**United States Supreme Court**

**J.E.B. v. ALABAMA EX REL. T.B.(1994)**

**No. 92-1239**

**Argued: November 2, 1993Decided: April 19, 1994**

BLACKMUN, J., delivered the opinion of the Court, in which Stevens, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. O'CONNOR, J., filed a concurring opinion. KENNEDY, J., filed an opinion concurring in the judgment. REHNQUIST, C.J., filed a dissenting opinion. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and THOMAS, J., joined. [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 1]

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,'" id., at 85, quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1880), the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Id., at 85-86. 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 [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 2]   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. App. 23. The jury found petitioner to be the father of the child and the court entered an order directing him to pay child support. On post-judgment motion, the court reaffirmed its ruling that Batson does not extend to gender-based peremptory challenges. App. 33. The Alabama Court of Civil Appeals affirmed, 606 So.2d 156 (1992), relying on Alabama precedent, see, e.g., Murphy v. State, 596 So.2d 42 (Ala.Crim.App. 1991), cert. [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 3]   denied, \_\_\_ U.S. \_\_\_ (1992), and Ex parte Murphy, 596 So.2d 45 (Ala. 1992). The Supreme Court of Alabama denied certiorari, No. 1911717 (Ala. Oct. 23, 1992).

We granted certiorari, \_\_\_ U.S. \_\_\_ (1993), to resolve a question that has created a conflict of authority - whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race. [1](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "f1) Today we reaffirm what, by now, should be axiomatic: intentional discrimination on the [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 4]   basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.

**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. [2](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "f2) 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." Strauder v. West Virginia, 100 U.S. 303, 310; see also Fay v. New York, 332 U.S. 261, 289 -290 (1947).

Many States continued to exclude women from jury service well into the present century, despite the fact that women attained suffrage upon ratification of the Nineteenth Amendment in 1920. [3](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "f3) States that did [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 5]   permit women to serve on juries often erected other barriers, such as registration requirements and automatic exemptions, designed to deter women from exercising their right to jury service. See, e.g., Fay v. New York, 332 U.S., at 289 ("[I]n 15 of the 28 states which permitted women to serve [on juries in 1942], they might claim exemption because of their sex"); Hoyt v. Florida, 368 U.S. 57 (1961) (upholding affirmative registration statute that exempted women from mandatory jury service).

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.'" United States v. DeGross, 960 F.2d 1433, 1438 (CA9 1992) (en banc), quoting 2 W. Blackstone, Commentaries \*362. [4](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "f4) 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

. . . "Restricting jury service to [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 8]   only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." Id., at 530. The diverse and representative character of the jury must be maintained "partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.'" Id., at 530-531, quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). See also Duren v. Missouri, 439 U.S. 357 (1979).

**III**

. . .While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, "overpower those differences." Note, Beyond Batson: Eliminating Gender-Based Peremptory Challenges, 105 Harv.L.Rev. 1920, 1921 (1992). As a plurality of this Court observed in Frontiero v. Richardson, 411 U.S. 677, 685 (1973):

"[T]hroughout much of the 19th century, the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right - which is itself "preservative of other basic civil and political rights" - until adoption of the Nineteenth Amendment half a century later." (Footnotes omitted.)

Certainly, with respect to jury service, African-Americans and women share a history of total exclusion, a history which came to an end for women many years after the embarrassing chapter in our history came to an end for African-Americans.

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 [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 10]   Nation's history. It is necessary only to acknowledge that "our Nation has had a long and unfortunate history of sex discrimination," …. we do not weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious discrimination from the courtroom. [7](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "f7) 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. [8](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "f8)   [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 11]

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 m ore sympathetic and receptive to the arguments of the complaining witness who bore the child." Brief for Respondent 10. [9](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "f9)   [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 12]

We shall not accept as a defense to gender-based peremptory challenges "the very stereotype the law condemns." . . .

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. See Edmonson, 500 U.S., at \_\_\_ (slip op. 13) (discrimination in the courtroom "raises serious questions as to the fairness of the [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 14]   proceedings conducted there"). 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..

**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. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 -442 (1985); Clark v. Jeter, 486 U.S. 456, 461 (1988). Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext. [16](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "f16)

If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently. See, e.g., Nebraska [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 18]   Press Assn v. Stuart, 427 U.S. 539, 602 (1976) (BRENNAN, J., concurring in the judgment) (voir dire "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause"); United States v. Witt, 718 F.2d 1494, 1497 (CA10 1983) ("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges").

The experience in the many jurisdictions that have barred gender-based challenges belies the claim that litigants and trial courts are incapable of complying with a rule barring strikes based on gender. See n. 1, supra (citing state and federal jurisdictions that have extended Batson to gender). [17](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "f17) As with race-based Batson claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 19]   before the party exercising the challenge is required to explain the basis for the strike. Batson, 476 U.S., at 97 . When an explanation is required, it need not rise to the level of a "for cause" challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual. See Hernandez v. New York, 500 U.S. 352 (1991).

Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of Batson itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. [18](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "f18) Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.

**V**

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. [19](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "f19) It not only furthers the goals of the jury [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 20]   system. It reaffirms the promise of equality under the law - that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. Powers v. Ohio, 499 U.S., at 407 ("Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process"). When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.

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]." Batson, 476 U.S., at 97 -98.

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.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I agree with the Court that the Equal Protection Clause prohibits the government from excluding a person from jury service on account of that person's gender. Ante, at 8-10. The State's proffered justifications for its gender-based peremptory challenges are far from the "`exceedingly persuasive'" showing required to sustain a gender-based classification. . . .

Nor is the value of the peremptory challenge to the litigant diminished when the peremptory is exercised in a gender-based manner. We know that, like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. See R. Hastie, S. Penrod, & N. Pennington, Inside the Jury 140-141 (1983) (collecting and summarizing empirical studies). Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that, in certain cases, a person's gender and resulting life experience will be relevant to his or her view of the case. "`Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them.'" Beck v. Alabama, 447 U.S. 625, 642 (1980). Individuals are not expected to ignore as jurors what they know as [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 4]   men - or women.

Today's decision severely limits a litigant's ability to act on this intuition, for the import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact. I previously have said with regard to Batson: "That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact. Brown v. North Carolina, 479 U.S. 940, 941 -942 (1986) (O'CONNOR, J., concurring in denial of certiorari). Today's decision is a statement that, in an effort to eliminate the potential discriminatory use of the peremptory, see Batson, 476 U.S., at 102 (Marshall, J., concurring), gender is now governed by the special rule of relevance formerly reserved for race. Though we gain much from this statement, we cannot ignore what we lose. In extending Batson to gender, we have added an additional burden to the state and federal trial process, taken a step closer to eliminating the peremptory challenge, and diminished the ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes.

These concerns reinforce my conviction that today's decision should be limited to a prohibition on the government's use of gender-based peremptory challenges. The Equal Protection Clause prohibits only discrimination by state actors. In Edmonson, supra, we made the mistake of concluding that private civil litigants were state actors when they exercised peremptory challenges; in Georgia v. McCollum, 505 U.S. \_\_\_, \_\_\_ (1992), we compounded the mistake by holding that criminal defendants were also state actors. Our commitment to eliminating discrimination from the legal process should [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 5]   not allow us to forget that not all that occurs in the courtroom is state action. Private civil litigants are just that - private litigants. "The government erects the platform; it does not thereby become responsible for all that occurs upon it." Edmonson, 500 U.S., at 632 (O'CONNOR, J., dissenting).

Clearly, criminal defendants are not state actors. "From arrest, to trial, to possible sentencing and punishment, the antagonistic relationship between government and the accused is clear for all to see. . . . [T]he unique relationship between criminal defendants and the State precludes attributing defendants' actions to the State. . . ." McCollum, supra, at \_\_\_ (O'Connor, J., dissenting). The peremptory challenge is "`one of the most important of the rights secured to the accused.'" Swain, 380 U.S., at 219 (emphasis added); Goldwasser, Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 Harv.L.Rev. 808, 826-833 (1989). Limiting the accused's use of the peremptory is "a serious misordering of our priorities," for it means "we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death." McCollum, supra, at \_\_\_ (THOMAS, J., concurring in judgment).

Accordingly, I adhere to my position that the Equal Protection Clause does not limit the exercise of peremptory challenges by private civil litigants and criminal defendants. This case itself presents no state action dilemma, for here the State of Alabama itself filed the paternity suit on behalf of petitioner. But what of the next case? Will we, in the name of fighting gender discrimination, hold that the battered wife - on trial for wounding her abusive husband - is a state actor? Will we preclude her from using her peremptory challenges to ensure that the jury of her peers contains as many [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 6]   women members as possible? I assume we will, but I hope we will not. [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 1]

JUSTICE KENNEDY, concurring in the judgment.

I am in full agreement with the Court that the Equal Protection Clause prohibits gender discrimination in the exercise of peremptory challenges. I write to explain my understanding of why our precedents lead to that conclusion. . .

There is no doubt under our precedents, therefore, that the Equal Protection Clause prohibits sex discrimination in the selection of jurors. Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975). The only question is whether the Clause also prohibits peremptory challenges based on sex. The Court is correct to hold that it does. The Equal Protection Clause and our constitutional tradition are based on the theory that an individual possesses rights that are protected against lawless action by the government. The neutral phrasing of the Equal Protection Clause, extending its guarantee to "any person," reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 3]   State violates the individual right in question). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class." Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'CONNOR, J., dissenting) (internal quotation marks omitted). For purposes of the Equal Protection Clause, an individual denied jury service because of a peremptory challenge exercised against her on account of her sex is no less injured than the individual denied jury service because of a law banning members of her sex from serving as jurors. Cf., e.g., Powers v. Ohio, 499 U.S. 400, 409 -410 (1991); Palmore v. Sidoti, 466 U.S. 429, 431 -432 (1984); Ex parte Virginia, 100 U.S. 339, 346-347 (1880). The injury is to personal dignity and to the individual's right to participate in the political process. Powers, supra, at 410. The neutrality of the Fourteenth Amendment's guarantee is confirmed by the fact that the Court has no difficulty in finding a constitutional wrong in this case, which involves males excluded from jury service because of their gender.

The importance of individual rights to our analysis prompts a further observation concerning what I conceive to be the intended effect of today's decision. We do not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias of his or her own. The jury system is a kind of compact by which power is transferred from the judge to jury, the jury in turn deciding the case in accord with the instructions defining the relevant issues for consideration. The wise limitations on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath. [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 4]

In this regard, it is important to recognize that a juror sits not as a representative of a racial or sexual group, but as an individual citizen. Nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice. Cf. Metro Broadcasting, supra, at 618 (O'CONNOR, J., dissenting). The jury pool must be representative of the community, but that is a structural mechanism for preventing bias, not enfranchising it. See, e.g., Ballard v. United States, 329 U.S. 187, 193 (1946); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946). "Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system." Id., at 220. Thus, the Constitution guarantees a right only to an impartial jury, not to a jury composed of members of a particular race or gender. See Holland v. Illinois, 493 U.S. 474 (1990); Strauder, 100 U.S., at 305.

\* \* \* \*

For these reasons, I concur in the judgment of the Court holding that peremptory strikes based on gender violate the Equal Protection Clause. [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 1]

CHIEF JUSTICE REHNQUIST, dissenting.

I agree with the dissent of JUSTICE SCALIA, which I have joined. I add these words in support of its conclusion. Accepting Batson v. Kentucky, 476 U.S. 79 (1986), as correctly decided, there are sufficient differences between race and gender discrimination such that the principle of Batson should not be extended to peremptory challenges to potential jurors based on sex.

That race and sex discrimination are different is acknowledged by our equal protection jurisprudence, which accords different levels of protection to the two groups. Classifications based on race are inherently suspect, triggering "strict scrutiny," while gender-based classifications are judged under a heightened, but less searching standard of review. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). Racial groups comprise numerical minorities in our society, warranting, in some situations, a greater need for protection, whereas the population is divided almost equally between men and women. Furthermore, while substantial discrimination against both groups still lingers in our society, racial equality has proved a more challenging goal to achieve on many fronts than gender equality. See, e. g., D. Kirp, M. Yudof, M. Franks, Gender Justice 137 (1986).

Batson, which involved a black defendant challenging [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 2]   the removal of black jurors, announced a sea-change in the jury selection process. In balancing the dictates of equal protection and the historical practice of peremptory challenges, long recognized as securing fairness in trials, the Court concluded that the command of the Equal Protection Clause was superior. But the Court was careful that its rule not "undermine the contribution the challenge generally makes to the administration of justice." 476 U.S., at 98 -99. Batson is best understood as a recognition that race lies at the core of the commands of the Fourteenth Amendment. Not surprisingly, all of our post-Batson cases have dealt with the use of peremptory strikes to remove black or racially identified venirepersons, and all have described Batson as fashioning a rule aimed at preventing purposeful discrimination against a cognizable racial group. [\*](https://caselaw.findlaw.com/us-supreme-court/511/127.html#f*) As JUSTICE O'CONNOR once recognized, Batson does not apply "[o]utside the uniquely sensitive area of race." Brown v. North Carolina, 479 U.S. 940, 942 (1986) (opinion concurring in denial of certiorari).

Under the Equal Protection Clause, these differences mean that the balance should tilt in favor of peremptory challenges when sex, not race, is the issue. Unlike the Court, I think the State has shown that jury strikes on the basis of gender "substantially further" the State's legitimate interest in achieving a fair and impartial trial through the venerable practice of peremptory challenges. . . .The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely "stereotyping" to say that these differences may produce a difference in outlook which is brought to the jury room. Accordingly, use of peremptory challenges on the basis of sex is generally not the sort of derogatory and invidious act which peremptory challenges directed at black jurors may be.

JUSTICE O'CONNOR's concurrence recognizes several of the costs associated with extending Batson to gender-based peremptory challenges - lengthier trials, an increase in the number and complexity of appeals addressing jury selection, and a "diminished . . . ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes." Ante, at 4. These costs are, in my view, needlessly imposed by the Court's opinion, because the Constitution simply does not require the result which it reaches.

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). See ante, at 4-10. All this, as I say, is irrelevant, since the case involves state action that allegedly discriminates against men. The parties do not contest [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 2]   that discrimination on the basis of sex [1](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "ff1) is subject to what our cases call "heightened scrutiny," and the citation of one of those cases (preferably one involving men rather than women, see, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 -724 (1982)) is all that was needed.

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. See ante, at 11-12 and n. 9. 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 [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 3]   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. See ante, at 13, n. 11; cf. ante, at 3-4 (O'CONNOR, J., concurring).

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. Indeed, far from having suffered harm, petitioner, a state actor under our precedents, see Georgia v. McCollum, 505 U.S. \_\_\_, \_\_\_ (1992) (slip op., at 7-8); cf. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 626 -627 (1991), has himself actually inflicted harm on female jurors. [2](https://caselaw.findlaw.com/us-supreme-court/511/127.html" \l "ff2) The Court today presumably supplies [ J.E.B. v. ALABAMA EX REL. T.B., \_\_\_ U.S. \_\_\_ (1994) , 4]   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’’. 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," ante, at 12, 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. See Powers, supra, at 424 (SCALIA, J., dissenting). 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 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.'" Ante, at 12 (quoting Powers, supra, at 410). 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. Or perhaps when the Court refers to "impermissible stereotypes," ante, at 13, n. 11, it means the adjective to be limiting, rather than descriptive - so that we can expect to learn from the Court's peremptory/ stereotyping jurisprudence in the future which stereotypes the Constitution frowns upon and which it does not. . . .

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.