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Fourteenth Amendment--Equal Protection: The Supreme Court's Prohibition of Gender-Based Peremptory Challenges

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FOURTEENTH AMENDMENT—EQUAL PROTECTION: THE SUPREME COURT'S PROHIBITION OF GENDER-BASED PEREMPTORY CHALLENGES

J.E.B. v. Alabama, 114 S. Ct. 1419 (1994)

I. INTRODUCTION

In *J.E.B. v. Alabama*,[1] the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the exercise of peremptory challenges based solely on the gender of a potential juror. The Court applied a heightened scrutiny test, the traditional equal protection analysis prescribed for gender-based classifications, and concluded that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[2] Determining that peremptory challenges exercised on the basis of gender stereotypes do not substantially further the state's objective of securing a fair and impartial jury, the Court established a procedure for addressing allegations of gender discrimination in jury selection.

This Note concludes that the Court correctly ruled that the concept of equal protection of the laws is inconsistent with state-sponsored discrimination in the exercise of peremptory challenges. This Note first argues that the decision is a logical and predictable extension of prior case law. Next, it determines that men and women are not fungible in the jury room, contrary to what the Court suggested, but rather each contributes a unique perspective. This uniqueness, however, does not translate into bias, and therefore, differences between the sexes cannot justify intentional exclusion of one gender or the other from the jury panel. Finally, this Note analyzes the impact of *J.E.B. v. Alabama* upon future jury selection procedures and its implications for criminal defendants being tried under the new peremptory challenge rule.

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1 114 S. Ct. 1419 (1994).
2 *Id.* at 1421.

II. BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[3] The development of equal protection jurisprudence within the context of jury selection procedures has spanned more than a century, yet its borders remain undefined and subject to expansion.

A. EQUAL PROTECTION DOCTRINE

The Equal Protection Clause guarantees that the government will treat similar individuals similarly.[4] Although the government may classify people on the basis of group characteristics, the Equal Protection Clause mandates that these classifications relate in varying degrees to legitimate governmental purposes.[5] To determine whether a state law is discriminatory either on its face or in its application, the Supreme Court developed a system of evaluating equal protection claims according to one of three levels of scrutiny. The level of scrutiny triggered depends upon the characteristics of the group receiving disparate treatment: rational basis review[6] applies to issues involving economic measures and classifications based on wealth and age;[7] strict scrutiny[8] applies to distinctions based on membership in a suspect class such as race, national origin, or alienage;[9] and an intermediate

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3 U.S. CONST. amend. XIV.

4 Nordlinger v. Hahn, 112 S. Ct. 2326, 2331 (1992).

5 *Id.*

6 The rational basis test asks whether a social or economic legislative classification rationally furthers a governmental objective that is not prohibited by the Constitution. *Id.*

7 *See, e.g., id.* (California property tax statute which created disparities in amount of taxes paid by persons owning similar pieces of property did not violate Equal Protection Clause because classification of taxpayers on basis of length of ownership rationally furthered state interest in preserving neighborhood continuity and protecting owners' reliance interests); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988) (statute charging indigent families user fee for school bus service did not violate Equal Protection Clause because it is within state's legitimate interest to encourage local school districts to provide bus service without requiring districts to expend revenues); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (Massachusetts statute requiring state police officers to retire at age 50 was rationally related to legitimate state objective of protecting public by assuring physical preparedness of officers. Therefore, statute did not violate the Equal Protection Clause).

8 Classifications reviewed according to the strict scrutiny standard must be narrowly tailored to further a compelling governmental objective. Loving v. Virginia, 388 U.S. 1 (1976).

9 *See, e.g., id.* (Court reversed convictions of white man and African-American woman who married in violation of Virginia antimiscegenation statute because no legitimate purpose justified statutory classification according to race); Graham v. Richardson, 403 U.S. 365 (1971) (state statutes which conditioned receipt of welfare benefits upon United States citizenship or upon statutorily prescribed period of residence violated Equal Protection

level of scrutiny applies to differentiation grounded in gender or illegitimacy.[10]

The Court first recognized that gender classifications are subject to scrutiny under the Equal Protection Clause in *Reed v. Reed.*[11] Refining the scope of the *Reed* decision in subsequent cases, the Court clearly articulated that men, as well as women, constitute a cognizable group entitled to equal protection of the laws.[12] The Court established the intermediate scrutiny test, currently used to evaluate gender-based classifications, in *Craig v. Boren.*[13] In *Mississippi University for Women v. Hogan,*[14] the Court clarified this two-part test for determining whether a classification based on gender can withstand equal protection analysis: first, the classification drawn must serve important governmental objectives, and second, the discriminatory means must directly and substantially relate to the accomplishment of a legitimate end.[15]

B. THE ORIGINS OF THE PEREMPTORY CHALLENGE

The process of *voir dire* in a jury trial represents an attempt by attorneys and the court to determine the suitability of prospective jurors to serve on the jury during a particular litigation. *Voir dire* consists of two different selection techniques: the challenge for cause and the peremptory challenge. In exercising a challenge for cause, an attorney must articulate a specific, demonstrable reason for believing that the stricken juror will be unable to evaluate the facts of the case fairly

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Clause because state desire to preserve welfare benefits for its own citizens or longtime residents is not adequate justification for such discrimination).

10 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976) (statutory scheme which prohibited sale of 3.2% beer to males under 21 but allowed females 18 years or older to purchase 3.2% beer constituted invidious discrimination against males 18-20 years of age in violation of Equal Protection Clause); Lalli v. Lalli, 139 U.S. 259 (1978) (intestate succession statute requiring illegitimate children, but not legitimate children, to provide proof of paternity was not substantially related to permissible state interests and, therefore, violated Equal Protection Clause).

11 404 U.S. 71 (1971). The Court found that while the Equal Protection Clause does not deny states the power to legislate differential treatment for different classes of people, the Constitution forbids the states from formulating classifications "on the basis of criteria wholly unrelated to the objective of that statute." *Id.* at 75-76.

12 *See Craig,* 429 U.S. at 204; *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (policy of state-supported university limiting enrollment to female students violated Equal Protection Clause because State did not provide an exceedingly persuasive justification for exclusion of males).

13 429 U.S. 190 (1976).

14 458 U.S. 718 (1982).

15 *Id.* at 724-25. The Court reasoned that "[t]he purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate assumptions about the proper roles of men and women." *Id.* at 725-26.

and impartially.[16] Peremptory challenges, on the other hand, permit rejection of a juror "for a real or imagined partiality" and may be exercised "without a reason stated, without inquiry and without being subject to the court's control."[17]

The peremptory challenge is an ancient institution that originated in thirteenth-century England.[18] Imported to the American colonies, it evolved into an important device for protecting the right of an accused to receive a trial by a fair and impartial tribunal.[19] Although the Constitution does not guarantee litigants a right to exercise peremptory challenges, each litigant's ability to strike arbitrarily a limited number of jurors has been codified by statutes and case law to assure an unbiased jury selection.[20] In practice, peremptory challenges are exercised upon intuition and first impressions and "on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."[21]

C. RACE AND JURY SELECTION

The Supreme Court first interpreted the impact of the Equal Protection Clause on jury selection procedures in the landmark case *Strauder v. West Virginia*,[22] in which the Court overturned the murder conviction of an African-American man tried by an all-white jury and declared unconstitutional a West Virginia statute that rendered African-Americans ineligible for jury service. Justice Strong, writing for the Court, declared that laws completely excluding African-American persons from the jury venire, "so that by no possibility can any colored man sit upon the jury," violate the Equal Protection Clause of the Fourteenth Amendment.[23] Framing its argument as a rhetorical inquiry, the Court asked of what significance is the language of the Equal Protection Clause if not to declare that:

> the law in the States shall be the same for the black as for the white; that all persons, whether colored or white shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be

16 Swain v. Alabama, 380 U.S. 202, 220 (1965).

17 *Id.*

18 Patrick J. Guinee, Comment, *The Trend Toward the Extension of Batson to Gender-based Peremptory Challenges*, 32 DUQ. L. REV. 833 (1994).

19 *See* David Everett Marko, *The Case Against Gender-Based Peremptory Challenges*, 4 HASTINGS WOMEN'S L.J. 109, 110-11 (1993).

20 *See* Batson v. Kentucky, 476 U.S. 79, 91 (1986).

21 *Swain*, 380 U.S. at 220.

22 100 U.S. 303 (1880).

23 *Id.* at 305.

made against them by law because of their color?[24]

Every criminal defendant is entitled to trial by a jury drawn from a venire that has been selected in a manner completely devoid of race-based discrimination.[25] While the decision in *Strauder* represented a significant step forward for newly emancipated African-American males, the Court stopped short of extending to all persons the equal protection of the laws—it conspicuously shunned women of all races condoning their exclusion from participation in the administration of justice.[26] It was not until nearly a century later that the Court recognized that "the exclusion of women from jury venires deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community."[27]

The Supreme Court first addressed the issue of whether the Equal Protection Clause prohibits race-based peremptory challenges in the 1965 case *Swain v. Alabama*.[28] The petitioner, an African-American man convicted of rape and sentenced to death by an all-white jury, alleged that African-Americans were systematically under-represented on juries in his jurisdiction and that the prosecutor had peremptorily eliminated all potential African-American jurors at the petitioner's trial in violation of the Constitution.[29] Although the Court acknowledged that complete exclusion of members of a particular race from jury service violates the Constitution, it noted that the defendant had the burden of proving that a prosecutor has demonstrated a pattern of striking qualified African-American jurors with the result that no African-American persons are ever allowed to serve on juries.[30] Recognizing that the peremptory challenge safeguards the right of the accused to a fair trial and is a capricious device exercised on the basis of minimal knowledge about each juror, the Court held that a prosecutor's act of striking African-American veniremen in one isolated case does not constitute a violation of equal protection.[31]

Twenty-one years later, in *Batson v. Kentucky*,[32] the Court rejected the evidentiary burden that the Court in *Swain* prescribed and instead ruled that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at defend-

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24 *Id.* at 307.
25 *Id.* at 309.
26 *See id.* at 310.
27 Taylor v. Louisiana, 419 U.S. 522, 535-36 (1975).
28 380 U.S. 202 (1965).
29 *Id.* at 205.
30 *Id.* at 223.
31 *Id.* at 221.
32 476 U.S. 79 (1986).

ant's trial."[33] The Court added that since the Court's decision in *Strauder*, states no longer have laws that facially discriminate against minority jurors.[34] Therefore, it is important to scrutinize the manner in which state officers, such as criminal prosecutors, administer statutes defining juror qualifications.[35] Justice Powell, writing for the majority,[36] stated that to establish a prima facie showing of purposeful discrimination in the administration of peremptory challenges, defendants: (1) must demonstrate that they are a member of a cognizable racial group and that the state has used peremptory challenges to strike potential jurors of the defendant's own race; (2) may rely on the fact that the use of peremptory challenges in jury selection allows discrimination to occur; and (3) must show that the facts raise an inference that the prosecutor excluded potential jurors solely because of their race.[37] Once a defendant makes the requisite showing, the burden shifts to the state to provide race-neutral explanations for challenges exercised against African-American jurors.[38] While the explanation need not be as precise and well-reasoned as a challenge for cause, prosecutors may not justify their challenges on the simple assumption that members of the defendant's race would be biased in favor of the defendant.[39]

Chief Justice Burger authored a prophetic dissent in *Batson*[40] which noted that the majority opinion did not apply conventional equal protection analysis, and therefore, limited the application of the decision to allegations of racial discrimination. He predicted that under conventional equal protection principles, the floodgates would open and exclusions on the basis of gender, religion, mental capacity, occupation, political inclination, family size, and living arrangements would be called into question.[41] Furthermore, Chief Justice Burger prophesied that the prohibitions levied against the state prosecutor's use of peremptory challenges would inevitably apply to defendants as well.[42]

Recently, the Court elaborated on the principles of *Batson* and expanded the circumstances under which the exercise of peremptory

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33 *Id.* at 96.

34 *Id.* at 88.

35 *Id.*

36 Justices Brennan, White, Marshall, Blackmun, Stevens, and O'Connor joined the opinion.

37 *Batson*, 476 U.S. at 96.

38 *Id.* at 97.

39 *Id.*

40 Chief Justice Rehnquist joined in the opinion.

41 *Batson*, 476 U.S. at 124 (Burger, C.J., dissenting).

42 *Id.* at 125-26 (Burger, C.J., dissenting).

challenges constitutes a violation of the Equal Protection Clause. First, the Court recognized that a criminal defendant has standing to assert the third-party rights of individual jurors excluded from a jury on the basis of race because the defendant and the excluded jurors share a common interest in maintaining the integrity of the judicial process.[43] The practical implication of this decision is that "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race."[44] Second, the Court erased the distinction between civil and criminal proceedings in the context of an Equal Protection Clause challenge by declaring that it is unconstitutional for private civil litigants, as well as state criminal prosecutors, to exclude jurors on the basis of race.[45] Determining that private civil litigants behave as state actors subject to the restraints of the Equal Protection Clause when they exercise peremptory challenges[46] and that civil litigants may assert the excluded juror's equal protection rights at trial,[47] the Court stated that "[r]acial discrimination has no

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[43] Powers v. Ohio, 499 U.S. 400, 411-15 (1991).

[44] *Id.* at 402. In *Powers*, a white defendant objected to the removal of seven African-American venirepersons from the jury through the use of peremptory challenges. *Id.* at 401-02. The Court found that a violation of the Equal Protection Clause had indeed occurred, declaring that "to bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." *Id.* at 415. The Court claimed that its holding was not inconsistent with the principles articulated in *Batson* because "racial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and . . . it may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred." *Id.* at 416.

[45] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991). In *Edmonson*, an African-American construction worker, who sued his former employer for negligence related to a worksite injury, objected to the defendant employer's use of two of its three peremptory challenges to remove from the venire jurors of the plaintiff's race. *Id.*

[46] The Court reached this conclusion by applying a two-part test articulated in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). *Edmonson*, 500 U.S. at 620. According to that test, the conduct of private parties constitutes state action governed by the Constitution when an alleged constitutional violation occurred as a result of the exercise of a right derived from state authority and the private party who allegedly engaged in the violation could be described in all fairness as a state actor. *Id.* Claiming that the first prong of the test was satisfied, the Court stated that although not constitutionally mandated, the use of peremptory challenges is authorized by statute and decisional law solely to "permit litigants to assist the government in the selection of an impartial trier of fact." *Id.* The second part of the test was satisfied, because the jury is a governmental body, the selection of jurors is a governmental function which is delegated to private litigants, and the exercise of the decisionmaking power is supervised and controlled by the court. *Id.* at 621-28. Furthermore, the fact that jury selection takes place in a courthouse, which symbolizes government authority, gives the appearance that the process is government-sanctioned. *Id.* at 628.

[47] The Court determined that the three requirements for third-party standing as set forth in *Powers* were satisfied in this case even though the participants were civil, not criminal, litigants: (1) persons excluded from the jury are equally unable to protect their own

place in the courtroom, whether the proceeding is civil or criminal."[48] Third, the Court held that a criminal defendant's exercise of racially discriminatory peremptory challenges violates the Equal Protection Clause because the harm caused to the personal dignity of the excluded juror and to the integrity of the judicial system is the same regardless of which side effected the juror's dismissal.[49] Expanding the scope of its recent precedents, the Court determined that criminal defendants engage in state action when they participate in jury selection,[50] and state prosecutors have standing to assert the third-party rights of the excluded jurors.[51]

D. GENDER AND JURY SELECTION

A woman's right to serve on a jury has evolved more slowly than the reciprocal right among racial minorities. Furthermore, the development of this right initially progressed along the lines of the Sixth Amendment fair cross-section guarantee rather than according to the principles of equal protection.

1. Sixth Amendment "Fair Cross-Section" Analysis

In *Ballard v. United States*,[52] the first case to recognize that women

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rights regardless of whether the trial is a criminal or civil proceeding; (2) the process of *voir dire* in both civil and criminal settings allows a litigant to develop a relationship with the jurors that persists throughout the duration of the trial; and (3) the civil litigant suffers the same type of cognizable injury as does the criminal defendant because discrimination in the jury selection process generates severe doubt about the fairness and integrity of the judicial process as a whole. *Id.* at 629-30.

48 *Id.* at 630.

49 *See* Georgia v. McCollum, 112 S. Ct. 2348, 2353 (1992). The state prosecutor in this case attempted to obtain an order from the trial court that would require the defendants, two white men on trial for a racially-motivated attack on an African-American man and woman, to provide race-neutral explanations for the exercise of their peremptory challenges if the state made out a prima facie case of racial discrimination against the defendants. *Id.* at 2351-52.

50 *Id.* at 2354-57. Applying the same pattern of reasoning articulated in *Edmonson v. Leesville Concrete Co.*, the Court concluded that state action encompasses a criminal defendant's exercise of peremptory challenges. The Court found that the conclusions reached in *Edmonson* with respect to civil litigants "apply with even greater force in the criminal context because the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function." *Id.* at 2355.

51 *Id.* at 2357. The Court arrived at this conclusion by applying the three-prong standing test set forth in *Powers v. Ohio*. First the Court determined that a state suffers cognizable injury when the fairness and integrity of its own judicial system is compromised by procedural discrimination on the basis of race. *Id.* Second, it is logical for a state to assert the equal protection rights of discriminatorily dismissed jurors because the state functions as a representative of all of its own citizens. *Id.* Finally, excluded jurors experience the same degree of difficulty bringing suit on their own behalf regardless of whether the trial takes place in a civil or criminal court. *Id.*

52 329 U.S. 187 (1946).

comprise an integral part of the community from which jurors are selected, the Court exercised its power of supervision over the federal courts by reversing the indictments and convictions of two criminal defendants based on the systematic exclusion of women from participation on the grand jury and petit jury.[53] The Court found that "[t]he systematic and intentional exclusion of women, like the exclusion of a racial group or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society."[54] While acknowledging that a federal juror's competence depends on the character of the individual rather than group or class membership, the Court admitted that male and female jurors are not fungible.[55] Members of each gender bring a different perspective to jury deliberations, and while neither males nor females act as a class in rendering a verdict, the complete exclusion of one sex diminishes the possibility that a defendant will receive a jury selected from a fair cross-section of the community.[56] The Court recognized that the injury from barring women from jury service extends beyond the individual defendant and causes harm "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."[57]

In 1975, the Court examined the conviction of a criminal defendant whose jury had been composed according to provisions in the Louisiana Constitution and Code of Criminal Procedure that prevented any woman from being summoned for jury duty unless she had previously registered a request with a court clerk to participate in the judicial process.[58] While the statute did not completely disqualify women from jury service, the practical effect of the law was to create a gross disparity in the number of men and women summoned for jury service in Louisiana.[59] The Court held that a statute that operates to exclude women from jury service does not comport with the fair cross-

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53 *Id.* at 189-90.

54 *Id.* at 195 (citations omitted).

55 *Id.* at 193.

56 *Id.* at 193-94.

57 *Id.* at 195.

58 Taylor v. Louisiana, 419 U.S. 522, 523 (1975). The pertinent section of the Louisiana Constitution read:

> [t]he Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service.

LA. CONST. art. VII, § 41 (repealed 1974). The relevant criminal code sections stated: "[a] woman shall not be selected for jury service unless she has previously filed with the clerk of [the] court of the parish in which she resides a written declaration of her desire to be subject to jury service." LA. CODE CRIM. PROC. ANN. art. 402 (repealed 1974).

59 *Taylor*, 419 U.S. at 525.

section guarantee of the Sixth Amendment to the United States Constitution,[60] because the exclusion from the jury pool of a large identifiable class of citizens defeats the protectionary aim of that requirement.[61] Men and women each bring distinct qualities to the jury box. Therefore, the systematic elimination of either sex from jury panels deprives criminal defendants of their constitutionally guaranteed right to trial by a fair and impartial cross-section of the community.[62] The Court carefully emphasized the fact that although the petit jury must derive from a representative cross-section of the community, "defendants are not entitled to a jury of any particular composition," and the decision imposes "no requirement that petit juries actually chosen must mirror the community and reflect the various and distinctive groups in the population."[63]

2. *Equal Protection Analysis: The Circuit Split*

The federal Courts of Appeals which considered the issue of gender-based peremptory challenges prior to the Supreme Court's decision in *J.E.B. v. Alabama*[64] split on the question of whether such strikes violate the Fourteenth Amendment's guarantee of equal protection of the laws.

In *United States v. Hamilton*,[65] the Fourth Circuit, while expressing distaste for the elimination of jurors based on group classifications, refused to extend the *Batson* prohibition against race-based peremptory challenges to gender.[66] The Court upheld a prosecutor's exercise of three peremptory strikes against African-American female venirepersons, reasoning that if the Supreme Court in *Batson* had intended to eliminate peremptory challenges based on gender, it would have declared all challenges based on group characteristics to be violations of the Equal Protection Clause.[67] Although the Equal Protection Clause forbids gender discrimination in other contexts, the *Batson* decision gives no indication that traditional equal protection analysis applies to the unique realm of peremptory challenges.[68]

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60 The relevant portion of the Sixth Amendment reads: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. CONST. amend. VI.

61 *Taylor*, 419 U.S. at 530-31.

62 *Id.* at 531.

63 *Id.* at 538.

64 114 S. Ct. 1419 (1994).

65 850 F.2d 1038 (4th Cir. 1988).

66 *Id.* at 1042.

67 *Id.*

68 *Id.*

The Fifth Circuit concurred with the Fourth Circuit, declaring that courts must confine the *Batson* decision to the context of race, because women do not face the same types of barriers to jury service that African-Americans experience.[69] Hypothesizing that the Court's formulation in *Swain* of a pattern of inequality across cases is sufficient to address concerns about gender discrimination, the Fifth Circuit pointed out that women are not a statistical minority, and therefore, it would be nearly impossible to remove all female jurors in a particular case through the use of peremptory challenges.[70]

The Ninth Circuit developed a different view of the issue, holding that a female criminal defendant's use of peremptory challenges to strike male jurors from the venire violated the Equal Protection Clause.[71] After establishing that the prosecution had standing to object to the defendant's use of peremptory challenges, the Ninth Circuit engaged in traditional equal protection analysis, applying the heightened scrutiny test prescribed for gender classifications.[72] While gender discrimination is tolerated if it is "substantially related to the achievement of important governmental objectives," peremptory challenges based solely on the gender of the prospective juror do not further the important government objective of securing a fair and impartial jury.[73] Therefore, because removal of jurors in this manner is unrelated to the person's ability to be impartial, such peremptory challenges are invalid.[74] The Ninth Circuit concluded that criminal defendants are state actors when they exercise peremptory challenges at their own trials, noting that the jury is a governmental body and its selection is supervised and controlled by the court, a state agency.[75]

III. Facts and Procedural History

On 21 October 1991, a civil paternity suit filed by the State of Alabama on behalf of Teresia Bible against the petitioner, Jim Bowman, was called to trial in the District Court of Jackson County, Alabama.[76] Based on a struck jury method specified in the Alabama Rules of Civil Procedure,[77] the court empaneled a jury consisting ex-

69 *See* United States v. Broussard, 987 F.2d 215, 220 (5th Cir. 1993).

70 *Id.*

71 *See* United States v. De Gross, 960 F.2d 1433 (9th Cir. 1992).

72 *Id.* at 1436-39.

73 *Id.* at 1439.

74 *Id.*

75 *Id.* at 1440-41.

76 Petitioner's Brief on the Merits at 2, J.E.B. v. Alabama, 114 S. Ct. 1419 (1994) (No. 92-1239).

77 A struck jury is chosen by allowing the litigants to take turns striking jurors from the panel until the requisite number of jurors remain.

clusively of female jurors. Beginning with a venire of twenty-four women and twelve men, the trial court excused one woman and two men for cause and allowed the litigants to alternate in the exercise of peremptory strikes against twenty-one of the remaining thirty-three prospective jurors.[78] The State exercised all but one of its peremptory strikes to remove nine men from the jury pool, while counsel for Bowman eliminated ten women and one man from the venire.[79]

Before the Court empaneled the jury, Bowman objected to the State's removal of male jurors solely on the basis of their gender, and requested a hearing in accordance with procedures articulated by the Supreme Court in *Batson v. Kentucky*[80] to determine whether the State violated the Equal Protection Clause of the Fourteenth Amendment by exercising its peremptory strikes in a discriminatory manner.[81] Bowman claimed that the Supreme Court's reasoning in *Batson*, which determined that peremptory strikes based solely on the race of the potential juror are unconstitutional, applied with equal force to intentional gender discrimination in the jury selection process.[82] Thus, Bowman argued, gender-based peremptory strikes were similarly prohibited.[83] The trial court overruled Bowman's objection and denied his request for a hearing, explaining that the original venire of sixty-two persons had been cut in half by disregarding every other name on the list.[84] As a result, the three to one ratio of women to men in the thirty-six-member jury pool occurred randomly.[85] At the conclusion of the trial, the all-female jury held that Bowman was the father of Teresia Bible's child.[86] In response to the jury's findings, the court ordered Bowman to pay child support to Bible in the amount of $415.71 per month.[87]

The trial court denied Bowman's post-judgment motion requesting an order of judgment notwithstanding the verdict or in the alternative a new trial, stating that the *Batson* prohibition against racially discriminatory peremptory challenges does not apply to gender-motivated peremptory strikes.[88] In January 1992, Bowman appealed the case to the Alabama Court of Civil Appeals claiming that the lower

78 Respondent's Brief on the Merits at 2, J.E.B. v. Alabama, 114 S. Ct. 1419 (1994) (No. 92-1239).

79 J.E.B. v. Alabama, 114 S. Ct. 1419, 1421-22 (1994).

80 476 U.S. 79 (1986).

81 Petitioner's Brief on the Merits at 2, *J.E.B.* (No. 92-1239).

82 *J.E.B.*, 114 S. Ct. at 1422.

83 *Id.*

84 Petitioner's Brief on the Merits at 4, *J.E.B.* (No. 92-1239).

85 *Id.*

86 *J.E.B.*, 114 S. Ct. at 1422.

87 Respondent's Brief on the Merits at 3, *J.E.B.* (No. 92-1239).

88 Petitioner's Brief on the Merits at 4-5, *J.E.B.* (No. 92-1239).

court committed error by denying Bowman's request for a hearing to determine whether the State's use of gender-based peremptory strikes during jury selection violated his right to equal protection of the laws.[89] The Court of Civil Appeals affirmed the trial court's decision and denied Bowman's petition for rehearing, citing Alabama Supreme Court precedent that refused to extend the *Batson* principle to gender-based strikes.[90] On 23 October 1992, the Alabama Supreme Court denied Bowman's subsequent writ of certiorari to the Court of Civil Appeals.[91] Following this denial, Bowman filed a petition for certiorari with the United States Supreme Court. The Supreme Court granted certiorari on 17 May 1993 to determine whether the Equal Protection Clause prohibits the exercise of peremptory challenges to eliminate prospective jurors on the basis of gender.[92]

IV. Summary of Opinions

A. Majority Opinion

The Supreme Court reversed the decision of the Alabama Court of Civil Appeals and remanded the case for proceedings consistent with the Court's holding that gender-based peremptory challenges violate the Equal Protection Clause.[93] Justice Blackmun, delivering the opinion of the Court,[94] declared that "today we reaffirm what, by now, should be axiomatic: intentional discrimination on the 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."[95] Justice Blackmun began his opinion with a thorough discussion of precedent relating to gender and jury service. In the next segment of the opinion, he conducted an equal protection analysis of the facts of the case, applying a heightened scrutiny standard of review. Finally, Justice Blackmun addressed the consequences and implications of the Court's opinion.

Justice Blackmun laid the foundation for his legal analysis of the case by discussing at length the history of women's jury service in the United States.[96] Recognizing that the issue of discrimination on the basis of gender in the jury selection process is a fairly recent develop-

89 *Id.* at 5.
90 J.E.B. v. State, 606 So. 2d 156, 157 (Ala. Civ. App. 1992).
91 Petitioner's Brief on the Merits at 5, *J.E.B.* (No. 92-1239).
92 J.E.B. v. T.B., 113 S. Ct. 2330 (1993).
93 J.E.B. v. Alabama, 114 S. Ct. 1419, 1421 (1994).
94 Justices Stevens, O'Connor, Souter, and Ginsburg joined in the opinion.
95 *J.E.B.*, 114 S. Ct. at 1422.
96 *See id.* at 1422.

ment, Justice Blackmun explained the phenomenon by recounting the fact that women were completely excluded from jury service until the nineteenth century and continued to be excluded by many states even after women attained suffrage in 1920.[97] Justice Blackmun cited several cases[98] which justified the exclusion of women by articulating a need to protect the delicacy of the female gender from the depravity and corrosive effects of the courtroom.[99] Discussing the 1946 case, *Ballard v. United States*,[100] in which the Court held that women could not be excluded from federal juries where the local laws provided that women were eligible for jury service, Justice Blackmun quoted a passage that recognized that while neither men nor women act as a class when sitting as jurors, male and female jurors are not interchangeable—each influences the other to create a unique courtroom atmosphere which cannot be replicated in the absence of one gender or the other.[101]

Justice Blackmun concluded his overview of gender and jury selection with a discussion of *Taylor v. Louisiana*,[102] the 1975 Supreme Court case that struck down a state statute restricting the ability of women to serve on juries.[103] In that case, the Court reasoned that restricting jury service to certain segments of the population violated the Sixth Amendment because juries must consist of a fair cross-section of the community to assure their impartiality.[104]

Turning his attention to the equal protection issues in the case, Justice Blackmun outlined the developments that have occurred in the area of gender discrimination.[105] The Court noted that the United States has a long history of sex discrimination, and that fact alone warrants the application of a heightened scrutiny to all gender-based classifications to distinguish governmental policies based on reasonable assumptions from those based on gender stereotypes and misconceptions.[106] The Court rejected the State's argument that because gender discrimination in the United States has not reached the same level of severity as race discrimination, courts should allow gender-based peremptory challenges, even though they prohibit race-

97 *Id.* at 1422-23.

98 Bradwell v. State, 21 L. Ed. 442 (1872); Bailey v. State, 219 S.W.2d 424 (Ark. 1949); *In re* Goodell, 39 Wis. 232 (1875).

99 *J.E.B.*, 114 S. Ct. at 1423.

100 329 U.S. 187.

101 *J.E.B.*, 114 S. Ct. at 1424 (quoting *Ballard*, 329 U.S. at 193-94).

102 419 U.S. 522.

103 *See J.E.B.*, 114 S. Ct. at 1424.

104 *Id.*

105 *Id.*

106 *Id.* at 1424-25.

based challenges.[107] The Court stated that although differences may exist in the histories of their oppression, both African-Americans and women share the experience of being excluded from juries.[108] Furthermore, attempts to calculate which group has suffered greater injury are irrelevant.[109]

The Court stated that the only inquiry necessary to determine whether the gender-based peremptory strike survives heightened scrutiny under the Equal Protection Clause is whether the discriminatory act furthers a legitimate state interest in "achieving a fair and impartial trial."[110] In making this determination, Justice Blackmun refused to engage in a cost-benefit analysis pitting the institutional value of the peremptory challenge against the desire to eliminate the specter of discrimination from the legal process.[111] Instead, the Court restricted the scope of its review to consideration of "whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury."[112]

The majority held that the State failed to demonstrate that eliminating male jurors from the venire would facilitate the process of obtaining an impartial jury.[113] Justice Blackmun, rejecting the State's rationale that male jurors might identify and sympathize with the male defendant in the case to the detriment of the out-of-wedlock child and the state, emphasized the fact that "[t]he State's interest in every trial is to see that the proceedings are carried out in a fair, impartial, and nondiscriminatory manner."[114] Furthermore, Justice Blackmun observed that the justifications offered by the State for its gender-based peremptory challenges are grounded upon the same types of gender stereotypes that were used to justify the exclusion of women from juries in the past, and the State offered no evidence that such assumptions are correlated with or predictive of actual juror attitudes.[115]

After concluding that allowing litigants to exercise gender-based peremptory strikes serves no legitimate state interest, the majority bolstered its decision by examining the detrimental results of permitting the discriminatory use of peremptory challenges.[116] First, the Court opined that litigants are harmed by the risk that the bias exhibited

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107 *Id.* at 1425.
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.* at 1425-26.
112 *Id.* at 1426.
113 *Id.*
114 *Id.* at 1426 n.8.
115 *Id.* at 1426-27.
116 *Id.* at 1427.

during jury selection will manifest itself during the trial proceeding as well.[117] Second, the Court believed that the community would suffer injury as a result of "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."[118] Finally, the Court recognized that excluded jurors are stripped of their dignity, reminded, in the case of female jurors, of their history of exclusion, and branded as unqualified to participate in a process to which all persons have a right to contribute.[119] While the majority acknowledged the argument that all peremptory challenges are based on some sort of stereotype, it differentiated peremptory challenges based on characteristics other than race or gender by the fact that those types of challenges do not threaten injury to fundamental personal dignity and do not recall a history of exclusion based on stereotypical notions.[120]

Attempting to assuage fears that its decision would ultimately lead to the effective elimination of peremptory challenges from the jury selection process, the Court delineated several instances in which the peremptory challenge may be constitutionally exercised without relying on stereotypical assumptions about gender and race.[121] As long as gender does not serve as a proxy for bias, litigants may continue to strike jurors from the panel, including jurors who are members of any class subject to "rational basis" review under the Equal Protection Clause and jurors who exhibit characteristics that are over represented in one gender.[122] The Court noted that the *voir dire* process can adequately acquaint litigants with juror attitudes and eliminate the need to rely on race or gender stereotypes.[123]

Finally, the Court outlined the procedure according to which litigants must address future allegations of gender discrimination in the use of peremptory challenges.[124] First, as the *Batson* decision mandated for race-based claims, the objecting party must make a prima

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117 *Id.*

118 *Id.*

119 *Id.* at 1428.

120 *Id.* n.14.

121 *Id.* at 1429.

122 *Id.* The Court describes two examples of constitutional peremptory strikes based on characteristics that are disproportionately associated with one gender. First, a peremptory challenge of all persons that have military experience likely affects men more than women at this time. Second, a challenge of all persons employed as nurses has the opposite result of affecting more women than men. Absent a showing of pretext, such challenges may not be unconstitutional since they are not based on gender or race.

123 *Id.*

124 *Id.*

facie showing of intentional discrimination.[125] The challenged party must then describe to the court the basis for striking the juror in question.[126] To adequately justify a peremptory strike, the challenged party need only identify a characteristic other than gender as the basis of the strike and demonstrate to the court's satisfaction that the explanation is not merely a pretext for striking jurors of a particular gender.[127] While requiring a litigant to articulate the reasons for exercising a suspect peremptory challenge places a greater burden on the litigants, the Court pointed out that such explanations need not meet the stringent requirement of a "for cause" challenge.[128]

In concluding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality,"[129] the majority addressed its concern that "when persons are excluded from participation in our democratic processes solely because of race or gender, [the] promise of equality dims, and the integrity of our judicial system is jeopardized."[130] The Court believed that its decision not only promoted gender equality but also prevented racial discrimination from occurring free from judicial scrutiny, under the guise of gender bias, in contravention of the principles set forth in *Batson*.[131]

B. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor joined the majority holding that the exclusion of persons from jury service on the basis of gender violates the Equal Protection Clause, but she delivered a cautionary concurring opinion that the majority's decision further eroded the role of the peremptory challenge in jury trials. Justice O'Connor predicted that by eliminating gender-based peremptory challenges, the Court "increases the number of cases in which jury selection—once a sideshow—will become part of the main event."[132] For that reason, Justice O'Connor argued, the Court's decision minimizes the ability of the peremptory challenge to maintain its long-cherished role as an aid to obtaining fair and impartial juries.[133]

Justice O'Connor hypothesized that this decision will jeopardize the right of private litigants to a fair and impartial trial, because lawyers will no longer be able to rely on inarticulable intuition to deter-

125 *Id.*
126 *Id.*
127 *Id.* at 1430.
128 *Id.*
129 *Id.* at 1421.
130 *Id.* at 1430.
131 *Id.*
132 *Id.* at 1431 (O'Connor, J., concurring).
133 *Id.* (O'Connor, J., concurring).

mine which jurors hold a particular disposition.[134] Therefore, lawyers will be more reluctant to exercise peremptory challenges against jurors that they instinctively suspect are biased because of fear that they will have to provide a gender-neutral explanation for the strike.[135] As litigators become paralyzed by the uncertainty of the situation, the possibility of biased jurors being admitted to the jury will increase.[136]

Justice O'Connor also expressed her conviction that the prohibition against the use of gender-based peremptory challenges should apply only to government actors—*i.e.*, prosecutors or attorneys for the government in civil cases. While acknowledging that the Equal Protection Clause forbids the use of discriminatory peremptory challenges in this case, where the challenged litigant is undeniably a state actor, Justice O'Connor adamantly declared that private litigants, in particular criminal defendants, are not state actors and should not, therefore, be subject to the constitutional prohibition against gender discrimination.[137] She lamented the fact that in recent years the Court has rendered imprudent decisions[138] establishing the principle that all litigants are state actors when exercising peremptory challenges.[139] Contemporary trends restricting private litigants' use of peremptory challenges threaten to extinguish "one of the most important of the rights secured to the accused."[140]

Justice O'Connor stated that the peremptory challenge is both a fundamental aspect of securing an impartial jury and a valuable tool for litigators, and, therefore, she hesitated to embrace the new restrictions on its discretionary power.[141] Contrary to the majority view, Justice O'Connor argued that the usefulness of the peremptory challenge to litigants is not lessened by gender discrimination in the

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134 *Id.* at 1431 (O'Connor, J., concurring).

135 *Id.* (O'Connor, J., concurring).

136 *Id.* (O'Connor, J., concurring).

137 *Id.* at 1432 (O'Connor, J., concurring).

138 Georgia v. McCollum, 112 S. Ct. 2348 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

139 *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring). In his dissenting opinion, Justice Scalia similarly expressed his disagreement with the Court's previous decisions establishing that both civil litigants and criminal defendants are state actors when they exercise peremptory challenges. *Id.* at 1437 n.2 (Scalia, J., dissenting). However, he challenged Justice O'Connor's implication that reversing such precedent is harmonious with prohibiting only government actors from exercising peremptory challenges on the basis of gender. *Id.* (Scalia, J., dissenting). Justice Scalia speculated that if substantive differences actually exist between the attitudes of male and female jurors, allowing criminal defendants to strike jurors on the basis of gender, but refusing to allow prosecutors the same latitude will generate the undesirable outcome of skewing the jury system in the defendants' favor. *Id.* (Scalia, J., dissenting).

140 *Id.* at 1432 (O'Connor, J., concurring).

141 *Id.* (O'Connor, J., concurring).

exercise of such strikes.[142] While the majority held that the fact that jurors' attitudes may differ according to gender is legally irrelevant, Justice O'Connor reasoned that "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."[143] She stated that "gender matters" because jurors cannot separate themselves from their experiences as men and women when they step into the jury box.[144]

C. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy agreed with the majority's conclusion that the Equal Protection Clause prohibits gender discrimination in the exercise of peremptory challenges.[145] However, he wrote a separate concurring opinion to trace the developments in equal protection jurisprudence which he felt compelled the majority's decision.[146]

Justice Kennedy recognized that the Fourteenth Amendment was originally enacted and judicially interpreted as a prohibition against racial discrimination by government actors.[147] Pointing to early Supreme Court decisions interpreting the Equal Protection Clause,[148] Justice Kennedy noted that while the Court held that state laws that intentionally excluded African-Americans from jury service violated the Equal Protection Clause, the protections of the Fourteenth Amendment did not extend to women in any context until many years later.[149] Beginning in 1971, the Court acknowledged that the prohibitions of the Equal Protection Clause extend beyond racial discrimination to include discrimination on the basis of gender, and thus, government classifications based on sex must survive heightened scrutiny by the judiciary to satisfy the Equal Protection Clause.[150] While Supreme Court precedents clearly established that the Equal Protection Clause prohibits gender discrimination in the selection of a jury pool,[151] Justice Kennedy pointed out that the issue of whether peremptory challenges based on gender are similarly unconstitutional remained undecided until the present time.[152]

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142 *Id.* at 1431-32 (O'Connor, J., concurring).
143 *Id.* at 1432 (O'Connor, J., concurring).
144 *Id.* (O'Connor, J., concurring).
145 *Id.* at 1433 (Kennedy, J., concurring).
146 *Id.* (Kennedy, J., concurring).
147 *Id.* (Kennedy, J., concurring).
148 Yick Wo v. Hopkins, 118 U.S. 356 (1886); Strauder v. West Virginia, 100 U.S. 303 (1880).
149 *J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring).
150 *Id.* (Kennedy, J., concurring).
151 Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).
152 *J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring).

After setting the historical stage, Justice Kennedy concluded that denying individuals the right to serve on a jury by exercising a peremptory strike against them on the basis of gender is no less injurious to the individual than laws that blatantly prohibit jury service by individuals of one gender or the other.[153] Justice Kennedy arrived at this conclusion by examining the neutral language in which the Equal Protection Clause frames its guarantees: the fact that the Clause extends its protections to "any person," he concluded, indicates that the framers intended to afford equal treatment to each individual, not merely to each class of individuals.[154] Therefore, striking individuals from a jury because of their gender causes injury to "personal dignity and the individual's right to participate in the political process."[155] The individual rights component of the Equal Protection Clause is significant to Justice Kennedy, who recognized that it is the jurors' duty to formulate a judgment on the basis of their individual assessment of the facts, not on the basis of racial or gender group bias.[156] He concluded that assumptions on the part of society that a person belonging to a particular race or gender classification will act as a representative of that group and interject bias into jury deliberations insults the integrity of individual jurors and denigrates the entire jury system.[157]

D. CHIEF JUSTICE REHNQUIST'S DISSENT

In his dissenting opinion, Chief Justice Rehnquist stated that even though the Court may have decided *Batson v. Kentucky*[158] correctly, the majority erred in extending the *Batson* prohibition against race-based peremptory challenges to strikes made on the basis of gender, because the Court has recognized significant differences between race and gender discrimination in its equal protection jurisprudence.[159] That the Court in *Batson* recognized a difference between the two types of discrimination is apparent from the fact that "classifi-

153 *Id.* at 1434 (Kennedy, J., concurring).

154 *Id.* (Kennedy, J., concurring).

155 *Id.* (Kennedy, J., concurring). Justice Kennedy viewed the fact that the majority considered the exclusion of male jurors to be a violation of the Equal Protection Clause as reinforcement of his notions about the neutrality of the Fourteenth Amendment.

156 *Id.* (Kennedy, J., concurring). Justice Kennedy conceived of the jury system as a compact according to which the judge transfers the power to decide a case to the jury and the jury agrees to abide by certain instructions "defining the relevant issues for consideration." *Id.* (Kennedy, J., concurring). Any juror who allows racial or gender bias to creep into the deliberation process in effect breaches the compact and violates the oath. *Id.* (Kennedy, J., concurring).

157 *Id.* (Kennedy, J., concurring).

158 476 U.S. 79 (1986).

159 *J.E.B.*, 114 S. Ct. at 1434-35 (Rehnquist, C.J., dissenting).

cations based on race are inherently suspect" and entitled to "strict scrutiny" by the Court, but gender classifications are assessed according to a less stringent standard of review.[160] Justice Rehnquist opined that racial groups require a greater degree of protection because they, unlike either gender, constitute statistical minorities in the United States and have experienced greater difficulty than women in obtaining equal treatment.[161]

Turning to a discussion of *Batson*, Justice Rehnquist argued that although the Court in *Batson* concluded that the prohibitions against racial discrimination contained in the Equal Protection Clause outweigh deference to the historical practice of using peremptory challenges, it did not intend to diminish the capacity of the peremptory challenge to secure fairness and impartiality in the jury system.[162] The differences between racial and gender classifications combined with the *Batson* Court's reluctance to erode the usefulness of the peremptory challenge therefore dictate that gender-based peremptory challenges should withstand scrutiny under the Equal Protection Clause.[163] Justice Rehnquist disagreed with the majority's conclusion that the State of Alabama failed to provide sufficient evidence that striking jurors on the basis of gender furthers a legitimate state interest in securing a fair and impartial jury.[164] He asserted that men and women differ not only biologically, but also in terms of experience, and that "[i]t is not merely 'stereotyping' to say that these differences may produce a difference in outlook which is brought into the jury room."[165] Therefore, Justice Rehnquist concluded, basing peremptory challenges on the gender of the juror is "generally not the sort of derogatory and invidious act which peremptory challenges directed at black jurors may be."[166]

E. JUSTICE SCALIA'S DISSENT

Referring to the issue in the case as "sex discrimination" because of the cultural and attitudinal baggage which he believes accompanies the term "gender,"[167] Justice Scalia[168] authored a sarcastic dissenting opinion in which he proclaimed that most of the majority's discussion

160 *Id.* at 1435 (Rehnquist, C.J., dissenting) (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).
161 *Id.* (Rehnquist, C.J., dissenting).
162 *Id.* (Rehnquist, C.J., dissenting).
163 *Id.* (Rehnquist, C.J., dissenting).
164 *Id.* (Rehnquist, C.J., dissenting).
165 *Id.* (Rehnquist, C.J., dissenting).
166 *Id.* (Rehnquist, C.J., dissenting).
167 *Id.* at 1436 n.1 (Scalia, J., dissenting).
168 Chief Justice Rehnquist and Justice Thomas joined in the opinion.

of the case was "irrelevant."[169] Justice Scalia labeled Justice Blackmun's discussion of the historical exclusion of women from jury service as irrelevant because the issue in this case focused on discrimination against men rather than women.[170] Equally irrelevant, Justice Scalia stated, is the Court's discussion of the lack of evidence supporting the State of Alabama's assertion that relying on gender stereotypes accurately predicts the views and dispositions of potential jurors.[171]

Justice Scalia launched his assault against Justice Blackmun and the majority by decrying the Court's illogical remedy of awarding a new trial to a petitioner who suffered no injury in the original trial.[172] Justice Scalia reasoned that, by the majority's own logic, male and female jurors are "fungible," and therefore, since the outcome would presumably have been the same if male jurors had been sitting on the jury, their exclusion harmed only the stricken jurors.[173] Justice Scalia conceded that the petitioner's cause of action rested upon Supreme Court precedent[174] granting third-party standing in cases where a stricken juror has been injured, but denounced such a practice, claiming that this case illustrates why it is illogical to afford a remedy to the litigant when it is the excluded juror who has been wronged.[175] Since scientific evidence presented at trial established the petitioner's paternity with 99.92% accuracy, granting the petitioner a retrial will needlessly consume State resources to rectify a truly harmless error.[176]

Justice Scalia next attacked the majority's equal protection analysis by accusing the Court of failing to see the big picture. Focusing upon individual exercises of the peremptory challenge, the Court concluded that exercising a peremptory challenge on the basis of a group characteristic subject to heightened scrutiny violates the Equal Protection Clause.[177] However, Justice Scalia argued that because all groups are regularly subject to the peremptory challenge and each will occasionally become the target of such strikes, no single group experiences differential treatment.[178] Justice Scalia cited the present case as a perfect example of the even-handedness of the peremptory challenge system: each side in the dispute attempted to remove jurors of

169 *J.E.B.*, 114 S. Ct. at 1436 (Scalia, J., dissenting).
170 *Id.* (Scalia, J., dissenting).
171 *Id.* (Scalia, J., dissenting).
172 *Id.* at 1436-37 (Scalia, J., dissenting).
173 *Id.* at 1437 (Scalia, J., dissenting).
174 Powers v. Ohio, 499 U.S. 400 (1991).
175 *J.E.B.*, 114 S. Ct. at 1437 (Scalia, J., dissenting).
176 *Id.* (Scalia, J., dissenting).
177 *Id.* at 1422.
178 *Id.* at 1437 (Scalia, J., dissenting).

one gender from the jury panel in an effort, not to express disdain for the capabilities of that gender, but to secure a jury that would favor the litigant's case.[179]

Justice Scalia then took issue with the majority's application of the "heightened scrutiny" test which requires any instance of gender-based discrimination to substantially further an important state interest to survive an Equal Protection Clause challenge.[180] The majority concluded that the only plausible state interest that the exercise of peremptory challenges could affect, the selection of a fair and impartial jury, was not furthered by the use of gender-based strikes.[181] Although the State of Alabama claimed that it aimed its strikes at removing a group that might unduly favor male defendants, the Court refused to accept any justifications based on unconstitutional stereotypes.[182] Justice Scalia interpreted the Court's conclusion as an elimination of all possible arguments in support of gender-based strikes, implying that gender-based peremptory challenges are not capable of satisfying even a rational basis test, much less heightened scrutiny.[183] From this, he extrapolated that the majority's decision endangers all peremptory challenges based on group characteristics because it is possible to claim that any such strike is based on a stereotype.[184]

Focusing his attention on the consequences of extending the Court's decision in *Batson* to gender and possibly other classifications, Justice Scalia described the damage inflicted by the majority's decision.[185] First, he noted that forcing a litigant to supply a justification for each strike compromises the essence of the peremptory challenge because litigants can no longer exercise it as an arbitrary right to remove a juror whom they instinctively distrust.[186] Justice Scalia predicted that the criminal defendant will experience the most significant backlash from this developing jurisprudence, as there is no substitute for the peremptory challenge that would as effectively protect the defendant's right to a fair jury.[187] Second, the entire judicial system will sustain injury as it assumes the burden of the new collateral litigation generated by a system in which each peremptory strike ap-

179 *Id.* (Scalia, J., dissenting).
180 *Id.* at 1438 (Scalia, J., dissenting).
181 *Id.* (Scalia, J., dissenting).
182 *Id.* (Scalia, J., dissenting).
183 *Id.* (Scalia, J., dissenting).
184 *Id.* (Scalia, J., dissenting).
185 *Id.* (Scalia, J., dissenting).
186 *Id.* (Scalia, J., dissenting).
187 *Id.* (Scalia, J., dissenting). *Voir dire* will not suffice as a replacement for the peremptory challenge, Justice Scalia noted, because "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." *Id.* at 1438-39 (Scalia, J., dissenting).

parently based on gender or race will be subject to a hearing to determine its true foundation.[188] Justice Scalia expects the criminal defendant, in particular, to make full and costly use of such opportunities, which could potentially arise in every trial once gender-based claims have entered the mix.[189] Third, expanding the Court's ruling to what he called its "logical conclusion," Justice Scalia argued that choosing a witness based on which gender the litigant believes will have a greater impact on the jury or selecting a particular line of reasoning because it may evoke the female jurors' sympathy, will constitute a violation of the Equal Protection Clause.[190]

In his conclusion, Justice Scalia accused the Court of threatening the peremptory challenge with extinction "not to eliminate any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes."[191] According to Justice Scalia, "[t]he Constitution of the United States neither requires nor permits this vandalizing of our people's traditions."[192]

V. ANALYSIS

The decision in *J.E.B. v. Alabama* is not surprising in light of the developments that have taken place in equal protection jurisprudence in recent years. Prohibiting civil litigants from exercising gender-based (more specifically, male-based) peremptory challenges appears to be a logical and predictable outgrowth of the Court's prior decisions. However, a great deal of controversy surrounds the practical implications of placing further restrictions on the use of peremptory challenges. The Court's decision in *Batson* sparked a firestorm of academic speculation about whether the Court would extend Equal Protection Clause analysis to peremptory challenges based on other cognizable group characteristics and further, whether such an extension would signal the demise of the peremptory challenge as an instrument of securing a fair and impartial jury.[193] While the decision

188 *Id.* at 1439 (Scalia, J., dissenting).

189 *Id.* (Scalia, J., dissenting).

190 *Id.* (Scalia, J., dissenting).

191 *Id.* (Scalia, J., dissenting).

192 *Id.* (Scalia, J., dissenting).

193 *See e.g.*, Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139 (1992) (arguing that, in light of historical exclusion of women from jury service, the Court should extend its decision in *Batson* to prohibit gender-based peremptory challenges, but that complete elimination of peremptory challenges would be ill-advised); Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35 (1992) (endorsing system of proportional representation as alternative to prohibiting gender-based peremptory challenges because while extending *Batson* to gender is justifiable in terms of law, such extension distorts arbitrary and capricious nature of peremptory challenge); Thomas A. Hett, Batson v. Kentucky: *Present Extensions*

in *J.E.B.* does not help to define the outer limits of equal protection prohibitions, this Note argues that the Court has selected the correct path toward eliminating invidious discrimination from the jury selection process.

A. THE COURT'S EQUAL PROTECTION ANALYSIS

True to the predictions of Chief Justice Burger's dissent in *Batson*,[194] the Court has applied traditional equal protection analysis to class-based peremptory challenges, and the challenges have not withstood the heightened scrutiny afforded to classifications based on gender. Unlike *Batson*, which bypassed traditional equal protection analysis and applied a strange hybrid analysis requiring the showing of a *prima facie* case of intentional discrimination,[195] the Court in *J.E.B.* determined that the important state objective of securing a fair and impartial jury could not be substantially advanced by removing jurors of a particular gender from the venire.[196]

Although the State of Alabama reasoned that its important interest in establishing the paternity of an illegitimate child justified the exclusion of jurors of one gender from the venire, the Court properly relied upon *Edmonson v. Leesville Concrete Co.*[197] to establish that the only purpose of peremptory challenges is to facilitate the selection of a fair and impartial jury, not to secure a jury stacked in the state's favor. Given either justification, however, no evidence indicates that excluding men from the jury would *substantially* advance the state's interest. While exclusion of men or women from the jury may eradicate a small portion of biased jurors under specific and limited circumstances,[198] the application of the peremptory challenge to all members of one gender group reflects a classification which is both over-inclusive and under-inclusive for purposes of equal protection analysis. The class of persons who will best effectuate the state's goal cannot be precisely identified: not all women will be sympathetic to the plight of a single mother; not all men will identify with a man who

and Future Applications, 24 LOY. U. CHI. L.J. 413 (1993) (predicting that Court would expand *Batson* rationale to prohibit gender-biased challenges but would not extend prohibition to peremptory challenges based on age or religion).

194 *See* Batson v. Kentucky, 476 U.S. 79, 123-24 (1986) (Burger, C.J., dissenting). "That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge on the basis of race. . . . But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex. . . ." *Id.* (Burger, C.J., dissenting).

195 *Id.* at 126 (Burger, C.J., dissenting).

196 *See* J.E.B. v. Alabama, 114 S. Ct. 1419, 1426-27 (1994).

197 500 U.S. 614 (1991).

198 In rape trials, for instance, female jurors tend to be slightly more conviction-prone than male jurors. REID HASTIE ET AL., INSIDE THE JURY 141-42 (1983).

chooses not to become involved in his illegitimate child's life. Therefore, it is not certain that the exercise of peremptory challenges to exclude one gender advances the state's interest in achieving an unbiased panel of jurors.

Although somewhat troublesome for the dissent, the fact that the petitioner in this case was male and the excluded venirepersons were also male was of no consequence to the disposition of the case.[199] The Court's lengthy discussion of the historic exclusion of women from jury service added some unnecessary confusion to the majority's equal protection analysis, for equal protection jurisprudence does not require a showing that the victim of disparate treatment belongs to a historically disadvantaged group. Although not elevated to the status of a suspect classification, gender has been judicially recognized as a classification which merits a heightened level of scrutiny to resolve disputes over disparate treatment.[200] The main issue in the case is whether striking jurors of one gender reinforces harmful stereotypes about the relative abilities of either gender to serve as impartial jurors.[201]

Because the peremptory challenges at issue in *J.E.B.* were exercised by the State of Alabama and not a private citizen, the question, prevalent in many recent cases, of whether the restraints of the Equal Protection Clause apply to the litigant's use of jury selection mechanisms, was not a factor in the Court's decision. Likewise, the often related issue of third-party standing did not play an important role in the disposition of this case because the defendant asserted his own right to equal protection of the laws—jurors of the defendant's own gender had been excluded from the jury leading to the presumption that the defendant himself had suffered injury as a result of being denied a fair and impartial jury. While in fact the verdict may not

199 *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982). Concluding that a statute that prohibited male students from enrolling in a nursing degree program at a state university for women disadvantaged excluded males, the Court stated, "that this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." *Id. See also* Reed v. Reed, 404 U.S. 71, 76 (1971) ("To give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.").

200 *See* Craig v. Boren, 429 U.S. 190, 197-98 (1976).

201 Striking male jurors in a paternity case like *J.E.B.* may simultaneously reinforce unflattering stereotypes about both the excluded men and the women who remain on the jury. For example, women may be perceived as weak and overly sympathetic to issues of childrearing and family because the home is a woman's domain, whereas men may be perceived as identifying with dead-beat dads because men typically shun their domestic responsibilities.

have differed if the state had not excluded men from the jury,[202] the Court reinforced its position by relying on precedent to establish that both excluded jurors and society at large suffer from the discriminatory exercise of peremptory challenges.[203]

B. ARE MALE AND FEMALE JURORS FUNGIBLE?

The Court based its decision in *J.E.B.* on the failure of the state to convincingly demonstrate that qualified male jurors are likely to exercise biased judgment in favor of male defendants in paternity suits.[204] The Court rejected the argument that gender is predictive of juror attitudes and implied that male and female jurors are interchangeable.[205] While studies generally fail to show any strong correlation between gender and juror bias in typical criminal cases,[206] social-psychological theories posit that men and women employ different methods of moral decision making[207] and different methods of recalling and perceiving facts.[208] The Court in *Ballard v. United States* appeared to recognize these differences between the sexes, pointing out that men and women are not fungible in terms of the experiences and perspectives which they bring into the jury box.[209] Each juror will be impartial, but each one will bring his or her own wealth of experience to the process and may perceive the facts in a different light.[210] There would be no need for the Sixth Amendment fair cross-section requirement if jurors from every conceivable classification espoused the same attitude about the case. Differences across group affiliations are expected, and, litigants should solicit divergent input to satisfy the fair cross-section requirement.

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202 J.E.B. v. Alabama, 114 S. Ct. 1419, 1436-37 (1994) (Scalia, J., dissenting).

203 *See id.* at 1427-28. The Court invoked the reasoning set forth in *Powers v. Ohio* to propound its argument that the state's participation in the exercise of discriminatory peremptory challenges undermines public confidence in the jury system and reinforces prejudicial group stereotypes regarding an individual's qualification to serve on a jury. *Id.* at 1427.

204 *See id.* at 1427.

205 *See id.*

206 HASTIE ET AL., *supra* note 198 at 141-42. The study notes some modest differences in female attitudes toward rape defendants indicating that women are more conviction-prone under the specific circumstances of a rape trial. The authors also note that female jurors may be more apt than male jurors to shift their votes from guilty to not guilty during the course of deliberations. *Id.* Such a tendency may erase any effects of women's enhanced propensity to prejudge a defendant's guilt. *See* Edmond Constantini et al., *Gender and Juror Partiality: Are Women More Likely to Prejudge Guilt?*, 67 JUDICATURE 121, 127 (1983).

207 CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

208 Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 600-01 (1986).

209 *See* Ballard v. United States, 329 U.S. 187, 193 (1946).

210 *Id.*

Acknowledging an incongruity between the Court's Equal Protection and Sixth Amendment approaches to the issue of gender differences, one scholar recently remarked:

> We seem to be faced with a paradox: the fair cross-section requirement ... recognizes women's difference, while *Batson*, *De Gross*, and equal protection analysis deny it. The challenge is how to accommodate the possibility of difference without reinforcing it and without perpetuating invidious stereotypes, while bearing in mind that the ultimate goal of jury selection is to empanel an impartial jury.[211]

The answer lies in the fact that while jurors' gender-related experiences may ultimately influence their decisions, gender does not impact upon an individual's ability to assess the facts and render an impartial and unbiased decision. Gender differences manifest themselves in the manner in which jurors recall and characterize facts, in their methods of discussing the case, and in their degree of participation in deliberations.[212] Such differences arise because men and women typically occupy different places in society.[213] The fact that men and women experience the world differently does not mean that persons of either gender will be unable to assess the facts of a particular case without interjecting gender-specific attitudes about the outcome—it merely means that men and women may arrive at their conclusions via different processes of analysis.

Extending beyond the limited scope of gender as a predictor of juror verdicts, other studies show that although at times *voir dire* may have a serious impact upon the outcome of a trial, by and large attorneys' intuitions about juror attitudes do not accurately detect bias in jurors against whom they exercise peremptory challenges.[214] The value of the peremptory challenge, then, lies not in its ability to accurately identify and remove biased jurors from the venire, but rather in its emotional impact on the litigants, in particular, criminal defendants. Litigants' ability to influence the process that will determine their fate is an important component in building confidence in the fairness of the judicial system. While widespread confidence in the jury system is important, the Court has recognized that the generation and perpetuation of invidious stereotypes is too high a price to pay to ensure such confidence.[215] Furthermore, confidence in the fairness

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211 Forman, *supra* note 193 at 54-55.

212 Marder, *supra* note 208 at 600-01.

213 *Id.* at 600.

214 Hans Zeisel & Shari Diamond, *The Effect of Peremptory Challenges on Jury Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 528 (1978); *see also* Solomon M. Fulero & Steven D. Penrod, *Attorney Jury Selection Folklore: What Do They Think and How Can Psychologists Help?*, 3 FORENSIC REPS. 233, 246-47 (1990).

215 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991).

and integrity of the jury selection process can be directly undermined by state use and sanction of discriminatory peremptory challenges.[216]

C. *J.E.B.*'S LEGACY

1. Closing the Floodgates

Most critics of the Court's decisions in *Batson* and *J.E.B.* express grave concern that the peremptory challenge, a pragmatic and venerable institution, will perish at the hands of the Equal Protection Clause.[217] Recent developments, however, indicate that the Court does not intend, at least for the present, to further extend its equal protection analysis to peremptory challenges based on classifications which are not as self-evident as race and gender.[218] In refusing to grant certiorari to a case in which an African-American man was purportedly struck from the jury panel because of his religious affiliation, the Court implicitly signified that *Batson*'s equal protection analysis does not apply to all peremptory challenges based on classifications entitled to heightened scrutiny.[219]

Furthermore, in *J.E.B.* the Court explicitly condoned the use of peremptory challenges to remove groups or classes of individuals ordinarily subject to rational basis review under the Equal Protection Clause and indicated that attorneys may base peremptory strikes on characteristics that are commonly linked to one gender or the other.[220] In effect, litigants may continue to exercise peremptory challenges on the basis of a wide array of group characteristics including age, wealth, mental capacity, political ideology, education, occupation, and other factors besides race and gender that litigants commonly predict will influence the jury deliberation process. Far from meeting its demise, the peremptory challenge has merely experienced a diminution of its territory.

Critics of the Court's inclination toward restricting the scope of peremptory challenges for the sake of eradicating reliance on and reinforcement of invidious stereotypes further advance the argument that the judicial system will become overwhelmed with collateral litigation arising from allegations of discrimination in the exercise of per-

216 Powers v. Ohio, 499 U.S. 400, 411-12 (1991).

217 *See* Batson v. Kentucky, 476 U.S. 79, 123-24 (1986) (Burger, C.J., dissenting); *See also* J.E.B. v. Alabama, 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring).

218 *See* Davis v. Minnesota, 114 S. Ct. 2120 (1994) (Ginsburg, J., concurring), *cert. denied.*

219 *Id.* at 2121 (Thomas, J., dissenting). Bewildered by the Court's denial of certiorari on the issue of religious-based peremptory challenges, Justice Thomas, joined in his dissenting opinion by Justice Scalia, stated, "I can only conclude that the Court's decision to deny certiorari stems from an unwillingness to confront forthrightly the ramifications of the decision in *J.E.B.*" *Id.* at 2122.

220 J.E.B. v. Alabama, 114 S. Ct. 1419, 1429 (1994).

emptory challenges.[221] They posit that if gender-based peremptory challenges were prohibited, every challenge exercised would become inherently suspect and subject to demands for alternative explanations.[222] History, however, does not support such theories: After *Batson*, the courts were not inundated with claims that peremptory challenges were made on racial grounds.[223] Furthermore, parties alleging the discrimination must make out a *prima facie* case that their opponents intentionally discriminated against jurors of one gender.[224] Only then is the litigant required to provide a gender-neutral explanation for the strike, an explanation which need not rise to the level of a challenge for cause.[225] Since the Court enunciated the *prima facie* requirement in *Batson*, lower courts have disagreed about the type of circumstances that give rise to an inference of discrimination.[226] While some courts hold that a litigant establishes a *prima facie* case if only one juror of a minority race is removed from the jury panel, many other courts require that a litigant demonstrate a pattern of striking jurors of one racial classification.[227] Demographic realities dictate that in most jury pools, jurors of one particular gender will greatly outnumber minority jurors, and, therefore, courts will probably exhibit greater hesitation in finding a *prima facie* case of gender discrimination unless a litigant strikes a significant number of jurors of one sex from the jury panel.[228]

While the decision in *J.E.B.* rendered the exercise of peremptory challenges somewhat less capricious and arbitrary, the right of litigants to remove jurors whom they find distasteful is not a constitutionally guaranteed right, and therefore, the equal protection concerns must take precedence over concerns about altering the nature of a time-honored tradition. Because no serious floodgate threat exists, there is no need to compromise the fundamental liberties that the Constitution guarantees.

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221 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 645 (1991) (Scalia, J., dissenting).

222 *See* State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987) (holding that reasoning in *Batson* does not extend to gender-based discrimination, because in *Batson* the Court limited its discussion to discrimination based on race); *see also* J.E.B. v. Alabama, 114 S. Ct. 1419, 1439 (1994) (Scalia, J., dissenting) ("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.").

223 Marko, *supra* note 19, at 127.

224 J.E.B. v. Alabama, 114 S. Ct. 1419, 1429-30 (1994).

225 *Id.*

226 Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of* Batson V. Kentucky, 25 WILLAMETTE L. REV. 293, 309-16 (1989).

227 *Id.*

228 *See* Forman, *supra* note 193 at 58.

2. *Precluding the Use of Gender as a Proxy for Racism*

The Court's holding in *J.E.B.* ensures that litigants cannot use gender as a race-neutral explanation for challenging a member of a cognizable racial group.[229] In the absence of a decision prohibiting the exercise of gender-based peremptory challenges, the majority speculated that the principles of *Batson* would be undermined by attorneys using gender-based eliminations as proxies for racial exclusion, thereby obscuring racial discrimination from judicial scrutiny.[230] While this prediction at first blush seems implausible, the Fourth Circuit encountered just such a scenario in the pre-*J.E.B.* case *Hamilton v. United States.*[231] In *Hamilton,* the court affirmed as constitutional the removal of three African-American jurors who were allegedly stricken because of their gender, not their race.[232] The prosecution's attempt to provide a race-neutral explanation for the strikes, although accepted by the court, was "completely wanting in rationality or validity because only black women were stricken while no white women were."[233]

Although most litigants will scrupulously adhere to the Court's interpretation of the Constitution and avoid challenging jurors on an invidiously discriminatory basis,[234] undoubtedly some litigants will continue to concoct neutral explanations to mask intentional racial and gender discrimination in the exercise of peremptory challenges. The Court's decision in *J.E.B.*, however, will reduce the ammunition available to would-be challengers. Furthermore, by removing gender and race as acceptable explanations for striking potential jurors, the Court forces litigants to use neutral justifications which, regardless of their true intent, will not reinforce invidious group stereotypes or create a presumption that particular individuals are unqualified for jury service based on a cognizable characteristic.

While requiring litigants to articulate race- and gender-neutral explanations for removing particular jurors from the venire detracts from the arbitrary nature of the peremptory challenge, the requirement is not unduly burdensome, because any attorney "can easily assert facially neutral reasons for striking a juror . . . ."[235] Problems arise, however, when a court must determine whether the proffered

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229 *J.E.B.*, 114 S. Ct. at 1430.

230 *Id.*

231 850 F.2d 1038 (4th Cir. 1988).

232 *See id.* at 1041-42.

233 *Id.* at 1043 (Murnaghan, J., dissenting).

234 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 644 (1991) (Scalia, J., dissenting).

235 Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

explanation for striking a juror is a legitimate reason or a pretextual reason, because "trial courts are ill-equipped to second-guess those reasons."[236] Admittedly, prohibiting gender-based peremptory challenges is no panacea for eliminating invidious discrimination from the jury selection process. However, it is more preferable to forbid the use of such challenges and periodically uphold a discriminatory strike masked by a neutral explanation, than to allow discriminatory gender-based strikes to consistently stand unchallenged.

3. Impact on the Criminal Defendant

In his dissenting opinion in *J.E.B.*, Justice Scalia stated that "the loss of the real peremptory will be felt most keenly by the criminal defendant," because there is no substitute for the peremptory challenge.[237] The peremptory strike, however, has not yet disappeared from the jury selection process, and litigants still have the ability to remove for cause those jurors who manifest blatant biases on either side of the spectrum through the *voir dire* process. Although by its nature the challenge for cause procedure is more cumbersome and time-consuming than the exercise of peremptory challenges, it constitutionally eliminates jury bias without reliance upon group stereotypes regarding a juror's ability to serve as an impartial trier of fact.

Criminal defendants may make use of *voir dire* to question potential jurors and discover actual bias. Although the courts generally will not excuse jurors for cause if they assert that they will cast away their preconceived opinions about the case and render an impartial verdict based on the facts presented in evidence,[238] they will excuse those jurors whose opinions raise a manifest presumption of partiality, rather than merely represent a hypothetical judgment.[239] Even if the litigant fails in dismissing a tainted juror for cause, the litigant may exercise a peremptory challenge against that juror on the basis of a number of benign characteristics that the Court sanctions. Jurors suspected of harboring bias will be stricken on the basis of their own statements made during *voir dire*, not because the gender or color of the juror's skin stereotypically suggests that the juror will not be impartial. For that reason it should not be burdensome for the challenger to provide a gender- and race-neutral explanation for the juror's removal. There is no real need, therefore, to base peremptory challenges on stereotypical notions about gender and race.

Although not a direct issue in the resolution of *J.E.B.*, the ques-

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236 *Id.*

237 J.E.B. v. Alabama, 114 S. Ct. 1419, 1438 (1994) (Scalia, J., dissenting).

238 Irvin v. Dowd, 366 U.S. 717, 722-23 (1961).

239 Reynolds v. United States, 98 U.S. 145, 155-56 (1878).

tion of who qualifies as a state actor for purposes of equal protection analysis occupied a dominant position in Justice O'Connor's concurrence. She advocates, in spite of Court precedent to the contrary,[240] that equal protection prohibitions should apply only to the government's use of peremptory challenges, and not to the exercise of challenges by private civil litigants or criminal defendants.[241] While intuitively it makes sense that private litigants and criminal defendants are not "state actors," courts have offered logical justifications for making such classifications.[242] Furthermore, it would be unfair to society to place restrictions on only the prosecutor's exercise of peremptory challenges. Although the distinction is designed to safeguard the interest of private litigants in securing a fair and impartial jury for themselves, state prosecutors presumably act on behalf of society at large in criminal proceedings and, therefore, have an equally important interest in selecting a jury that will render an unbiased decision based upon the facts of the case.[243]

By way of illustration, one commentator recently suggested that abolishing the government's right to exercise peremptory strikes would be a fair solution to the problem of bigotry in jury selection.[244] The author stated that criminal defendants must retain their right to exercise peremptory challenges because "[i]t would be intolerable for an African-American or a Jewish defendant to be prohibited from striking a potential juror who is editor of 'White Power' magazine."[245] It would be an intolerable detriment to society, however, for a prosecutor to be prohibited from striking that same juror in the trial of a white man accused of committing a hate crime.

It is counter-intuitive to assume that curtailing a prosecutor's exercise of peremptory challenges while simultaneously allowing criminal defendants and private civil litigants to discriminate at random, will accomplish any sort of justice. Discrimination within a govern-

240 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); *see also* Georgia v. McCollum, 112 S. Ct. 2348 (1992).

241 *J.E.B.*, 114 S. Ct. at 1433 (O'Connor, J., concurring).

242 *See* United States v. De Gross, 960 F.2d 1433, 1440-41 (9th Cir. 1992). Citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Ninth Circuit recognized that litigants cannot exercise peremptory challenges without significant aid from the government and that the jury is a governmental body whose purpose it is to carry out a government function. The court noted that although the government delegates a portion of its jury selection power to private litigants, the power nonetheless retains its governmental nature and its exercise is supervised and controlled by the court. Furthermore, the fact that jury selection takes place in a courthouse, which symbolizes government authority, gives the appearance that the process is government-sanctioned.

243 *See id.* at 1436-37.

244 Marko, *supra* note 19, at 128.

245 *Id.*

ment forum will continue to occur under Justice O'Connor's scheme—the only difference is that it will be one-sided. Exclusion of jurors based on group stereotypes is no less damaging to the excluded juror if accomplished at the hands of a private citizen participating in a government-sponsored process rather than at the hands of the government prosecutor.[246] Uneven distribution of the power to eliminate jurors from the venire would lead to unjust results.

VI. CONCLUSION

In *J.E.B. v. Alabama,* the Court concluded that the Fourteenth Amendment prohibits the exercise of gender-based peremptory strikes. The opinion is a well-reasoned extension of the *Batson v. Kentucky* line of cases which previously prohibited the use of race-based peremptory challenges.

This decision has not sounded the death knell for the peremptory challenge as many jurists predicted it would. Instead, *J.E.B.* placed one reasonable restriction upon the use of peremptories, while leaving unblemished a litigant's right to challenge jurors bearing characteristics of other heightened scrutiny classifications such as religious affiliation. Additionally, the Court has preserved the entire field of rational basis classifications as legitimate grounds for the exclusion of jurors. Rather than detracting from the jury selection process, the decision enhances the fairness of the entire judicial system by enforcing fundamental rights guaranteed by the Constitution of the United States and guaranteeing to all citizens an equal opportunity to participate in the administration of justice.

BETH A. DEVERMAN

246 Georgia v. McCollum, 112 S. Ct. 2348, 2353 (1992).