Tulsa Law Review

Volume 27 | Number 2

Winter 1991

Resting in Mid-Air, the Supreme Court Strikes the Traditional Peremptory Challenge and Creates a New Creature, the Challenge for Semi-Cause: Edmonson v. Leesville Concrete Company

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RESTING IN MID-AIR, THE SUPREME COURT STRIKES THE TRADITIONAL PEREMPTORY CHALLENGE AND CREATES A NEW CREATURE, THE CHALLENGE FOR SEMI-CAUSE: *EDMONSON v. LEESVILLE CONCRETE COMPANY*

I. INTRODUCTION

For every lawyer who believes that "most cases are won or lost in voir dire,"[1] the peremptory challenge is an essential tool.[2] Traditionally, this challenge or "strike" allowed each side to eliminate jury panel members without cause or explanation. The skillful use of the peremptory challenge by both sides contributed to the selection of fairer, more impartial petit juries. In *Edmonson v. Leesville Concrete Co.*,[3] the Supreme Court redefined and remade the peremptory challenge. After *Edmonson*, the peremptory challenge is no longer truly peremptory. It is, in fact, "a challenge for semi-cause."[4]

To create this new animal, the United States Supreme Court held that whenever *any* litigant, in *any* action, criminal or civil, exercises a peremptory challenge, and the trial judge gives effect to that challenge by excusing the stricken juror, the litigant's act may be imputed to the state. Because the state is deemed to have acted whenever a peremptory challenge is exercised, *all* litigants, whether civil or criminal, carry the constitutional burdens of state actor status, and may be challenged if a peremptory challenge is exercised in a facially racial manner. Such an exercise, the Court holds, violates the equal protection component of the

1. Richard "Racehorse" Haynes, Speech at Mississippi College School of Law (April 16, 1985) (discussing the role of the jury in the American legal system).

2. The peremptory challenge is especially helpful in two situations. First, it may be held in reserve for those jurors who have been challenged unsuccessfully for cause, on the premise that there will be residual hostility on the part of the interrogated juror. The second use is basically a "seat of the pants" exercise where each side eliminates jurors whom it thinks will be inclined to favor the opponent. This seat of the pants strike is often made on the belief that if a juror belongs to a particular group, he or she will be predisposed to act like other members of that group. *See generally* Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545-55 (1975).

3. 111 S. Ct. 2077 (1991).

4. Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1317 (5th Cir. 1988) (Gee, J., dissenting), *vacated*, 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991).

Fifth Amendment's due process clause.[5] This tortured attempt to eradicate racism from the courthouse is unrealistic at best. At worst, it constitutes faddish tinkering with the jury trial itself and may lead to the abolition of the peremptory challenge altogether.

II. STATEMENT OF THE CASE

A. *Facts of the Case*

Petitioner Thaddeus Edmonson, a black man, was injured at Fort Polk, Louisiana on June 18, 1984, while working within the course and scope of his employment for Tanner Heavy Equipment Co.[6] Edmonson brought a negligence action against Leesville Concrete Co., owner of a cement truck which pinned Edmonson between the truck and another trailing piece of road equipment.[7]

The case came to trial on July 27, 1987, and after voir dire each side exercised three peremptory strikes. Two of the three jurors struck by the defendant were black.[8] All of the jurors struck by Edmonson were white.[9] One black juror was seated on the petit jury.[10] The plaintiff's lawyer asked the judge to require defense counsel to articulate a race-neutral reason for striking the two black jurors pursuant to the rule in *Batson v. Kentucky*.[11] After reviewing the law, the trial judge denied plaintiff's request and ruled that *Batson* did not apply to civil cases.[12]

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5. The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation.

U.S. CONST. amend. V. *See also* Bolling v. Sharpe, 347 U.S. 497 (1954).

6. *Edmonson*, 111 S. Ct. at 2080-81; *See also* Brief for Respondent at 2, *Edmonson* (No. 89-7743).

7. *Edmonson*, 111 S. Ct. at 2080-81.

8. *Id.*

9. *Id.*

10. Edmonson v. Leesville Concrete Co., 895 F.2d 218, 219 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2077 (1991).

11. *Id.* In *Batson*, the United State Supreme Court held that a criminal defendant establishes a prima facie case of purposeful discrimination when he proves: (1) he is a member of a cognizable racial group; (2) the prosecutor has used peremptory challenges to strike members of the defendant's race; and (3) the facts surrounding the exercise raise an inference that the prosecutor used the peremptory challenges to exclude members of the defendant's race on racial grounds, from the petit jury. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

12. *Edmonson*, 111 S. Ct. at 2081. *See also* Joint Appendix at 52, *Edmonson* (No. 89-7743) (wherein Judge Earl E. Veron was quoted: "I have read the *Batson* case and I don't, I am unable by

The trial judge also found no discrimination in the selection of the petit jury and seated the jury as originally selected.[13] Following a trial on the merits, Edmonson was awarded $90,000.[14]

B. *Lower Court Disposition and Reasoning*

Edmonson appealed the pretrial ruling denying the application of *Batson* to civil actions. A panel of the Fifth Circuit Court of Appeals held for Edmonson by a two to one majority and extended the rule in *Batson* to civil cases.[15] Writing for the panel, Judge Rubin reasoned that the case turned on whether the Fifth Amendment[16] applied to the exercise of a peremptory challenge by a private litigant in a civil action or whether the exercise was a private action not reached by the Constitution.[17]

Judge Rubin began with the proposition that no precise formula exists for determining state action.[18] After this disclaimer, the court proceeded to search for significant involvement by the government in the exercise of peremptory strikes by private parties.[19] To determine significant involvement, the court applied the test for state action as formulated in *Lugar v. Edmondson Oil Co.*[20]

The *Lugar* test consists of two prongs. Courts must first ask whether the alleged deprivation is caused by the exercise of a right or privilege having its source in state authority.[21] Next, courts applying *Lugar* must ask whether the party in question may be appropriately characterized as a state actor.[22] The Fifth Circuit panel in *Edmonson* had little trouble finding that the exercise of a peremptory challenge is a right or privilege having its source in state authority.[23] The more difficult second prong was also met by the joint participation of lawyer and judge in exercising

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any stretch of the imagination to stretch the *Batson* case to apply to a civil case . . . . The court finds there is no discrimination, no violation of the law in the selection procedure.").

13. Joint Appendix at 52, *Edmonson* (No. 89-7743).

14. *Edmonson*, 111 S. Ct. at 2081.

15. Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1313 (5th Cir. 1988), *vacated*, 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991).

16. *See supra* note 5.

17. *Edmonson*, 860 F.2d at 1310.

18. *Id.* at 1311 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).

19. *Id.* (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967)). *See also* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

20. 457 U.S. 922 (1982).

21. *Id.* at 939.

22. *Id.*

23. *Edmonson*, 860 F.2d 1308, 1312 (5th Cir. 1988) (quoting 28 U.S.C. § 1870 (1988) which provides: "In civil cases, each party shall be entitled to three peremptory challenges.").

and then giving effect to the peremptory challenge.[24] After denying that the application of *Batson* to civil cases would effectively convert the peremptory challenge to one for cause,[25] the court remanded the case to determine whether Edmonson could establish a prima facie case of racial discrimination as outlined by *Batson*.

In response to the panel majority, Judge Gee dissented, arguing that no state action could be found in the exercise of a peremptory challenge by a private party,[26] and that the effect of such a ruling would severely impair the usefulness of the peremptory challenge.[27] Judge Gee also disagreed with the majority's inference that striking jurors along ethnic lines in a particular case implies or gives the appearance of derogatory racial views.[28] He observed:

> [I] am unable to avoid the conclusion that first the Supreme Court, with its decision in *Batson*, and now our panel, with today's case, have leapt halfway across a logical chasm and come to rest in midair.
>
> . . . .
>
> What remains after today's holding is not the peremptory challenge which our procedure has known for decades . . . .[29]

Referring to Justice Marshall's concurrence in *Batson*,[30] Judge Gee concluded: "Justice Marshall would dispense with strikes entirely, and perhaps this will be the final outcome. In this much at least he is surely correct, that we must go on or backward; to stay here is to rest content with a strange procedural creature indeed: a challenge for semi-cause . . . ."[31]

On rehearing en banc, the panel opinion was reconsidered and vacated, and the district court's ruling as to the inapplicability of *Batson* affirmed twelve to four.[32] Judge Gee wrote the opinion for the majority in which he tracked his previous dissent. He restated that the exercise of a peremptory challenge along ethnic lines by a private litigant does not

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24. *Id.*

25. *Id.* at 1314-15 (noting that the peremptory challenge can still be exercised for any reason, "however capricious or whimsical, save to violate the Fourteenth Amendment: it may not be exercised to exclude a prospective juror because of race").

26. *Id.* at 1316 (Gee, J., dissenting).

27. *Id.* at 1315 (Gee, J., dissenting).

28. *Id.* at 1316 (Gee, J., dissenting).

29. *Id.* at 1316-17 (Gee, J., dissenting).

30. Batson v. Kentucky, 476 U.S. 79, 102 (1986) (Marshall, J., concurring).

31. *Edmonson.*, 860 F.2d at 1317 (Gee, J., dissenting).

32. Edmonson v. Leesville Concrete Co., 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991).

involve state action or call into question the fairness of the legal system.[33] The United States Supreme Court granted Edmonson's petition for a writ of certiorari to decide whether a private litigant in a civil case must articulate a race-neutral reason for a peremptory challenge when an opponent makes out a prima facie case of racial discrimination.

III. HISTORY OF THE PEREMPTORY CHALLENGE

A. *Early History*

The peremptory challenge has been used for hundreds of years. It was an integral component of criminal jury trials in ancient Rome where the accused and the accuser would each propose one hundred jurors. Each side then exercised fifty strikes, leaving one hundred jurors to try the case.[34] At early common law, the prosecutor was allowed to exercise an unlimited number of peremptory challenges.[35] This right led to "infinite delayes and danger," according to Coke,[36] and was eliminated by statute in 1305.[37] The defendant's right was preserved, however, and was identified by Blackstone as a "provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous."[38]

Although the 1305 statute stripped the prosecutor of his peremptory challenge, an alternative practice developed which enabled prosecutors to shape the petit jury without resorting to a challenge for cause. After 1305, prosecutors were allowed to "stand aside" a juror until the entire panel had been examined and the defendant's strikes used. If the petit jury was not complete at this point in the process, the jurors who had been asked to stand aside were recalled and the prosecutor required to show cause why the recalled jurors should not be seated.[39]

While the peremptory challenge was considered primarily a criminal defendant's tool, the English practice of allowing prosecutors to stand

33. *Id.* at 219.

34. Batson v. Kentucky, 476 U.S. 79, 119 (1986) (Burger, C.J., dissenting) (quoting WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 75 (1852)).

35. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON § 234:156.b [p] (15th ed. 1794), *cited in* Swain v. Alabama, 380 U.S. 202, 213 (1965).

36. *Id.*

37. Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), *reprinted in part in Swain*, 380 U.S. at 213.

38. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 353 (15th ed. 1809), *cited in Swain*, 380 U.S. at 212 n.9.

39. *Swain*, 380 U.S. at 213 n.11. *See also* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 10 n.11 (1990).

aside jurors was continued in some American colonies.[40] In 1790, Congress provided thirty-five peremptory strikes to the citizen accused of treason and twenty strikes to citizens accused of other capital crimes.[41] In 1865, Congress resurrected the prosecutor's right to a peremptory challenge by allowing five strikes against the defendant's twenty in capital cases, and two against the defendant's ten in noncapital felony offenses.[42]

B. *Post Civil War*

After the Civil War, peremptory strikes were widely used to eliminate black men from jury service, not due to any trial-related considerations, but simply because blacks were thought to be unfit to serve on *any* jury.[43] It has been argued by at least one commentator that this past abuse of the peremptory strike marks it as an incident and badge of slavery, and therefore unconstitutional under the Thirteenth Amendment.[44]

C. Strauder v. West Virginia

Strauder v. West Virginia[45] was decided twelve years after ratification of the Fourteenth Amendment to the Constitution.[46] In *Strauder*, the United States Supreme Court held that a West Virginia statute[47]

40. JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 148-49 (1977) (noting South Carolina, Georgia and Pennsylvania permitted the stand aside practice).

41. Act for Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 112 (1790). *See also* Swain v. Alabama, 380 U.S. 202, 214-15 (1965).

42. Act to Protect All Citizens in their Civil and Legal Rights, ch. 86, § 2(v), 13 Stat. 500 (1865).

43. Colbert, *supra* note 39, at 12.

44. *See generally id.* In Strauder v. West Virginia the Court stated:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law . . . .

100 U.S. 303, 308 (1879).

45. 100 U.S. 303 (1879).

46. The Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

47. *Strauder*, 100 U.S. at 305. (quoting 1872-1873 W. Va. Acts 102 which provides in relevant part: "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 herein provided.").

which made black men ineligible for grand or petit jury service was unconstitutional.[48] Although the Court held that no person could be excluded from jury service on account of race, it also warned that the question before the Court was not whether a defendant had a right to a jury composed, in whole or in part, by members of his own race.[49]

D. Swain v. Alabama

In 1965, the Supreme Court reviewed the case of Robert Swain, a nineteen year old black man sentenced to death for the rape of a seventeen year old white girl.[50] No black person had served on a criminal petit jury in Talladega County, Alabama for more than ten years prior to the *Swain* trial, although two blacks served on the grand jury panel of thirty-three that indicted Swain.[51] The *Swain* Court affirmed *Strauder* as the analytical starting point and reiterated that although a black defendant is not entitled to a jury containing other blacks, a state's purposeful or deliberate exclusion of blacks from participation as jurors in the administration of justice violates the equal protection clause.[52] The Court then examined the Alabama system of calling potential jurors, including the "struck-jury system" employed in capital cases.[53] The Supreme Court found the roots of this system in "ancient" common law and noted that the struck jury system was generally fairer to both sides and an efficient way to obtain an impartial jury.[54]

After a lengthy discussion of the origin and purpose of the peremptory challenge,[55] the Court refused to hold that the striking of a black, "in any given case," amounted to a violation of the equal protection clause.[56] The Court did address a broader claim, however, and reasoned that if a prosecutor employed an across the board policy to strike blacks

48. *Id.* at 303.

49. *Id.* at 305.

50. Swain v. Alabama, 380 U.S. 202 (1965).

51. *Id.* at 231.

52. *Id.* at 203-04.

53. *Id.* at 210. In the struck jury system, the parties begin with 100 jurors in a capital case. After excuses and challenges for cause approximately 75 remain. The remaining 75 are then "struck." That is, the defense strikes two and the prosecutor strikes one until the panel is reduced to 12. *Id.*

54. *Id.* at 217-18.

55. *Id.* at 212-18.

56. *Id.* at 224.

in every circumstance, then "giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms,"[57] the purpose of the peremptory challenge would be perverted.[58] This reasoning was later fleshed out to require criminal defendants to show that a prosecutor had systematically used the peremptory challenge to exclude blacks over a period of time.[59] The practical effect of this requirement was crippling, since few defendants could muster a record of past panels and strikes sufficient to show anything more than "irrational but trial-related suspicions and antagonisms."[60] In affirming the Alabama Supreme Court and upholding the conviction, Justice White, writing for the majority, concluded that Swain had failed to meet his burden of proof.[61]

E. Batson v. Kentucky

In April of 1986, the United States Supreme Court lessened the burden of proof required by *Swain*.[62] James Batson was accused of burglary and receipt of stolen property.[63] Following voir dire, the prosecutor struck all four blacks on the jury panel.[64] Defense counsel promptly moved to have the jury discharged, claiming that his client's Sixth[65] and Fourteenth Amendment[66] rights had been violated.[67] The trial judge denied the motion and Batson was convicted by an all-white jury.[68]

The *Batson* Court, like the *Swain* Court, began its analysis with *Strauder*. The Court stated that even though a statute may not be discriminatory on its face, if the procedures implementing the statute operate to exclude persons from the jury panel on the basis of race, the statute

57. *Id.* at 223-24.
58. *Id.* at 224.
59. *Id.* at 227.
60. *Id.* at 224.
61. *Id.* at 226.
62. Batson v. Kentucky, 476 U.S. 79 (1986).
63. *Id.* at 82.
64. *Id.* at 83.
65. The Sixth Amendment guarantees the accused the following rights:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.
66. *See supra* note 46.
67. *Batson*, 476 U.S. at 83.
68. *Id.*

is unconstitutional.[69] The Court then restated that the equal protection clause of the Fourteenth Amendment may not be contravened by the exercise of a right not specified in the Constitution, that is, the peremptory challenge.[70] The significance of *Batson* did not, however, rest in the restatement of old principles.

The real impact of *Batson* came when Justice Powell lifted the crippling burden of proof required under *Swain*,[71] which had been broadly interpreted to mean that a defendant must prove the repeated exclusion of blacks over several trials to make out a prima facie case of discrimination.[72] The Court held that a defendant may establish a prima facie case of racial discrimination solely on the basis of the prosecutor's exercise of strikes at the defendant's trial.[73] Under the *Batson* standard, a defendant need only show membership in a cognizable racial group, that the prosecutor exercised peremptory challenges to exclude members of the defendant's race from the petit jury, and that the circumstances surrounding the exercise of the prosecutor's challenges raise an inference that the strikes were made on the basis of race.[74]

Once a prima facie case is made under *Batson*, the prosecutor must come forward with a race-neutral explanation for the strikes.[75] The prosecutor's explanation need not rise to a level that would justify a challenge for cause,[76] but it must be more than a good faith denial of discrimination or a simple assertion that the excluded juror would be partial to the defendant because of their shared race.[77]

The new evidentiary scheme did not go far enough for Justice Marshall. He argued that the Court's decision would not end racial discrimination in the exercise of peremptory challenges. That goal, according to Marshall, could only be accomplished by eliminating peremptory challenges entirely.[78] In Marshall's view, the new framework could be and would be subverted by the conscious and unconscious racism[79] of prosecutors and judges who would find it difficult to distinguish "seat-of-the-

69. *Id.* at 88.
70. *Id.* at 91.
71. *Id.* at 92-93.
72. *Id.* at 92.
73. *Id.* at 97.
74. *Id.* at 96.
75. *Id.* at 97.
76. *Id.*
77. *Id.*
78. *Id.* at 102-03 (Marshall, J., concurring).
79. *Id.* at 106 (Marshall, J., concurring). *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

pants" instincts[80] from actual racial prejudice in offering and evaluating race-neutral reasons.

Chief Justice Burger and future Chief Justice Rehnquist did not agree with the majority reasoning either, but for different reasons. In dissent, Chief Justice Burger predicted that voir dire would certainly become more difficult as lawyers would require jurors to state their race for the record, which in turn would require continuous monitoring of the panel composition, "present and prospective."[81]

F. Holland *and* Powers

Since *Batson* was decided, the Supreme Court has dealt with several issues left unresolved by the original decision. In *Holland v. Illinois*,[82] the Court was confronted with a white man convicted of rape seeking to have his conviction overturned because blacks were peremptorily stricken from his jury panel. Justice Scalia, joined by Justices White, O'Connor, Kennedy and Chief Justice Rehnquist affirmed the conviction and held that Holland did not have a valid constitutional challenge *based on the Sixth Amendment*, which does not prohibit the prosecutor from striking jurors on the basis of race or on the basis of innumerable other generalized characteristics.[83]

Although the Court refused to incorporate *Batson* into the Sixth Amendment, the narrow holding, coupled with Justice Kennedy's concurring opinion, provided an alternate route for future litigants and foreshadowed the basis on which Edmonson would prevail. Justice Kennedy agreed with Justice Scalia that the fair cross section requirement of the Sixth Amendment was not violated, but Justice Kennedy clearly stated that if Holland had argued that exclusion via a peremptory strike based on race violated the juror's Fourteenth Amendment rights, the case would have been decided five to four in petitioner's favor.[84]

Accordingly, on April 1, 1991, Justice Kennedy, joined by Justices White, Marshall, Blackmun, Stevens, O'Connor and Souter confirmed

80. *Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting).

81. *Id.* at 130 (Burger, C.J., dissenting). *See also* People v. Motton, 704 P.2d 176, 180 (Cal. 1985). Chief Justice Burger criticized the California Supreme Court's attempt in *Motton* to "finesse" the problem of the subjective appearance of an excused juror as belonging to a minority racial group versus the juror's actual and verified descent, and whether it was possible to make a record of "counsel's subjective impressions" on this subject. *Batson*, 476 U.S. at 130 n. 10.

82. 493 U.S. 474 (1990).

83. *Id.* at 487.

84. *Id.* at 488 (Kennedy, J., concurring).

that a criminal defendant need not be the same race as the juror peremptorily excluded to bring a claim under the Fourteenth Amendment's equal protection clause. In *Powers v. Ohio*,[85] the prosecutor used six of his nine peremptory challenges to exclude blacks.[86] Each time a black was struck, Powers objected on *Batson* grounds.[87] Each time, his objection was overruled. Powers was convicted on two counts of aggravated murder, one count of attempted aggravated murder, and firearms violations.[88] Justice Kennedy, writing for the Court, tracked his concurrence in *Holland*, reversed and remanded.[89]

Predictably, Justice Scalia and Chief Justice Rehnquist dissented. Calling the majority's decision a clear departure,[90] the dissenters noted the obvious shift in emphasis from the right of the defendant to the right of the excluded juror.[91] The dissent also noted that the necessity of racial identity between the defendant and the excluded juror had been a major component in the *Batson* analysis, but had been largely ignored by the majority.[92] On a larger plane, the dissent attacked the majority's view that a peremptory strike stigmatized and dishonored the excluded group and inflicted an "injury in fact" on the litigant necessary to assert third party standing.[93] Justice Scalia also denied that the case involved a mere clarification of *Batson*.[94] He wrote:

> The sum and substance of the Court's lengthy analysis is that, since a denial of equal protection to other people occurred in the defendant's trial, though it did not affect the fairness of that trial, the defendant must go free. Even if I agreed that the exercise of peremptory strikes constitutes unlawful discrimination (which I do not), I would not understand why the release of a convicted murderer who has not been harmed by those strikes is an appropriate remedy.

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85. 111 S. Ct. 1364 (1991).
86. *Id.* at 1366.
87. *Id.*
88. *Id.*
89. *See id.*
90. *Id.* at 1377 (Scalia, J., dissenting).
91. *Id.* Justice Scalia notes that "[o]n only two occasions in the past have we considered claims by a criminal defendant of one race that the prosecution had discriminated against prospective jurors of another race." *Id.* at 1376. Those two cases were Holland v. Illinois, 493 U.S. 474 (1990), and Peters v. Kiff, 407 U.S. 493 (1972). In *Peters*, a white defendant alleged denial of due process and equal protection because segregated jury lists effectively excluded blacks from his grand and petit juries. Although Peters prevailed six to three, the case did not produce a majority decision and no justice relied on the petitioner's equal protection claims, preferring his due process claim and "strong statutory policy" contained in 18 U.S.C. § 243 (prohibiting disqualification of jurors on racial grounds). *Powers*, 111 S. Ct. at 1376.
92. *Powers*, 111 S. Ct. at 1376.
93. *Id.* at 1378.
94. *Id.* at 1381.

> . . . Today's supposed blow against racism, while enormously self satisfying, is unmeasured and misdirected. If for any reason the State is unable to reconvict Powers for the double murder at issue here, later victims may pay the price for our extravagance. Even if such a tragedy, in this or any case, never occurs, the prosecutorial efforts devoted to retrials will necessarily be withheld from other endeavors, as will the prosecutorial efforts devoted to meeting the innumerable *Powers* claims that defendants of all races can be relied upon to present—again with the result that crime goes unpunished and criminals go free.[95]

IV. THE SUPREME COURT DISPOSITION OF *EDMONSON V. LEESVILLE CONCRETE CO.*

In *Edmonson*,[96] the issue was no longer whether criminals would go free and crime go unpunished when a challenge was found to be racially motivated. Instead, the Court considered whether race-based peremptory challenges in a *civil* context could be fairly imputed to the state and thereby prohibited. The majority noted from the outset that the Constitution's protections against infringement of individual liberty and equal protection applied in general only to action by the government.[97] To determine whether the acts at issue fell within the sphere of state action, the Court employed the two-prong *Lugar* test and determined that the first prong was easily met.[98] The exclusion resulted from the exercise of a right or privilege having its source in state power.[99]

The second prong required a lengthier analysis. To determine whether Leesville Concrete could be fairly characterized as a state actor, the Court considered three factors: (1) whether the actor relied on state assistance and benefits,[100] (2) whether the actor performed a traditional state function,[101] and (3) whether the injury was aggravated in a unique way by the incident of state authority.[102]

In considering these factors, the Court claimed that without the assistance of the trial judge, the peremptory challenge would simply not be given effect and that Leesville Concrete relied on and benefitted from

95. *Id.* at 1381-82.

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

97. *Id.* at 2082 (citing National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988)).

98. *Id.* at 2083 (citing 28 U.S.C. § 1870).

99. *Id.*

100. *Id.* at 2084.

101. *Id.* at 2085.

102. *Id.* at 2087.

this assistance.[103] Second, the Court held that the selection of jurors was a unique state function delegated in part to private litigants and that any discrimination in the selection was a "direct result of government delegation and participation."[104] Finally, the Court found that the incident of discrimination was aggravated by the simple fact that it occurred and was permitted in a federal courthouse.[105]

Having determined that state action was present, the Court held by a six to three vote that even in civil litigation, race-based exclusion violated the equal protection rights of the challenged jurors.[106] Not surprisingly, Justice Kennedy wrote for the majority, as he had in *Powers*. Once again the majority allowed a petitioner to press the equal protection rights of the excluded juror.[107] To overcome the general rule that a litigant cannot base a claim on the legal rights of third parties,[108] the Court held:

> [A] litigant may raise a claim on behalf of a third party if the 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. All three of these requirements for third party standing were held satisfied in the criminal context, and they are satisfied in the civil context as well.[109]

More specifically, the Court found a concrete redressable injury in the discriminatory exercise of a peremptory challenge.[110] The second requirement for avoiding the general rule was met in voir dire, according to the Court, when the excluded venireperson and the party challenging the exclusion established a bond of trust.[111] The third and final requirement for invoking the exception to the general rule was met by the barriers a challenged juror inevitably confronts in protecting his or her own interests in serving as a juror, including the impracticality of initiating a lawsuit.[112]

According to the Court, the primary value served by the extension

103. *Id.* at 2084.
104. *Id.* at 2087.
105. *Id.* at 2088.
106. *Id.*
107. *Id.*
108. Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991).
109. *Edmonson*, 111 S. Ct. at 2087.
110. *Id.* at 2088.
111. *Id.* at 2087.
112. *Id.* (citing *Powers*, 111 S. Ct. at 1373).

of *Batson/Powers* to the civil arena is the elimination of racial discrimination and stereotyping in the selection of the petit jury.[113] According to the majority, the "quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes."[114]

V. ANALYSIS

Although the Court's politics may be correct, the *Edmonson* decision is flawed. The Court has simply decided that the selection of a fair and impartial jury is less important than the rights of jury panel members not to be excluded on the basis of stereotypes, especially racial stereotypes. Having made that value judgment, the Court unfairly characterizes *every* litigant as a state actor when exercising peremptory challenges. The broad application of state actor status fails to take into account fundamental differences between civil and criminal litigation and the real life impact the extention of equal protection guarantees will have on jury selection generally.

A. *Implementation of the State Action Doctrine*

At various times the court has reiterated a commitment to "sifting facts and weighing circumstances" when approaching the question of state action.[115] This case by case analysis has generally boiled down to deciding whether there are enough state connections to a challenged activity to bring that activity within the confines of the Constitution's equal protection guarantees, even when that activity is performed by a private party.[116]

According to Professors Nowak and Rotunda, this sifting of facts and weighing of circumstances approach does not, at least in theory, take into account the relative values of the challenged practice and the character of the complainant's rights.[117] Nowak and Rotunda have suggested that the Court will not find state action when it wants to protect the challenged practice, but will find state action when it wants to find a Constitutional violation.[118] This balancing of values theory may account for the leap the Court makes in *Edmonson* to find state action. Clearly,

113. *Id.* at 2088.
114. *Id.*
115. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).
116. JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 483 (4th ed. 1991).
117. *Id.* at 484-85.
118. *Id.* at 485.

the Court values the right of the civil litigant or criminal defendant to exercise a true peremptory challenge less than the right of jurors not to be excluded on the basis of racial stereotypes. Yet, the Court did not reason in terms of relative values, preferring instead to maintain at least the illusion of finding significant involvement by the state.

The dichotomy between state and private action is obviously very complex. Admittedly no bright line separates the two spheres.[119] Yet, the lack of a bright line does not mean there are no lines at all. In the absence of bright lines, it is helpful to remember the rationale for state action doctrine. The state action doctrine protects against state encroachment on constitutional liberties, whether attempted directly or through the agency of private individuals. The state action doctrine also recognizes a sphere of individual action that, although repugnant to the majority, is simply not fairly attributable to the state, and therefore not proscribed by the Constitution.

To determine whether there is state action, the *Edmonson* Court employed the two-pronged *Lugar* test, which provides a general framework within which facts are sifted and circumstances weighed. To satisfy the first prong, the Court held that since Congress provided the peremptory challenge,[120] the constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority.[121] The second prong required a more significant inquiry to determine whether the private party charged with the deprivation could be fairly characterized as a state actor.[122]

B. *Assistance and Benefits*

To satisfy the second prong of *Lugar*, the majority considered three factors. First, the Court examined the extent to which the actor relied on governmental assistance.[123] In weighing this factor, the Court magnified the role of the trial judge in giving effect to the litigant's peremptory challenge and found that the litigant had benefitted and been assisted by the court and the court's rules.[124]

Undoubtedly, private parties do benefit from the availability and

119. Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1311 (5th Cir. 1988), *vacated*, 895 F.2d 218 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991).
120. *See* 28 U.S.C. § 1870 (1988).
121. See *Edmonson*, 111 S. Ct. at 2082-83.
122. *Id.*
123. *Id.* at 2084.
124. *Id.* at 2084-85.

functioning of the courts and court procedures; yet, in citing *Burton v. Wilmington Parking Authority*,[125] the Court must have considered a narrower meaning of assistance and benefits. *Burton* involved a whites only restaurant.[126] The restaurant was built and maintained on state property, and the state received considerable rent from the operator.[127] The Court held that the restaurant operator could be fairly characterized as a state actor.[128] Certainly the tenant who discriminates while occupying government property and drawing much of his livelihood from government workers cannot be allowed to escape the stricter constitutional standards carried by a state actor. The operator is obviously assisted by and benefits from his contact and identification with the state.

In contrast, the assistance and benefit a lawyer and his client derive from a judge during the exercise of peremptory challenges is of an entirely different character. As a general practice, prior to *Edmonson*, when a lawyer exercised a strike the judge was not consulted. The lawyer did not consider whether the strikes would be allowed. The judge's function in giving effect to the lawyer's exercise was assumed to be purely ministerial. The lawyer was presented with a panel, a panel list, and perhaps an opportunity to conduct voir dire. The lawyer then exercised his strikes in the best interests of the client.[129] The other side did the same. Each side presented the judge with the names of the stricken jurors and the judge seated the first twelve (or six) beyond those challenged.

This procedure, like every other rule of court, is designed to benefit the system as a whole, not the lawyers, the Judge or the parties individually. Surely, each actor in a trial will benefit from a functioning legal system, but this broad benefit is radically unlike the individualized and specific benefits realized in *Burton*, where the assistance flowing between the state and the operator of the restaurant could truly be labeled symbiotic.[130] Although the courthouse and its procedures are inseparable from the practice of law itself, as Justice O'Connor notes in her dissent, riding a bus is not converted into state action merely because the government has built the road and provided public transportation.[131]

125. 365 U.S. 715 (1961).
126. *Id.* at 716.
127. *Id.* at 720.
128. *Id.* at 725.
129. *See infra* note 148. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980).
130. Burton v. Willimington Parking Auth., 365 U.S. 715, 724 (1961).
131. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2090 (1991).

C. *Traditional Government Function*

The benefits and assistance factor did not conclude the Court's inquiry. The second factor considered was whether the action in question involved the performance of a function traditionallly performed by the government.[132] Justice O'Connor reminded the Court in her dissent that "challenges are not a traditional government function; the tradition is one of unguided private choice."[133] Nevertheless, the Court stated:

> In the jury-selection process, the government and private litigants work for the same end. Just as a government employee was deemed a private actor because of his purpose and functions in *Dodson*, so here a private entity becomes a government actor for the limited purpose of using peremptories during jury selection.[134]

This analysis is startling in more than one respect. First, and most obviously, the government and private litigants in a civil case do not work for the same end. The private litigant has little interest in obtaining a jury that is neutral and unbiased. This is only the minimum he hopes for. The goal of the civil litigant is to win, and his peremptory strikes are exercised to that end. The rights of the panel members have, up to now, played no part in the decision to strike. Additionally, the judge's function in giving effect to the peremptory challenge, prior to *Edmonson*, was considered purely ministerial. But it is not only the judge's role that has become muddled in the wake of *Edmonson*.

Polk County v. Dodson[135] involved a public defender acting within the course and scope of her employment. The Supreme Court held that she was not a state actor during the time she represented a criminal defendant, though at other times, presumably when performing administrative tasks, she reverted to state actor status.[136] Leesville Concrete, in its briefs to the Court, relied heavily on *Dodson* for the proposition that if a public defender is not a state actor, surely a private civil lawyer cannot be either.[137] The *Edmonson* majority distinguished *Dodson* on the basis of adversity. The public defender is adverse to the government whereas the private civil litigant usually is not.[138] From that distinction, the Court moved to the heart of its state action theory. That is, since the selection

132. *Id.* at 2085.
133. *Id.* at 2093.
134. *Id.* at 2086 (citing Polk County v. Dodson, 454 U.S. 312 (1981)).
135. 454 U.S. at 312.
136. *Id.* at 324-26.
137. Brief for Respondent at 4, *Edmonson* (No. 89-7743).
138. *Edmonson*, 111 S. Ct. at 2086.

of jurors is a traditional government function which has been delegated to private parties, the exercise of a peremptory strike by a private litigant can be fairly imputed to the state.[139]

One can only wonder under such reasoning how lawyers will keep track of their status during the course of a lawsuit. It is conceivable that a private party may be characterized as a state actor during voir dire, revert back to private status for opening statements before being transformed once more into a state actor when evidence is offered. If private lawyers are in fact state actors while exercising strikes, the Court must make clear what is expected and what is permissible in jury selection, and to whom the primary duty is owed: the client, the summoned panel members, or perhaps the public as a whole.

D. *Aggravated Injury*

Finally, the Court considered a third factor and asked whether the injury was aggravated in some unique way by the incidents of the government's authority.[140] The Court dispensed with this factor rather quickly by stating that the physical location of the alleged deprivation, a courtroom, compounds the insult of being excluded from a petit jury on account of race.[141]

After considering these three factors, the Court concluded that the second prong of the *Lugar* Test had been met, and Leesville Concrete Co. had become a state actor while exercising strikes.[142] Therefore, Leesville Concrete Co. was required to rebut Edmonson's prima facie case of racial discrimination with a race-neutral rationale.[143]

E. *Distinguishing Civil Challenges*

Under *Batson*, and now *Edmonson*, a lawyer striking by the seat of his pants will no longer have the freedom to exclude jurors of any identifiable class or cognizable group without factoring in equal protection guarantees. This is acceptable and fair in the criminal context when focusing on the rights of the defendant, where, as Justice Scalia wrote, "it is intolerably offensive for the state to imprison a person on the basis of a

139. *Id.*
140. *Id.* at 2087.
141. *Id.*
142. *Id.*
143. *Id.* at 2088.

conviction rendered by a jury from which members of that person's minority were carefully excluded."[144]

There can be no doubt that a prosecutor is a state actor. Because he is said to embody the will of the state, he has a unique goal. His aim is not necessarily to convict.[145] He can claim victory whenever justice is done.[146] Since the prosecutor's aim is justice and because he embodies the will of the state in a criminal trial, it has been suggested that the prosecutor should be held to a higher standard in his dealings with citizens than is required of citizens when they deal with one another.[147] Therefore, in the criminal context, it is sound public policy that requires the state to avoid even the appearance of across the board racial discrimination in the exercise of peremptory challenges.

This high standard should not and cannot be realistically imposed on the civil litigator or criminal defense attorney. They cannot be said to embody the will of the state. The civil litigator or criminal defense lawyer has a different goal, different duties, and a different standard with regard to public perception. Their goal is to win.[148] Their loyalties are to their clients, and their duty is to pursue the clients' goal in a fair and ethical manner.[149] The public expects no less, and no more.

F. *The Effect of* Edmonson *on Voir Dire*

It is offensive and dehumanizing to be simplified and classified on the basis of limited information, such as skin color. Yet, when a lawyer exercises a peremptory strike, especially in a court where voir dire is conducted by the judge, that is often what happens. To move beyond racial stereotypes in the exercise of peremptory challenges, lawyers should be allowed at least the opportunity, time and freedom to question each prospective juror individually.[150]

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144. Powers v. Ohio, 111 S. Ct. 1364, 1381 (1991) (Scalia, J., dissenting).

145. "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." CANONS OF PROFESSIONAL ETHICS Canon 5 (1908). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1990).

146. Edmonson v. Leesville Concrete Co., 895 F.2d 218, 225 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991).

147. *Id.*

148. *Id.* at 226. "It is the first imperative of the civil advocate to see that it is his side that wins. . . . Within the limits of fair and ethical conduct, his sole concern is, quite properly, that his client gain the case." *Id.*

149. *Id.*

150. Although it may be unrealistic in many cases, five minutes per juror, per lawyer, would amount to an eight hour day, including lunch (assuming a panel of forty jurors). This is not an

In federal practice, the judge normally conducts voir dire.[151] The primary justification for judge conducted voir dire is speed. Although important, this benefit may be illusory and perhaps insignificant, especially when weighed against the values served by *Edmonson*. In current practice, there is generally not enough opportunity for lawyers to move beyond the information contained in jury qualification forms, so there is, by necessity, more reliance on superficial grouping and predetermined ideal juror profiles.

In some states voir dire is still conducted primarily by lawyers.[152] In such states, there is a greater opportunity to move beyond stereotypes, including racial stereotypes. Yet even in states where voir dire retains its "wonderful power,"[153] it is an imperfect instrument. Even when lawyers are given the freedom to conduct extensive voir dire, there is often not

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unreasonable "front end" investment considering the likelihood of error and appeal under the new *Edmonson* scheme.

151. The Federal Rules of Civil Procedure provide:

> The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

FED. R. CIV. P. 47(a). The Northern District of Oklahoma is typical of most United States District Courts in its implementation of FED. R. CIV. P. 47(a). LOCAL RULE 22 OF THE U.S. DIST. CT. FOR THE NORTHERN DISTRICT OF OKLAHOMA provides: "The Court will conduct voir dire and counsel will be given the opportunity to suggest additional questions to the Court." *See also* FED. R. CRIM. P. 24(a) which is essentially identical to FED. R. CIV. P. 47(a).

152. The Texas Rules of Civil Procedure provide mandatory instructions to the jury panel that includes some education as to the purpose of voir dire:

> The parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences and attitudes. In questioning you, they are not meddling in your personal affairs, but are trying to select fair and impartial jurors who are free from any bias or prejudice in this particular case.

TEX. R. CIV. P. ANN. r. 226(a) APPROVED INSTRUCTIONS I(4) (West 1988). *See generally* WALTER E. JORDAN, TEXAS TRIAL HANDBOOK § 74 (1981 & Supp. 1989). Compare Oklahoma District Court Rule 6 which states:

> The judge shall initiate the voir dire examination of jurors by identifying the parties and their respective counsel. He may outline the nature of the case, the issues of fact and law to be tried, and may then put to the jurors any questions regarding their qualifications to serve as jurors in the cause of the trial. The parties or their attorneys shall be allowed a reasonable opportunity to supplement such examination. Counsel shall scrupulously guard against injecting any argument in their voir dire examination and shall refrain from asking a juror how he would decide hypothetical questions involving law or facts. Counsel shall avoid repetition, shall not call jurors by their first names or indulge in familiarities with individual jurors, and shall be fair to court and opposing counsel.

RULE 6 FOR THE DISTRICT COURTS OF OKLAHOMA.

153. Babcock, *supra* note 2, at 545. The author offers insight into the workings of voir dire generally and the function of the peremptory challenge within that framework. She argues that the peremptory challenge serves not only to create a fair and impartial jury by eliminating extremes, but also "avoids trafficking in the core of truth in most common stereotypes." *Id.* at 553.

enough information to employ anything more than seat of the pants intuition and instinct. If a negative stereotype has not been dispelled or countered by a smile or body language or perhaps a brief verbal exchange, it will probably be relied upon. This reliance is a system's cost that cannot be realistically eliminated and must be balanced against the usefulness of the peremptory challenge itself.

The new peremptory challenge will force lawyers to articulate "hunches"[154] in open court. In doing so, voir dire will certainly become a very different experience for all concerned. Whites will be forced to account for conscious and even unconscious racism. Blacks will deal with similar questioning designed to confirm, for the record, that they are being struck because they may resent, consciously or not, the general subjugation of their race, and may, for instance, favor a black tenant over a white landlord. Much that was left unsaid or left to hunches will be ventilated. Perhaps racial tension will be dissipated in some small way, but the function of voir dire is not to improve relations between races, men and women, or different religious groups. The function of voir dire is to uncover real bias and allow for the selection of an impartial petit jury.

The new practice of articulating neutral reasons will not reduce bigotry and increase respect for the legal system. It will have the opposite effect as lawyers routinely meet *Edmonson* challenges with any number of stock unverifiable race-neutral reasons. An increased use of the challenge for cause will inflict far more humiliation than the unfettered peremptory challenge. The jury that survives the new voir dire will not be fairer, more able to work together, or more willing to see other points of view. It will be Balkanized.

VI. CONCLUSION

It is no longer acceptable, according to the Supreme Court, to strike blacks because they are black, or by extension, Jews because they are Jewish, or women because they are women, or Irish Americans because they are Irish Americans, or poor people because they are poor. There must be something else. There must be a reason that does not take into account race, religion, sex, national origin or economic status.[155] Lawyers are no longer free to rely on a hunch when exercising a peremptory challenge. If the hunch is challenged, it must be explained.

154. Irving Younger, *Unlawful Peremptory Challenges*, 7 LITIG. 23 (1980).
155. Batson v. Kentucky, 476 U.S. 79, 124 (1986) (Burger, C.J., dissenting).

Obviously things are bound to become very complicated as jury selection becomes the hyper-technical exercise pleading used to be. No doubt those who manipulated the old rules will manipulate the new rules as well. Lawyers will learn a new language that will mask the same old reasons for striking blacks, Jews, women, Irish Americans or poor people. Perhaps nothing will change. It is conceivable that the new rules and the new language will do very little, if anything, to eradicate what is a basic component of human nature: the tendency of every sub-group in this melting pot we share to favor its own—at least when the question is close.

The *Edmonson* doctrine may raise the consciousness of a few on the important issues of discrimination and stereotyping. This increased consciousness will not, however, translate into fairer juries, or even the perception of fairer juries. It may, in fact, have the opposite result if implementation of the doctrine causes legislatures to respond to judicial frustration and a clogged system by simply abolishing the peremptory challenge altogether.[156] If and when this occurs, our legal system will have discarded a valuable tool, at considerable cost, in return for a very uncertain, if not chimerical, benefit.

Bill K. Felty

156. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2096 (1991) (Scalia, J., dissenting).