SUPREME COURT OF THE UNITED STATES

No. 92–1239

J. E. B., PETITIONER *v.* ALABAMA EX REL. T. B.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

[April 19, 1994]

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.

Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against "persons because of race, color or previous condition of servitude," the Amendment submitted for consideration and later ratified contained more comprehensive terms: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." See *Oregon v. Mitchell*, 400 U. S. 112, 172–173 (1970) (Harlan, J., concurring in part and dissenting in part); B. K. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865–1867, pp. 90–91, 97–100 (1914). In recognition of the evident historical fact that the Equal Protection Clause was adopted to prohibit government discrimination on the basis of race, the Court most often interpreted it in the decades that followed in accord with that purpose. In *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), for example, the Court invalidated a West Virginia law prohibiting blacks from serving on juries. In so doing, the decision said of the Equal Protection Clause: "What is this but declaring that the law in the States shall be the same for the black as for the white." *Id.*, at 307. And while the Court held that the State could not confine jury service to whites, it further noted that

the State could confine jury service "to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications." *Id.*, at 310. See also *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–374 (1886).

As illustrated by the necessity for the Nineteenth Amendment in 1920, much time passed before the Equal Protection Clause was thought to reach beyond the purpose of prohibiting racial discrimination and to apply as well to discrimination based on sex. In over 20 cases beginning in 1971, however, we have subjected government classifications based on sex to heightened scrutiny. Neither the State nor any Member of the Court questions that principle here. And though the intermediate scrutiny test we have applied may not provide a very clear standard in all instances, see *Craig* v. *Boren*, 429 U. S. 190, 221 (1976) (REHNQUIST, J., dissenting), our case law does reveal a strong presumption that gender classifications are invalid. See, *e.g.*, *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718 (1982).

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 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.

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.

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For these reasons, I concur in the judgment of the Court holding that peremptory strikes based on gender violate the Equal Protection Clause.