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Constitutional Law - Equal Protection Clause Bars Prosecutors' Peremptory Challenge Based Soley on Race - Batson v. Kentucky

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CONSTITUTIONAL LAW - EQUAL PROTECTION CLAUSE BARS PROSECUTORS' PEREMPTORY CHALLENGE BASED SOLELY ON RACE

Batson v. Kentucky,

106 S. Ct. 1712 (1986).

FACTS

James Kirkland Batson was indicted by a Jefferson County, Kentucky grand jury on January 6, 1982. Charged with second-degree burglary and receipt of stolen goods,[1] Batson was tried in Jefferson Circuit Court on February 14-15, 1984.[2] After the trial judge had conducted voir dire examination of the venire and excused certain jurors for cause, the parties were permitted to exercise their peremptory challenges. "The prosecutor used his peremptory challenges to strike all four black persons on the venire."[3] Counsel for the defendant exercised his peremptory challenges, and a jury was selected with all white members.[4] Counsel for the defendant moved to discharge the panel before it was sworn. He asserted that the prosecutor's peremptory challenge of all the black persons on the venire violated Batson's rights under the sixth and fourteenth amendments to a jury drawn from a cross-section of the community, and under the fourteenth amendment to equal protection of the laws. The trial judge denied the motion, reasoning that the cross-section requirement applies only to selection of the venire and not to the selection of the petit jury.[5] The trial proceeded, and the jury convicted Batson on both counts. The Supreme Court of Kentucky affirmed the lower court, relying on *Swain v. Alabama*[6] to hold that a defendant alleging lack of a fair cross-section must demonstrate "systematic exclusion from the jury

1. Brief for Petitioner at 2, Batson v. Kentucky, 106 S. Ct. 1712 (1986).
2. *Id.*
3. Batson v. Kentucky, 106 S. Ct. 1712, 1715 (1986).
4. *Id.* Batson is a black man.
5. *Id.*
6. 380 U.S. 202 (1965).

drum."[7] Batson's petition for certiorari was granted by the United States Supreme Court.[8]

BACKGROUND

A. The Challenge

The peremptory challenge has long been recognized as a significant element in ensuring fair and impartial jury trials.[9] "It was used amongst the Romans in criminal cases, and the *Lex Servilia* (B.C. 104) provided that the accuser and the accused should severally propose one hundred judices, and that each might reject fifty from the list of the other, so that one hundred would remain to try the alleged crime."[10]

At English common law, "[i]n all trials for felonies . . . , the defendant was allowed to challenge peremptorily thirty-five jurors, and the prosecutor originally had a right to challenge any number of jurors without cause."[11] The right of the Crown's prosecutors to challenge peremptorily was eliminated in 1305 by the Ordinance for Inquests.[12] The Ordinance for Inquests was a response to charges that the Crown's peremptory challenges caused infinite delays and grave dangers.[13] The English judiciary construed the Ordinance for Inquests so as to allow the Crown's prosecutor to "stand aside" jurors and without showing cause unless the entire panel was exhausted with not enough veniremen left to compose a full jury.[14]

In the United States federal system, Congress as early as 1790, established "that a defendant was entitled to 35 peremptories [sic] in trials for treason, and 20 in trials for other felonies specified in the 1790 Act as punishable by death."[15] In trials for offenses not included in the 1790 statute, there is evidence that a right to peremptory challenges existed for both the government and the defendant, although the source of this right is not wholly clear.[16]

The development of peremptory challenges in the states apparently paralleled that in the federal system. The right of defen-

7. Petition for a Writ of Certiorari at 3, Batson v. Kentucky, 106 S. Ct. 1712 (1986).

8. Batson v. Kentucky, 106 S. Ct. 1712 (1986).

9. W. FORSYTH, HISTORY OF TRIAL BY JURY 145 (2d ed. 1875).

10. *Id.*

11. Swain v. Alabama, 380 U.S. 202, 212-13 (1965) (citing COKE ON LITTLETON 156 (14th ed. 1791)). *See also* Moore, *Voir Dire Examination of Jurors*, 16 GEO. L.J. 438 (1927-28).

12. 33 Edw. 1, Stat. 4 (1305).

13. *Swain*, 380 U.S. at 213.

14. *Id. See also* United States v. Marchant, 25 U.S. (12 Wheat.) 480, 483 (1827).

15. *Id.* at 214 (citing 1 Stat. 112, 119 (1790)).

16. *Id.* at 214.

dants to challenge peremptorily was early established by statute. "The prosecution was thought to have retained the Crown's common-law right to stand aside, and by 1870, most, if not all, states had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant."[17]

B. The Effect of Equal Protection

Following the enactment of the fourteenth amendment until 1965, the United States Supreme Court did not directly address the right of the states to peremptory challenges. During that time, however, there developed a line of Supreme Court cases regarding the role of the states in the selection of jurors, an area closely related to peremptory challenges.[18]

The Supreme Court in this line of cases held that the intentional exclusion of Negroes by the states from the jury venire selection rolls was a denial of a defendant's equal protection under the states' laws. This body of case law regarding jury selection and the equal protection clause can be traced to *Strauder v. West Virginia.*[19] In *Strauder*, the Court held that the state statute precluding Negroes from serving on juries violated the Negro defendant's fourteenth amendment right to equal protection under the law of that state.[20] Following *Strauder*, the Court held in *Virginia v. Rives*[21] that a racially mixed jury in a particular case is not essential to equal protection.[22] Later in *Ex Parte Virginia,*[23] the Court held that an officer of the state, responsible for jury venire selection, was an agent of the state, and that his discrimination in the selection of potential jurors was state action for purposes of the fourteenth amendment.[24]

As the states changed their statutes to conform with the Court's decisions, more cases turned on the discriminatory practices of state agents in the selection of jury venires. In such cases, the amount and sufficiency of evidence necessary to prove discrimi-

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17. *Id.* at 215-16.

18. *See e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880); Neal v. Delaware, 103 U.S. 370 (1881); Norris v. Alabama, 294 U.S. 587 (1935); Patton v. Mississippi, 332 U.S. 463 (1947); Avery v. Georgia, 345 U.S. 559 (1953); Hernandez v. Texas, 347 U.S. 475 (1954).

19. 100 U.S. 303 (1880).

20. *Id.* at 308-09. The West Virginia Constitution guaranteed its citizens the right to a trial by jury.

21. 100 U.S. 313 (1880).

22. *Id.* at 323. *See also* In Re Wood, 140 U.S. 278 (1891).

23. 100 U.S. 339 (1880).

24. *Id.* at 347-48.

nation was a very important issue. In *Neal v. Delaware,*[25] the Court held that an affidavit in support of a motion to quash an indictment offered as evidence by the defendant was sufficient to make a prima facie case of discrimination. This holding was later qualified when the Court said that for affidavits to be used as evidence, the prosecution would have to agree in advance to their use as evidence as had been done in *Neal.*[26] The fact that no members of the defendant's race were included on the grand or petit jury panels was not sufficient;[27] purposeful exclusion had to be shown.[28] Unrebutted direct testimony that no Negro had served on a local petit or grand jury for a long period of time was held to be sufficient for a prima facie case,[29] as was the use of statistics which indicated substantial under-representation of Negroes on juries when compared to their proportion of those qualified to serve.[30] In each case, the burden was on the defendant to show purposeful exclusion of members of his race from the jury panel.[31] Once the defendant made a prima facie showing of discrimination, the burden of going forward shifted to the prosecution.[32] The elements necessary to rebut the defendant's prima facie showing remain unsettled. The Supreme Court has stated that mere affirmation of good faith in making individual selections are insufficient to rebut a prima facie case of systematic exclusion.[33]

Prior to the Supreme Court ruling in 1968 that the sixth amendment right to a jury trial in criminal cases was applicable to the states,[34] the defendant's right to a jury in a state proceeding was based on that state's laws and the fourteenth amendment's guarantee

25. 103 U.S. 370 (1881).

26. Smith v. Mississippi, 162 U.S. 592, 601 (1896). *See also* Hale v. Kentucky, 303 U.S. 613 (1938) (implied agreement by prosecution); Glasser v. United States, 315 U.S. 60 (1942) (additional proof needed absent stipulation by the state).

27. Martin v. Texas, 200 U.S. 316 (1906). *See also* Franklin v. South Carolina, 218 U.S. 161 (1910) (grand jury); Thomas v. Texas, 212 U.S. 278 (1909) (grand and petit jury).

28. Martin v. Texas, 200 U.S. at 320-21.

29. Norris v. Alabama, 294 U.S. 587 (1935) (petit jury). *See also* Patton v. Mississippi, 332 U.S. 463 (1947) (grand and petit juries); Hill v. Texas, 316 U.S. 400 (1942) (grand juries); Pierre v. Louisiana, 306 U.S. 354 (1939) (grand jury).

30. Smith v. Texas, 311 U.S. 128 (1940).

31. *See* Fay v. New York, 332 U.S. 261, 285 (1946); Akins v. Texas, 325 U.S. 398 (1945); Norris v. Alabama, 294 U.S. 587 (1935); Martin v. Texas, 200 U.S. 316 (1906); Tarrance v. Florida, 188 U.S. 519 (1903).

32. *See* Alexander v. Louisiana, 405 U.S. 625, 632 (1972); Eubank v. Louisiana, 356 U.S. 584, 587 (1958).

33. Alexander v. Louisiana, 405 U.S. 625, 632 (1972) (citing Turner v. Fouch, 396 U.S. 346 (1970)). *See also* Jones v. Georgia, 389 U.S. 24 (1967); Sims v. Georgia, 389 U.S. 404 (1967).

34. Duncan v. Louisiana, 391 U.S. 145 (1968).

of equal protection of those laws.[35] This was the setting in 1965 when the Supreme Court heard *Swain v. Alabama*,[36] the first case in which a defendant challenged the prosecutor's use of peremptory challenges as a violation of his rights to equal protection. Before *Swain*, claims challenging the composition of the jury had been directed at the formation of the venire. The state was responsible for administering the selection of the venire, and its responsibility to administer that selection without purposeful exclusion of Negroes or other societal subgroups[37] was clearly established.

Swain was faced with a different type of purposeful exclusion. His claim was that the attorney for the state had used peremptory challenges to exclude members of his race from the jury.[38] He could not claim a right to racial representation on the jury because the Supreme Court said that a mixed jury in a particular case is not essential to equal protection.[39] The constitutional right to an impartial jury was not an available argument because the Supreme Court had not yet held that provision of the sixth amendment applicable to the states. Swain's course then was to argue under well settled case precedent that the state had violated his rights to equal protection under the fourteenth amendment by purposefully excluding members of his race from the jury.

The Court, in deciding *Swain*, traced the history of peremptory challenges and concluded that the state's exercise of such challenges is a very important part of trial by jury.[40] The Court acknowledged that, while a state's use of peremptory challenges could be used so as to violate a defendant's rights,[41] there are many valid reasons for prosecutors to peremptorily challenge jurors. Thus, in order for a defendant to establish a prima facie showing of purposeful discrimination, he must show that "in case after case,whatever the crime and whoever the defendant or the victim may be,"[42] the prosecutor was responsible for the removal

35. The defendant's claim to a jury trial in all the above mentioned cases was based on state law. *See supra* text at note 18. Before Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court had held that jury trials in cases were a matter of state law. *See* Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934); Maxwell v. Dow, 176 U.S. 581 (1900); Walker v. Sauvinet, 92 U.S. 900 (1875); Edwards v. Elliot, 88 U.S. (21 Wall.) 532 (1874).

36. 380 U.S. 202 (1965).

37. Hernandez v. Texas, 347 U.S. 475 (1954) (persons of Mexican descent); Ballard v. United States, 329 U.S. 187 (1946) (women); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) (wage earners).

38. *Swain*, 380 U.S. at 209-10.

39. Virginia v. Rives, 100 U.S. 313, 323 (1880). *See also* Akins v. Texas, 325 U.S. 398, 403 (1945). ("Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried.").

40. *Swain*, 380 U.S. at 219.

41. *Id.* at 223-24.

42. *Id.* at 223.

of Negroes "with the result that no Negroes ever served on petit juries."[43]

Swain was the premier case on the issue of discriminatory use of peremptory challenges. It placed a heavy burden on the defendant's ability to establish a prima facie showing of purposeful discrimination. Numerous state and federal courts held, under *Swain*'s authority, that evidence of the discriminatory use of peremptory challenges by the prosecutor in any single case did not violate the defendant's constitutional rights.[44]

In 1968, the Supreme Court held the sixth amendment right to trial by impartial jury was applied to the states.[45] Seven years later, the Supreme Court ruled that an impartial jury was one drawn from a fair cross-section of the community.[46] These decisions offered hope to defendants that the Supreme Court might hold, as constitutionally prohibited, a prosecutor's use of peremptory challenges in a single trial to exclude members of the defendant's race. Most lower courts continued to hold that *Swain* controlled any time a defendant sought to challenge a prosecutor's use of peremptory challenges.[47]

The Supreme Court of California, in 1978, held that the California Constitution compelled it to apply a stricter standard than *Swain* to California prosecutors.[48] The California court held that a defendant could establish a prima facie case by showing that, in a single case, the prosecutor had used peremptory challenges to exclude members of an identifiable group.[49] The California court recognized the validity of *Swain* but held that the California Constitution demanded greater protection for California defendants.[50] Several states followed California and held that their respective constitutions proscribed discriminatory use of peremptory challenges by prosecutors.[51]

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43. *Id.*

44. *See* United States v. Pollard, 483 F.2d 929 (8th Cir. 1973); United States ex rel. Dixon v. Cavell, 284 F. Supp. 535 (E.D. Pa. 1968); Watts v. State, 53 Ala. App. 518, 301 So. 2d 280 (1974); People v. Allums, 47 Cal. App. 3d 654, 121 Cal. Rptr. 62 (1975); People v. Attaway, 41 Ill. App. 3d 837, 354 N.E. 2d 448 (1976). *See also* Annot., 79 A.L.R. 3d 14 (1977); United States v. Ming, 466 F.2d 1000 (7th Cir. 1972); Davis v. United States, 374 F.2d 1 (5th Cir. 1967).

45. Duncan v. Louisiana, 391 U.S. 145 (1968).

46. Taylor v. Louisiana, 419 U.S. 522 (1975).

47. United States v. Leslie, 759 F.2d 366, 375 n.6 (1985).

48. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

49. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

50. 22 Cal. 3d at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908.

51. State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499 (1979), *cert. denied*, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980).

Two United States Courts of Appeals embraced the view that peremptory challenges used to strike black jurors in a single case may violate the sixth amendment.[52] The Second Circuit Court of Appeals held that the discriminatory use of peremptory challenges by a prosecutor violated the defendant's right to an impartial jury drawn from a fair cross-section of the community.[53] The Second Circuit reasoned that the Supreme Court's decisions in *Duncan v. Louisiana*[54] and *Taylor v. Louisiana*[55] had modified *Swain v. Alabama.*[56]

INSTANT CASE

In his state appeal Batson attempted to persuade the Supreme Court of Kentucky to follow the rationale of the California Supreme Court in *People v. Wheeler*[57] and hold that the prosecutor's conduct violated his rights under the Kentucky Constitution.[58] The Kentucky Supreme Court rejected Batson's argument and affirmed its reliance on *Swain.*[59]

Before the United States Supreme Court, Batson attempted to avoid a confrontation with *Swain* by pursuing only the claim that the prosecutor's conduct had violated his sixth amendment right to an impartial jury drawn from a cross-section of the community, applicable to Kentucky through the fourteenth amendment.[60] Kentucky argued, in response, that the case was controlled by the law of equal protection.[61] Justice Powell, writing for a majority court, agreed with the State of Kentucky that resolution of the issue turned on the application of equal protection principles and therefore required reconsideration of *Swain.*[62] The Court's opinion did not explain why the issue was controlled by equal protection principles, and the Court refused to express any view of the merits of the sixth amendment arguments.[63]

52. Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984).
53. McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984).
54. 391 U.S. 145 (1968).
55. 419 U.S. 522 (1975).
56. 380 U.S. 202 (1965).
57. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).
58. Batson v. Kentucky, 106 S. Ct. 1712, 1715 (1986).
59. *Id.* at 1716.
60. *Id.* at 1716 n.4.
61. *Id.*
62. *Id.*
63. *Id.*

After the Court decided that equal protection principles were controlling, it briefly reviewed the case law from *Strauder v. West Virginia.*[64] The Court then reviewed the *Swain* decision. In reviewing *Swain*, the Court recognized the barrage of criticism *Swain* had received.[65] The heavy burden necessary to present a prima facie case was the subject of most of the criticism. The Court agreed with its critics and held that the evidentiary formulation was inconsistent with standards developed since *Swain* for assessing a prima facie case under the equal protection clause.[66]

The new evidentiary burden announced by the Court to replace the *Swain* standard was the same burden applicable to other equal protection cases. The Court said decisions in the context of Title VII "disparate treatment" have explained the operation of prima facie burden of proof rules.[67] The Court then used its prior decisions to formulate a test for determining a prima facie case. To establish a prima facie case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor exercised peremptory challenges to remove from the venire members of the defendant's race.[68] Second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate.[69] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor exercised peremptory challenges to purposefully exclude veniremen from the petit jury on account of their race.[70]

"Once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge,"[71] the Court emphasized that "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause."[72]

Justice White, the author of *Swain*,[73] wrote a short concurring

64. 100 U.S. 303 (1880).
65. *Batson*, 106 S. Ct. at 1719 n.14.
66. *Id.* at 1721.
67. *Id.* at 1721 n.18.
68. *Id.* at 1723.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. 380 U.S. 202 (1965).

opinion,[74] in which he gave his reason for changing positions. He stated that prosecuting attorneys had failed to heed the warning of *Swain*.[75] He further stated his position that the holding in *Batson*[76] should not apply retroactively.[77] Justice Marshall concurred separately expressing the view that racial discrimination in the use of peremptory challenges could be ended only by eliminating them entirely.[78] Justice Stevens, joined by Justice Brennan, wrote a concurring opinion to answer Chief Justice Burger's criticisms. Justice Stevens stated that, even though Batson did not raise the equal protection issue, the Court was justified in deciding it because the state had briefed and argued the issue.[79] Justice O'Connor wrote separately to state that the decision should not apply retroactively.[80]

Chief Justice Burger dissented for two major reasons. First, the holding of the majority was based on a constitutional argument that the petitioner expressly declined to raise. Secondly, the majority declined to rule on the importance of the peremptory challenge in the right to trial by jury.[81] Justice Rehnquist joined the Chief Justice's opinion but wrote separately to express his view that peremptory challenges used to remove blacks from a jury venire did not violate a defendant's right to equal protection.[82]

ANALYSIS AND CONCLUSION

The obvious result of *Batson v. Kentucky* will be to make it easier for criminal defendants to force prosecutors to give reason for peremptory challenges. It is true that such a practice will change, even if only slightly, the peremptory nature of the government's challenges. Yet, such a change should not have significant impact on the present form of jury trials. English statutes in 1305 eliminated the right of prosecutors to challenge peremptorily, and the form of jury trial prevalent at that time was not significantly altered.[83]

It remains the defendant's responsibility to show that circum-

74. *Batson*, 106 S. Ct. at 1725.
75. 380 U.S. 202 (1965).
76. 106 S. Ct. 1712 (1986).
77. *Id.* at 1726.
78. *Id.*
79. *Id.* at 1729.
80. *Id.* at 1731.
81. *Id.* at 1731-39.
82. *Id.* at 1744-45.
83. *See supra* text at note 10.

stances raise an inference that the prosecutor used peremptory challenges on the basis of race.[84] Once the defendant has made a prima facie showing, the burden shifts to the prosecutor to show that the challenges were made on some ground other than race. How much evidence is sufficient for the prosecutor to make this showing, the Court did not say. The Court did say that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption . . . that they would be partial to the defendant because of their shared race."[85]

The Court's decision leaves much discretion to the trial court in deciding what evidence is sufficient to rebut a defendant's prima facie showing. Given the traditional nature of the peremptory challenge, and the many reasons other than race why an attorney may choose to exercise the challenge, the burden placed on prosecutors by *Batson* could be very slight indeed. The trial courts, in determining the sufficiency of prosecutors' rebuttals, will determine what effect *Batson* will have on the present form of criminal jury trials. In any particular case, whatever burden placed on the prosecutor by the trial judge is likely to be contested by the defendant. Even Justice White in his concurring opinion observed that "much litigation will be required to spell out the contours of the Court's equal protection holding."[86]

What the Court declined to decide in *Batson* may be revealing. In oral argument, the petitioner expressly declined to raise the issue of equal protection.[87] He instead chose to rely on his sixth amendment argument that the prosecutor's use of peremptory challenges had violated his right to a jury composed of a fair cross section of the community.[88] Yet, the Court, expressly declining any view of the merits of Batson's sixth amendment argument, chose instead to decide the case on equal protection grounds.[89] The connection between equal protection and peremptory challenges appears tenuous, considering that both the defendant and the state exercise peremptory challenges. The Court apparently reasoned that since the fourteenth amendment protects an accused throughout the proceedings bringing him to justice,[90] a "[s]tate may not draw up its jury lists pursuant to neutral proce-

84. 106 S. Ct. at 1723.

85. *Id.*

86. *Id.* at 1725-26.

87. Batson v. Kentucky, 106 S. Ct. 1712, 1733 (1986) (Burger, C. J., dissenting).

88. *Id.*

89. *Id.* at 1716 n.4.

90. Hill v. Texas, 316 U.S. 400, 406 (1942).

dures and then resort to discrimination at 'other stages in the selection process.' "[91] The connection appears to have been assumed in *Swain v. Alabama*,[92] and could have been shown by evidence that the prosecutor excluded jurors on the basis of race over a long series of cases.[93]

By failing to consider Batson's sixth amendment argument, the Court left open the question - what is the constitutional role of peremptory challenges in the right to a trial by jury? More specifically, what is the constitutional role of peremptory challenges by the government in the right to trial by jury? By deciding the case on equal protection grounds, the Court said indirectly that there was the requisite state action; but was the requisite state action the prosecutor's action, as agent for the state,[94] or the exercise of peremptory challenges generally, as a statutory grant of power from the state?[95] If the requisite state action was the exercise of peremptory challenges as a statutory grant of power generally, then the principle of *Batson* could be extended to apply to peremptory challenges by defendants. Such an extension would immediately raise the question whether a defendant has a constitutional right to peremptory challenges as a requisite part of the right to trial by jury. If, on the other hand, the Court found the requisite state action in the prosecutor's exercise of challenges as agent of the state, then the principle of *Batson* would be limited to the peremptory challenges of prosecuting attorneys.

By refusing to express any view on Batson's sixth amendment argument, the Court appears to have found the requisite state action in the action of the prosecuting attorney and limited the reach of *Batson* to peremptory challenges by the state. This conclusion is supported by the fact that the issue before the Court involved only the peremptory challenges of the state and not those of the defendant. Another indication that the Court was addressing only the action of the prosecutor is found in Chief Justice Burger's criticism of the majority. The Chief Justice criticized the majority for not considering, as a part of the equal protection analysis, the state's

91. *Batson*, 106 S. Ct. at 1718, (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

92. 380 U.S. 202 (1965).

93. *Id.* at 223.

94. *See e.g.*, Ex Parte Virginia, 100 U.S. 339 (1880).

95. *See e.g.*, Norris v. Alabama, 294 U.S. 587 (1935).

interest in peremptory challenges.[96] By viewing the Court's decision as directed at the action of the prosecutor rather than at the exercise of peremptory challenges generally, the Court's analysis can be more easily reconciled with traditional equal protection analysis.

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96. 106 S. Ct. at 1737.