

J. E. B. v. ALABAMA

SUPREME COURT OF THE UNITED STATES

511 U.S. 127

April 19, 1994, Decided

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. The Court explained that although a defendant has "no right to a 'petit jury composed in whole or in part of persons of his own race,'" the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Since *Batson*, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. See *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S. (1992).

Although premised on equal protection principles that apply equally to gender discrimination, all our recent cases defining the scope of *Batson* involved alleged racial discrimination in the exercise of peremptory challenges. Today we are faced with the question whether the Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race. We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.

I

On behalf of relator T. B., the mother of a minor child, respondent State of Alabama filed a complaint for paternity and child support against petitioner J.E.B. in the District Court of Jackson County, Alabama. On October 21, 1991, the matter was called for trial and jury selection began. The trial court assembled a panel of 36 potential jurors, 12 males and 24 females. After the court excused three jurors for cause, only 10 of the remaining 33 jurors were male. The State then used 9 of its 10 peremptory strikes to remove male jurors; petitioner used all but one of his strikes to remove female jurors. As a result, all the selected jurors were female.

Before the jury was empaneled, petitioner objected to the State's peremptory challenges on the ground that they were exercised against male jurors solely on the basis of gender, in violation of the Equal Protection Clause of the Fourteenth Amendment. App. 22. Petitioner argued that the logic and reasoning of *Batson v. Kentucky*, which prohibits peremptory strikes solely on the basis of race, similarly forbids intentional discrimination on the basis of gender. The court rejected petitioner's claim and empaneled the all-female jury. The jury found petitioner to be the father of the child and the court entered an order directing him to pay child support.

II

Discrimination on the basis of gender in the exercise of peremptory challenges is a relatively recent phenomenon. Gender-based peremptory strikes were hardly practicable for most of our country's existence, since, until the 19th century, women were completely excluded from jury service. n2 So well-entrenched was this exclusion of women that in 1880 this Court, while finding that the exclusion of African-American men from juries violated the Fourteenth Amendment, expressed no doubt that a State "may confine the selection [of jurors] to males."

The prohibition of women on juries was derived from the English common law which, according to Blackstone, rightfully excluded women from juries under "the doctrine of propter defectum sexus, literally, the 'defect of sex.'" In this country, supporters of the exclusion of women from juries tended to couch their objections in terms of the ostensible need to protect women from the ugliness and depravity of trials. Women were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere. See *Bailey v. State*, 219 S.W. 2d 424, 428 (1949) ("Criminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady"). . . .

III

Despite the heightened scrutiny afforded distinctions based on gender, respondent argues that gender discrimination in the selection of the petit jury should be permitted, though discrimination on the basis of race is not. Respondent suggests that "gender discrimination in this country . . . has never reached the level of discrimination" against African-Americans, and therefore gender discrimination, unlike racial discrimination, is tolerable in the courtroom. . . .

We need not determine, however, whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history. It is necessary only to acknowledge that "our Nation has had a long and unfortunate history of sex discrimination," a history which warrants the heightened scrutiny we afford all gender-based classifications today. Under our equal protection jurisprudence, gender-based classifications require "an exceedingly persuasive justification" in order to survive constitutional scrutiny. Thus, the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial. In making this assessment, we do not weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious discrimination from the courtroom. Instead, we consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury.

Far from proffering an exceptionally persuasive justification for its gender-based peremptory challenges, respondent maintains that its decision to strike virtually all the males from the jury in this case "may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more

sympathetic and receptive to the arguments of the complaining witness who bore the child." n. 1

We shall not accept as a defense to gender-based peremptory challenges "the very stereotype the law condemns." Respondent's rationale, not unlike those regularly expressed for gender-based strikes, is reminiscent of the arguments advanced to justify the total exclusion of women from juries. n. 2 Respondent offers virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes; yet it urges this Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box. n11 Respondent seems to assume that gross generalizations that would be deemed impermissible if made on the basis of race are somehow permissible when made on the basis of gender.

Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice which motivated the discriminatory selection of the jury will infect the entire proceedings.

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n1 Respondent cites one study in support of its quasi-empirical claim that women and men may have different attitudes about certain issues justifying the use of gender as a proxy for bias. See R. Hastie, S. Penrod & N. Pennington, *Inside the Jury* 140 (1983). The authors conclude: "Neither student nor citizen judgments for typical criminal case material have revealed differences between male and female verdict preferences. * * * The picture differs [only] for rape cases, where female jurors appear to be somewhat more conviction-prone than male jurors". The majority of studies suggest that gender plays no identifiable role in jurors' attitudes.

n2 A manual formerly used to instruct prosecutors in Dallas, Texas, provided the following advice: "I don't like women jurors because I can't trust them. They do, however, make the best jurors in cases involving crimes against children. It is possible that their 'women's intuition' can help you if you can't win your case with the facts." Another widely circulated trial manual speculated:

"If counsel is depending upon a clearly applicable rule of law and if he wants to avoid a verdict of 'intuition' or 'sympathy,' if his verdict in amount is to be proved by clearly demonstrated blackboard figures for example, generally he would want a male juror. . . .

"[But women] are desired jurors when the plaintiff is a man. A woman juror may see a man impeached from the beginning of the case to the end, but there is at least the chance with the woman juror (particularly if the man happens to be handsome or appealing) [that] the plaintiff's derelictions in and out of court will be overlooked. A woman is inclined to forgive sin in the opposite sex; but definitely not her own. . . ." 3 M. Belli, *Modern Trials* @@ 51.67 (2d ed. 1982).

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.

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The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.

When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity. Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the "deck has been stacked" in favor of one side.

In recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures. Contrary to respondent's suggestion, this right extends to both men and women. All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination. Striking individual jurors on the assumption that they hold particular views simply because of their gender is "practically a brand upon them, affixed by law, an assertion of their inferiority." It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation. The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.

IV

Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. Neither does it conflict with a State's legitimate interest in using such challenges in its effort to secure a fair and impartial jury. Parties still may remove jurors whom they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias. Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to "rational basis" review. Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext. . . . n. 3

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n3 For example, challenging all persons who have had military experience would disproportionately affect men at this time, while challenging all persons employed as nurses would disproportionately affect women. Without a showing of pretext, however, these challenges may well not be unconstitutional, since they are not gender- or race-based.

-----End Footnotes-----

In view of these concerns, the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. As with race, the "core guarantee of equal protection, ensuring citizens that their State will not discriminate . . . , would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' [gender]."

The judgment of the Court of Civil Appeals of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Today's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors. The price to be paid for this display -- a modest price, surely -- is that most of the opinion is quite irrelevant to the case at hand. The hasty reader will be surprised to learn, for example, that this lawsuit involves a complaint about the use of peremptory challenges to exclude men from a petit jury. To be sure, petitioner, a man, used all but one of his peremptory strikes to remove women from the jury (he used his last challenge to strike the sole remaining male from the pool), but the validity of his strikes is not before us. Nonetheless, the Court treats itself to an extended discussion of the historic exclusion of women not only from jury service, but also from service at the bar (which is rather like jury service, in that it involves going to the courthouse a lot). All this, as I say, is irrelevant, since the case involves state action that allegedly discriminates against men.

The Court also spends time establishing that the use of sex as a proxy for particular views or sympathies is unwise and perhaps irrational. The opinion stresses the lack of statistical evidence to support the widely held belief that, at least in certain types of cases, a juror's sex has some statistically significant predictive value as to how the juror will behave. This assertion seems to place the Court in opposition to its earlier Sixth Amendment "fair cross-section" cases. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 532, n. 12 (1975) ("Controlled studies . . . have concluded that women bring to juries their own perspectives and values that influence both jury deliberation and result"). But times and trends do change, and unisex is unquestionably in fashion. Personally, I am less inclined to demand statistics, and more inclined to credit the perceptions of experienced litigators who have had money on the line. But it does not matter. The Court's fervent defense of the proposition *il n'y a pas de difference entre les hommes et les femmes* (it stereotypes the opposite view as hateful "stereotyping") turns out to be, like its recounting of the history of sex discrimination against women, utterly irrelevant. Even if sex was a remarkably good predictor in certain cases, the Court would find its use in peremptories unconstitutional.

Of course the relationship of sex to partiality would have been relevant if the Court had demanded in this case what it ordinarily demands: that the complaining party have suffered some injury. Leaving aside for the moment the reality that the defendant himself had the opportunity to strike women from the jury, the defendant would have some cause to complain about the prosecutor's striking male jurors if male jurors tend to be more favorable towards defendants in

paternity suits. But if men and women jurors are (as the Court thinks) fungible, then the only arguable injury from the prosecutor's "impermissible" use of male sex as the basis for his peremptories is injury to the stricken juror, not to the defendant. The Court today presumably supplies petitioner with a cause of action by applying the uniquely expansive third-party standing analysis of *Powers v. Ohio*, 499 U.S. 400, 415 (1991), according petitioner a remedy because of the wrong done to male jurors. This case illustrates why making restitution to Paul when it is Peter who has been robbed is such a bad idea. Not only has petitioner, by implication of the Court's own reasoning, suffered no harm, but the scientific evidence presented at trial established petitioner's paternity with 99.92% accuracy. Insofar as petitioner is concerned, this is a case of harmless error if there ever was one; a retrial will do nothing but divert the State's judicial and prosecutorial resources, allowing either petitioner or some other malefactor to go free.

The core of the Court's reasoning is that peremptory challenges on the basis of any group characteristic subject to heightened scrutiny are inconsistent with the guarantee of the Equal Protection Clause. That conclusion can be reached only by focusing unrealistically upon individual exercises of the peremptory challenge, and ignoring the totality of the practice. Since all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection. That explains why peremptory challenges coexisted with the Equal Protection Clause for 120 years. This case is a perfect example of how the system as a whole is even-handed. While the only claim before the Court is petitioner's complaint that the prosecutor struck male jurors, for every man struck by the government petitioner's own lawyer struck a woman. To say that men were singled out for discriminatory treatment in this process is preposterous. The situation would be different if both sides systematically struck individuals of one group, so that the strikes evinced group-based animus and served as a proxy for segregated venire lists. The pattern here, however, displays not a systemic sex-based animus but each side's desire to get a jury favorably disposed to its case. That is why the Court's characterization of respondent's argument as "reminiscent of the arguments advanced to justify the total exclusion of women from juries," is patently false. Women were categorically excluded from juries because of doubt that they were competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case. There is discrimination and dishonor in the former, and not in the latter -- which explains the 106-year interlude between our holding that exclusion from juries on the basis of race was unconstitutional, *Strauder v. West Virginia*, 100 U.S. 303 (1880), and our holding that peremptory challenges on the basis of race were unconstitutional, *Batson v. Kentucky*, *supra*.

Although the Court's legal reasoning in this case is largely obscured by anti-male-chauvinist oratory, to the extent such reasoning is discernible it invalidates much more than sex-based strikes. After identifying unequal treatment (by separating individual exercises of peremptory challenge from the process as a whole), the Court applies the "heightened scrutiny" mode of equal-protection analysis used for sex-based discrimination, and concludes that the strikes fail heightened scrutiny because they do not substantially further an important government interest. The Court says that the only important government interest that could be served by peremptory strikes is "securing a fair and impartial jury." It refuses to accept respondent's argument that these strikes further that interest by eliminating a group (men) which may be partial to male defendants, because it will not accept any argument based on "the very

stereotype the law condemns.'" This analysis, entirely eliminating the only allowable argument, implies that sex-based strikes do not even rationally further a legitimate government interest, let alone pass heightened scrutiny. That places all peremptory strikes based on any group characteristic at risk, since they can all be denominated "stereotypes." Perhaps, however (though I do not see why it should be so), only the stereotyping of groups entitled to heightened or strict scrutiny constitutes "the very stereotype the law condemns" -- so that other stereotyping (e.g., wide-eyed blondes and football players are dumb) remains OK.

Even if the line of our later cases guaranteed by today's decision limits the theoretically boundless Batson principle to race, sex, and perhaps other classifications subject to heightened scrutiny (which presumably would include religious belief, much damage has been done. It has been done, first and foremost, to the peremptory challenge system, which loses its whole character when (in order to defend against "impermissible stereotyping" claims) "reasons" for strikes must be given. The right of peremptory challenge "is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.'" And make no mistake about it: there really is no substitute for the peremptory. Voir dire (though it can be expected to expand as a consequence of today's decision) cannot fill the gap. The biases that go along with group characteristics tend to be biases that the juror himself does not perceive, so that it is no use asking about them. It is fruitless to inquire of a male juror whether he harbors any subliminal prejudice in favor of unwed fathers.

And damage has been done, secondarily, to the entire justice system, which will bear the burden of the expanded quest for "reasoned peremptories" that the Court demands. The extension of Batson to sex, will provide the basis for extensive collateral litigation, which especially the criminal defendant (who litigates full-time and cost-free) can be expected to pursue. While demographic reality places some limit on the number of cases in which race-based challenges will be an issue, every case contains a potential sex-based claim. Another consequence, as I have mentioned, is a lengthening of the voir dire process that already burdens trial courts.

The irrationality of today's strike-by-strike approach to equal protection is evident from the consequences of extending it to its logical conclusion. If a fair and impartial trial is a prosecutor's only legitimate goal; if adversarial trial stratagems must be tested against that goal in abstraction from their role within the system as a whole; and if, so tested, sex-based stratagems do not survive heightened scrutiny -- then the prosecutor presumably violates the Constitution when he selects a male or female police officer to testify because he believes one or the other sex might be more convincing in the context of the particular case, or because he believes one or the other might be more appealing to a predominantly male or female jury. A decision to stress one line of argument or present certain witnesses before a mostly female jury -- for example, to stress that the defendant victimized women -- becomes, under the Court's reasoning, intentional discrimination by a state actor on the basis of gender.

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In order, it seems to me, not to eliminate any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes, the Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people's traditions.

For these reasons, I dissent.