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 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 that discrimination on the basis of sex[1] is

[1]Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word “gender” has acquired the new and useful connotation of cultural or attitudinal

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.

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characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution's peremptories). The case involves, therefore, sex discrimination plain and simple.

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 différence 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. 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] 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

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[2]I continue to agree with JUSTICE O'CONNOR that *McCollum* and *Edmondson* erred in making civil litigants and criminal defendants state actors for purposes of the Equal Protection Clause. I do not, however, share her belief that correcting that error while continuing to consider the exercise of peremptories by prosecutors a denial of equal protection will make things right. If, in accordance with common perception but contrary to the Court's unisex creed, women really will decide some cases differently from men, allowing defendants alone to strike jurors on the basis of sex will produce—and will be seen to produce—juries intentionally weighted in the defendant's favor: no women jurors, for example, in a rape prosecution. That is not a desirable outcome.

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. See *Id*., at 423–424 (SCALIA, J., dissenting); *Batson* v. *Kentucky*, 476 U. S. 79, 137–138 (1986) (REHNQUIST, J., dissenting). 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. See *Swain* v. *Alabama*, 380 U. S. 202, 223–224 (1965). 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," *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 jury," *ante*, at 10 and n. 8.[3] 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.'" *Ante*, at 12 (quoting *Powers*, *supra*, at 410). This analysis, entirely eliminating the only allowable argument, implies that sex-based strikes do

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[3]It does not seem to me that even this premise is correct. Wise observers have long understood that the appearance of justice is as important as its reality. If the system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function. See, *e.g.*, 4 W. Blackstone, Commentaries *353. In point of fact, that may well be its greater value.

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.

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, see *Larson* v. *Valente*, 456 U. S. 228, 244–246 (1982)), 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.'" *Lewis* v. *United States*, 146 U. S. 370, 378 (1892), quoting *Lamb* v. *State*, 36 Wis. 424, 427 (1874). See also *Lewis*, *supra*, at 376; *United States* v. *Marchant*, 12 Wheat. 480, 482 (1827) (Story, J.); 4 W. Blackstone, Commentaries *353. The loss of the real peremptory will be felt most keenly by the criminal defendant, see *Georgia* v. *McCollum*, 505 U.S. ___ (1992), whom we have until recently thought

"should not be held to accept a juror, apparently indifferent, whom he distrusted for any reason or for no reason." *Lamb*, *supra*, at 426. 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, and almost certainly beyond, cf. *Batson*, 476 U. S., at 124 (Burger, C. J., dissenting), 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.