In addition, jury selection was found to be a traditional governmental function: the jury "is a quintessential governmental body, having no attributes of a private actor," and it followed, so the Court majority believed, that selection of individuals to serve on that body is also a governmental function whether or not it is delegated to or shared with private individuals.[1340] Finally, the Court concluded that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself."[1341] Dissenting Justice O'Connor complained that the Court was wiping away centuries of adversary practice in which "unrestrained private choice" has been recognized in exercise of peremptory challenges; "[i]t is antithetical to the nature of our adversarial process," the Justice contended, "to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes."[1342]

The Court soon applied these same principles to hold that the exercise of peremptory challenges by the defense in a criminal case also constitutes state action,[1343] even though in a criminal case it is the government and the defendant who are adversaries. The same generalities apply with at least equal force: there is overt and significant governmental assistance in creating and structuring the process, a criminal jury serves an important governmental function and its selection is also important, and the courtroom setting intensifies harmful effects of discriminatory actions. An earlier case[1344] holding that a public defender was not a state actor when engaged in general representation of a criminal defendant was distinguished, with the Court emphasizing that "exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense," because it involves selection of persons to wield governmental power.[1345]

[1340] 500 U.S. at 624, 625.

[1341] 500 U.S. at 628.

[1342] 500 U.S. at 639, 643.

[1343] Georgia v. McCollum, 505 U.S. 42 (1992). It was, of course, beyond dispute that a prosecutor's exercise of peremptory challenges constitutes state action. *See* Swain v. Alabama, 380 U.S. 202 (1965); Batson v. Kentucky, 476 U.S. 79 (1986).

[1344] Polk County v. Dodson, 454 U.S. 512 (1981).

[1345] 505 U.S. at 54. Justice O'Connor, again dissenting, pointed out that the Court's distinction was inconsistent with *Dodson's* declaration that public defenders are not vested with state authority "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Id. at 65–66. Justice Scalia, also dissenting again, decried reduction of *Edmonson* "to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state." Id. at 69–70. Chief Justice Rehnquist, who had dissented in *Edmonson*, concurred in *McCollum* in the belief that it was controlled by *Edmonson*, and Justice Thomas, who had not participated in *Edmonson*, expressed similar views in a concurrence.