the Lugar test is satisfied by the facts of McCollum as well. The only fact that might distinguish McCollum from Edmonson, in terms of the state action analysis, is that in McCollum the criminal defendant is the direct adversary of the state's prosecutor. In Polk County v. Dodson,^86 the Supreme Court held that criminal defense attorneys are not state actors when performing the traditional functions of counsel as an adversary of the state. The next section of this Note discusses Polk County and applies it to McCollum.

2. Polk County

The issue in Polk County was whether a public defender, when representing an indigent defendant, acts "under color of state law,"^87 as required to bring an action under section 1983. In Polk County, a public defender was appointed to represent Dodson in an appeal of a robbery conviction. After determining that the

and the federal government have an obligation to provide an impartial jury in a criminal trial. See supra note 5. Accordingly, when the State utilizes private parties to fulfill its constitutional obligation to provide an impartial jury in a criminal case, state action would follow. Under Justice O'Connor's reading of West, the same result should follow in federal civil cases, where the government does have a constitutional obligation to provide a jury trial. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

^85 Edmonson, 111 S.Ct. at 2087. The Court continued: "To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin." Id.


^87 Although Polk County determined whether or not the public defender's actions were under color of state law, as opposed to whether or not they constituted state action, the Court has subsequently held that the two inquiries are the same, see, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982), and has specifically extended Polk County's reasoning to state action cases. Blum v. Yaretsky, 457 U.S. 991, 1009 n.20 (1982) ("[I]t is clear that the reasoning employed in Polk County is equally applicable to 'state action' cases . . . .").
appeal was frivolous, the public defender moved for and was
granted permission to withdraw from the case. Dodson’s complaint
claimed that the public defender’s actions denied him due process
of law, deprived him of his right to counsel, and subjected him to
cruel and unusual punishment. The district court dismissed
Dodson’s claims, holding that a public defender is obligated to be
loyal to his client; therefore, a public defender cannot be an
agent of the state. The Court of Appeals for the Eighth Circuit
reversed, holding that because the public defender was a creature
of the state, she was a state actor.

The Supreme Court reversed, finding that a public defender,
like any other attorney, functions as an adversary of the State in a
criminal trial. The only difference is that a public defender re-
ceives her payment from the State. Thus, the Court could not
find any color of state law in the public defender’s adversarial
functions.

Despite this seemingly broad holding, the Court was careful to
emphasize that public defenders could, under appropriate circum-
stances, act under color of state law. The Court left open the
possibility that a public defender “would act under color of state
law while performing certain administrative and possibly investiga-
tive functions.” The Court’s narrow holding in Polk County, was
“that a public defender does not act under color of state law
when performing a lawyer’s traditional functions as counsel to a
defendant in a criminal proceeding.”

89 628 F.2d 1104 (8th Cir. 1980).
90 Polk County, 454 U.S. at 320.
91 Id. at 318. However, the Court did not consider the employment relationship
irrelevant. Rather, it determined that public defenders are not subject to the same ad-
ministrative control as other state employees, id. at 321, and that the states have a constitu-
tional obligation to respect the professional independence of public defenders. Id. at
321-22. These factors differentiate public defenders from other state employees.
92 Id. at 320.
93 Id. at 325. See, e.g., Branti v. Finkel, 445 U.S. 507 (1980) (public defender acts
under color of state law when making hiring and firing decisions for the state); Tower v.
Glover, 467 U.S. 914 (1984) (allegation that public defender conspired with state officials
to secure the conviction of defendant adequately states a claim of action under color of
state law).
94 Polk County, 454 U.S. at 325. See also Tower, 467 U.S. at 920. ("[A]ppointed coun-
sel in a state criminal prosecution . . . does not act 'under color of' state law in the
normal course of conducting the defense.") (construing Polk County). Justice Blackmun
dissented in Polk County, arguing that the public defender’s position as a state employee
and her exercise of power possessed by virtue of state law meant that her actions were
under color of state law as defined by United States v. Classic, 313 U.S. 299 (1941). Polk
The Court's most extensive explanation of Polk County is found in West v. Atkins. West, a prisoner in the state of North Carolina, brought a section 1983 action against Atkins, a private doctor who provided medical care to prisoners under a contract with the state, alleging that Atkins was "deliberately indifferent to his serious medical needs," and that this indifference amounted to cruel and unusual punishment.

In affirming the district court's dismissal, the Fourth Circuit, sitting en banc, concluded that

County, 454 U.S. at 329 (Blackmun, J., dissenting).

Recently, the Court found an adversarial situation outside of the criminal defense attorney context that prohibited a finding of state action. In National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988), Jerry Tarkanian claimed that he was suspended from his job as head basketball coach of the University of Nevada, Las Vegas ("UNLV") "Running Rebels" in violation of his Fourteenth Amendment due process rights. After a lengthy investigation by the NCAA, the UNLV basketball team was put on two year's probation. The NCAA further ordered UNLV "to show cause why the NCAA should not impose further penalties unless UNLV severed all ties during the probation between its intercollegiate athletic program and Tarkanian." Id. at 181.

The decisive issue was whether the activities of the NCAA constituted state action. Id. at 181-82. The NCAA is an association of universities and colleges that establishes rules and legislation governing intercollegiate athletics. Its policies are made by the member institutions, many of which, including UNLV, are state schools. Id. at 183.

Tarkanian claimed, inter alia, that the NCAA's activities constituted state action "because they resulted from a delegation of power by UNLV," id. at 195, and because "UNLV and the NCAA were 'joint participants' in state action." Id. at 196 n.16. The Court rejected both of these arguments. The Court first noted that the university did not delegate any power to the NCAA to take action against individual employees of the university; the NCAA could only impose sanctions on the university itself. Id. at 195-96. Additionally, because the parties were in an adversarial relationship, UNLV's acquiescence in the NCAA's decision could not be explained by a theory of delegated powers or joint participation:

UNLV used its best efforts to retain its winning coach—a goal diametrically opposed to the NCAA's interest in ascertaining the truth of its investigators' reports . . . [T]he NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth . . . just as a state-compensated public defender acts in a private capacity when he or she represents a private client in a conflict against the State, the NCAA is properly viewed as a private actor at odds with the State when it represents the interest of its entire membership in an investigation of one public university.

Id. at 196 (citing Polk County v. Dodson, 454 U.S. 312, 320 (1981)). The Court also found that "the state and private parties' relevant interests do not coincide . . . rather, they have clashed throughout the investigation . . . UNLV and the NCAA were antagonists, not joint participants, and the NCAA may not be deemed a state actor on this ground." Id. n.16. Accordingly, the Nevada Supreme Court's holding in favor of Tarkanian was reversed. Id. at 199.

96 Id. at 45.
97 A panel of the Fourth Circuit originally vacated the district court opinion and
the clear and practicable principle enunciated by the Supreme Court [in Polk County] ... is that a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where ... the professional is a full-time employee of the state.¹⁸

Holding that Dr. Atkins was acting under color of state law, the Supreme Court criticized the Fourth Circuit’s reading of Polk County. In the Court’s view, the Fourth Circuit did not perceive the adversarial role the defense lawyer plays in our criminal justice system as the decisive factor in the Polk County decision. The court, instead, appears to have misread Polk County as establishing the general principle that professionals do not act under color of state law when they act in their professional capacities.⁹⁹

The Polk County holding was not based on the fact that a public defender is a professional. Rather, Polk County “turned on the particular professional obligation of the criminal defense attorney to be an adversary of the State ....”¹⁰⁰ Accordingly, professionals are not per se immune from section 1983 liability.¹⁰¹

As discussed above, under Lugar and Edmonson, a finding of state action should result from the facts of McCollum.¹⁰² This result, however, seems in tension with the proper understanding of Polk County in light of West: that criminal defense attorneys are not state actors when performing their traditional functions as an adversary of the state.¹⁰³ Accordingly, the proper inquiry is whether a criminal defense attorney’s use of peremptory challenges is one of his traditional functions as an adversary of the state.

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remanded to determine whether the record could support a finding of deliberate indifference to a serious medical need. 799 F.2d 923 (1986).
¹⁰⁸ 815 F.2d 993, 995 (4th Cir. 1987) (en banc).
¹⁰⁹ West, 487 U.S. at 51.
¹¹⁰ Id. at 52 (emphasis added). However, the Court did not consider the fact that a person is a professional to be wholly irrelevant. “Where the issue is whether a private party is engaged in activity that constitutes state action, it may be relevant that the challenged activity turned on judgments controlled by professional standards, where those standards are not established by the State.” Id. n.10.
¹¹¹ Id. at 52. Applying this analysis to Atkins, the Court found that he was acting under color of state law when performing his duties under the contract. These actions were fairly attributable to the state. Id. at 54.
¹¹² See supra part III.A.1.
¹¹³ See supra notes 87-101 and accompanying text.
Several reasons have been articulated justifying peremptory challenges. One of these is that the peremptory challenge gives the accused a sense of fairness by allowing him to strike jurors that he thinks will be biased against him, even if he does not have a rational reason for this belief.\textsuperscript{104} Another is that it allows the accused to remove a potential juror who became hostile during voir dire, but could not be removed for cause.\textsuperscript{105} A third is that it allows removal of potential jurors who counsel thinks are biased for a reason that would not suffice to remove them for cause.\textsuperscript{106} The peremptory also gives counsel an opportunity to correct a judge's erroneous refusal to strike a juror for cause.\textsuperscript{107} All of these rationales are various elements of the primary reason for granting peremptory challenges: they are devices used to help empanel an impartial jury. Indeed, one commentator claims that, "[i]n the search for an impartial jury, the peremptory challenge is one of the attorney's most valuable tools."\textsuperscript{108} This view is widely shared.\textsuperscript{109}

The Supreme Court has also long recognized the importance of peremptory challenges in securing an impartial jury. In \textit{Hayes v. Missouri}, the Court stated: "Experience has shown that one of the most effective means to free the jury-box from men unfit to be

\textsuperscript{104} WILlIAM BLACKSTONE, COMMENTARIES *353; GOBERT & JORDAN, supra note 1, § 8.01, at 271; Barbara A. Babcock, \textit{Voir Dire: Preserving "Its Wonderful Power"}, 27 STAN. L. REV. 545, 552 (1975).

\textsuperscript{105} BLACKSTONE, supra note 104, at *353; Babcock, supra note 104, at 554-55.

\textsuperscript{106} GOBERT & JORDAN, supra note 1, § 8.01, at 271; Comment, \textit{Limiting the Peremptory Challenge: Representation of Groups on Petit Juries}, 86 YALE L.J. 1715, 1718 (1977).

\textsuperscript{107} GOBERT & JORDAN, supra note 1, § 8.01, at 271. In some situations, parties may be required to use their peremptories for this purpose. In \textit{Ross v. Oklahoma}, 487 U.S. 81 (1988), the trial judge erroneously refused to remove a juror for cause. As a result, the defendant had to use one of his peremptory challenges. He was eventually sentenced to death. \textit{Id.} at 83. The Supreme Court held that the defendant's Sixth Amendment rights were not violated because he did not make a challenge for cause of any of the jurors who were eventually seated. \textit{Id.} Furthermore, the Court recognized that peremptory challenges are not a constitutional right. Accordingly, the state can regulate their use. \textit{Id.} at 89. Under Oklahoma law, parties were expected to use peremptories to correct erroneous refusals to remove for cause. \textit{Id.} at 89-91.

\textsuperscript{108} GOBERT & JORDAN, supra note 1, § 8.13, at 309.

\textsuperscript{109} See, e.g., Babcock, supra note 104, at 550-51 ("Both [challenges for cause and peremptory challenges] are part of the civil and criminal procedure of every jurisdiction . . . for meeting the constitutional requirement that juries be impartial.") (footnotes omitted); Gilda Mariani, Note, \textit{Peremptory Challenges—Divining Rod for a Sympathetic Jury?}, 21 CATH. LAW. 56 (1975); Comment, supra note 106, at 1719 (Use of the two kinds of challenges "is expected to eliminate from the jury both extremes of bias and thus to result in a tribunal as impartial as could be drawn from the available venire.").
there is the exercise of the peremptory challenge."110 In Swain v. Alabama, the Court claimed a dual function for the peremptory challenge: "to eliminate extremes of partiality on both sides [and] to assure the parties that the jurors . . . will decide on the basis of the evidence placed before them, and not otherwise."111 And in Edmonson, the Court explicitly recognized that the "sole purpose [of peremptory challenges] is to permit litigants to assist the government in the selection of an impartial trier of fact."112

Given the purpose of the peremptory challenge, it is clear that Polk County's reasoning does not apply to their use by criminal defendants and their attorneys. The Sixth Amendment guarantees the accused a right to trial by an impartial jury; the government has an obligation to provide such a jury. The purpose of providing peremptory challenges is to assist the government in its obligation to empanel an impartial jury. In creating its jury selection procedures and granting parties the right to peremptory challenges, the government is delegating the power to choose "a quintessential governmental body,"113 the jury. As noted by the Court in Edmonson: "If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race-neutrality."114

Indeed, the Court has previously recognized that a public defender is a state actor when making employment decisions for the state. In Branti v. Finkel,115 the Court held that a Democratic public defender violated the First Amendment rights of assistant public defenders when he fired them because they were Republicans. Implicit in this holding is that the public defender was a state actor. The Polk County Court cited Branti as an example of a situation in which a public defender is a state actor.116 Because peremptory challenges are part of the process by which the State chooses its employees, their exercise is not a traditional function of defense counsel as an adversary of the state.

110 120 U.S. 68, 70 (1887).
113 Id. at 2085.
114 Id.
Justice O'Connor's dissent in *Edmonson v. Leesville Concrete Co.* misreads both *Polk County* and the majority opinion in *Edmonson*. Justice O'Connor claims that the majority wishes to limit the scope of [*Polk County*] to the actions of public defenders in an adversarial relationship with the government. At a minimum then, the Court must concede that [*Polk County*] stands for the proposition that a criminal defense attorney is not a state actor when using peremptory strikes on behalf of a client . . . .

This conclusion rests on Justice O'Connor's determination that the use of a peremptory challenge is an adversarial function because "parties use these strikes to further their own perceived interests, not as an aid to the government's process of jury selection." The obvious implication of Justice O'Connor's conclusion is that regardless of the reason for giving parties peremptory challenges, the parties use them to seat a jury slanted in their favor, not an impartial one. Even if this is true, Justice O'Connor's reliance on it is misplaced. The fact that defense counsel use peremptory challenges to strike unsympathetic jurors does not make their use the kind of traditional adversarial function envisioned by *Polk County*. As examples of traditional adversarial func-

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117 It is unclear why Justice O'Connor believes the majority sought to limit *Polk County* to public defenders. The second sentence of the quoted material implies that she recognizes *Polk County*'s applicability to both private and court appointed defense counsel. Additionally, the majority does not give any indication that it would limit *Polk County* to criminal defense attorneys, thereby making it inapplicable to cases such as National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988). See supra note 94.

118 *Edmonson*, 111 S. Ct. at 2094.

119 Id. Justice O'Connor also notes that "a lawyer, when representing a private client, cannot at the same time represent the government." Id. Although this is undoubtedly true, it misses the point. The fact that the attorney cannot represent both the government and his client does not mean that the two cannot be working for the same goal, an impartial jury.

120 The Court has consistently refused to assume improper motives in the use of peremptory challenges. In *Swain v. Alabama* the Court stated that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury . . . ." *Swain v. Alabama*, 380 U.S. 202, 222 (1965). The Court reaffirmed this point in *Batson v. Kentucky*, stating that it had "no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes." *Batson v. Kentucky*, 476 U.S. 79, 99 n.22 (1986). In response to Justice Marshall's call for abolishing peremptory challenges, *id.* at 103 (Marshall, J., concurring), the Court claimed that the fear that prosecutors and judges would not perform their constitutional duties did not justify abolishing a practice "which long has served the selection of an impartial jury . . . ." *Id.* at 99 n.22. The same presumption of good faith must logically be extended to the accused.
tions, the Polk County Court noted that the defense attorney's job is "to enter 'not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants." Unlike participation in the jury selection process, none of these tasks can be considered functions of the State delegated to the parties; they go to the heart of our adversarial system. In contrast, peremptory challenges could be eliminated without diminishing the adversarial nature of our system in the least.

Because a criminal defense attorney's use of peremptory challenges is not a traditional function of the attorney as an adversary of the State, but rather is a delegated function of government, Polk County should not negate a finding of state action in McCollum.123

122 For example, it is difficult to imagine an adversarial system in which the State is obligated to object to its own evidence and has merely delegated the duty to a private party.
123 The Ninth Circuit Court of Appeals recently held that a criminal defendant's gender-based use of peremptory challenges violates the equal protection principles of the Fifth Amendment. In United States v. DeGross, 1992 U.S. App. LEXIS 5645 (9th Cir. Apr. 2, 1992) (en banc), the Ninth Circuit held that the United States Supreme Court's decision in Edmonson v. Leesville Concrete Co., "settled the issue" of whether equal protection principles apply to a criminal defendant's use of peremptory challenges. Id. at 16. It held that "because the evils of discriminatory peremptory strikes result from the misuse of peremptory challenges, regardless of which party strikes the venireperson, the Fifth Amendment similarly limits a federal criminal defendant's peremptory strikes." Id.

As to the potential conflict because of the criminal defendant's role as an adversary of the state, the court held:

We find this conflict to be conceptual only. The "state" which the defendant opposes is not the same state actor whose powers he invokes in exercising a peremptory challenge. When exercising a peremptory challenge, the defendant has become a state actor for that limited purpose. If we saw no distinction between the state as the prosecutor and the state as the administrator of the system, we would always see a conflict in criminal cases between the courts and the prosecutor. But we do not see such a problem. While both are state actors, they are distinct entities with distinct and different roles.

The defendant exercising a peremptory challenge invokes the authority of the state as justice administrator. In so doing, the defendant becomes a state actor. But the defendant is still distinct from the state actor that compelled his presence in court and which opposes him.

Id. at 22-23.

Thus, the court found that while the defendant's interests were at odds with the state as represented by the prosecutor, they were the same as the state's in its role as administrator of the trial. Id. at 22-24.
B. Would Restricting the Use of Peremptory Challenges Impede the Rights of the Accused?

McCollum's criminal context also arguably implicates a new set of issues, not considered in Batson and Edmonson. Traditionally, criminal defendants have been accorded heightened protection in the American legal system, and any measures that might impede the criminal defendant's ability to wage an effective defense have been regarded suspiciously. It might be argued that restricting the criminal defendant's use of peremptory challenges would have such an effect.

Historically, criminal defendants have been given the right to exercise peremptory challenges for any reason they see fit. Indeed, the peremptory challenge has long been regarded as a means to insure that an accused is afforded a fair trial by jury. Blackstone viewed the peremptory challenge as "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous." The criminal defendant's right to peremptory challenges has been protected since the First Congress.

The peremptory challenge, then, has come to be viewed by many as crucial to the accused's defense. The importance of this device, however, must be kept in perspective. While Congress thought the peremptory challenge important enough to the criminal defendant to codify the right, the criminal defendant has never possessed a constitutional right to exercise these challenges. This point was emphasized by the Edmonson court, which noted: "While we have recognized the value of peremptory challenges, . . . particularly in the criminal context, there is no constitutional obligation to allow them." As a result, these challenges

124 "American public law is deliberately weighted in favor of defendants accused of crime. It gives the accused very many assurances that he will be treated fairly." D. FELLMAN, THE DEFENDANT'S RIGHTS TODAY 3 (1976). See, e.g., Coy v. Iowa, 487 U.S. 1012 (1988) (Iowa statute that allowed placement of a screen between child victim of sexual assault and the accused violated the Confrontation Clause of the Sixth Amendment, even though the accused could see the child, because the child did not have to confront the accused face-to-face while testifying); Gideon v. Wainwright, 372 U.S. 335 (1963) (Under Florida law, a court could only appoint counsel to an indigent defendant in capital cases. The Court held that this violates the accused's Sixth Amendment right to representation by counsel.).


126 BLACKSTONE, supra note 104, at *353.

127 See supra note 1.

128 Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2083 (1991) (citation omit-
are subject to a wide variety of regulation and are obviously subject to scrutiny under the Equal Protection Clause.

It has been asserted that limiting a criminal defendant's use of peremptory challenges might infringe upon the defendant's Sixth Amendment rights, including the right to an impartial jury and the right to effective assistance of counsel. Neither assertion appears very persuasive, however, especially in light of the resultant violation of a juror's equal protection rights.

One of the notions underlying the Court's opinion in Batson v. Kentucky was that one may not assume that a potential juror will be partial to a member of his own race. Thus, given the invalidity of the assumption that members of a certain race are likely to favor members of their race, restricting a defendant's right to exercise peremptory challenges for solely racial reasons will not affect the defendant's Sixth Amendment right to an impartial jury. In seeking to seat an impartial jury, the defendant can still strike a juror for any reason or no reason at all, as long as the strike is not racially-motivated.

The other Sixth Amendment argument against limiting the defendant's use of peremptory challenges is that requiring defense counsel to provide a racially neutral explanation for some peremptory challenges "would at times call for the disclosure of communications from the defendant to counsel . . . ." Thus, it is argued, the defendant's Sixth Amendment right to effective assistance of counsel would be violated since this would chill attorney-client communications and could even undermine the client's confidence in counsel.

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130 See Goldwasser, supra note 125, at 831-33.

131 *Batson*, 476 U.S. at 97 ("[T]he Equal Protection Clause . . . 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.").

132 Indeed, the Supreme Court has stated: "The right [to utilize peremptory challenges] is in the nature of a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guaranties of 'an impartial jury' and a fair trial." Frazier v. United States, 335 U.S. 497, 505 n.11 (1948) (quoting Stilson v. United States, 250 U.S. 583, 586 (1919)).

133 See Goldwasser, supra note 125, at 831-32.

134 Id. at 833.
This also seems a tenuous argument. Effective assistance of counsel certainly does not include the right to exclude jurors on the basis of racial stereotypes. In addition, the likelihood that requiring defense counsel to provide a racially neutral explanation for the use of some peremptory challenges would in any way impair defense counsel's representation of a client seems almost too remote to consider. Counsel would not be required to divulge trial strategies or even attorney-client communications, but merely to provide a justifiable reason for striking a juror. Indeed, this explanation need not even rise to the level that counsel is regularly required to meet when seeking to challenge a juror for cause.\textsuperscript{135}

Denying the ability to exercise peremptory challenges in a discriminatory manner has minimal, if any, Sixth Amendment implications. If the defendant's Sixth Amendment rights are implicated at all, this infringement is minor relative to the clear violation of the excluded juror's Fourteenth Amendment equal protection rights.

IV. CONCLUSION

In \textit{Georgia v. McCollum}, the Supreme Court will resolve the last major issue remaining in the line of cases that began with \textit{Swain v. Alabama}. While this case presents a rather unique state action question, the Court should rule that the Equal Protection Clause prohibits a criminal defendant from exercising peremptory challenges on the basis of race. The Court's previous decisions in \textit{Lugar v. Edmonson Oil Co.} and \textit{Edmonson v. Leesville Concrete Co.} provide the relevant framework for a finding of state action.\textsuperscript{136} And, while \textit{Polk County v. Dodson} initially appears to mandate a

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\textsuperscript{135} See \textit{Batson}, 476 U.S. at 97. The \textit{Batson} court explained: "Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." \textit{Id}.

\textsuperscript{136} See supra notes 63-87 and accompanying text.
different conclusion, a proper reading of the narrow holding in *Polk County* reveals otherwise.\(^{137}\) Finally, although it may be argued that such a holding in *McCollum* would infringe upon a criminal defendant's Sixth Amendment rights, these arguments ultimately prove tenuous, especially in light of the clear equal protection violation.\(^{138}\)

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