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J.E.B. v. ALABAMA 114 S.Ct. 1419 (1994) United States Supreme Court

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FACTS

The State of Alabama filed a complaint for paternity and child support against J.E.B. in the District Court of Jackson County, Alabama. Petitioner appealed the district court's child support order, requesting a jury trial in a circuit court, where district court decisions are subject to de novo review.

Jury selection began on October 21, 1991, from a panel of thirty-six potential jurors, twelve males and twenty-four females. The court excused three jurors for cause, leaving ten males remaining out of thirty-three jurors. The State then used nine of its ten peremptory strikes to remove male jurors, while petitioner used all but one of his strikes to remove female jurors, resulting in an all female jury. Petitioner objected to the State's peremptory challenges on the ground that they were exercised against male jurors solely on the basis of gender, in violation of the Equal Protection Clause of the Fourteenth Amendment. He claimed that such actions were in violation of his rights to equal protection and due process. The court rejected petitioner's claim, and empaneled the all-female jury, which found petitioner to be the father of the child. The court entered an order directing him to pay child support. On post-judgment motion, the court reaffirmed its ruling that *Batson v. Kentucky*[1] does not extend to gender-based peremptory challenges. The Alabama Court of Civil Appeals affirmed.[2] The Supreme Court of Alabama denied certiorari,[3] and the United States Supreme Court granted certiorari.

HOLDING

The Supreme Court reversed the decision of the Alabama Court of Civil Appeals and remanded the case to that court for further proceedings. In a six to three opinion written by Justice Blackmun, the Court extended the reach of the Equal Protection Clause as enunciated in *Batson v. Kentucky*[4] to gender-based peremptory challenges, holding that intentional discrimination by state actors exercising peremptory challenges on the basis of gender violates the Equal Protection Clause.

ANALYSIS/APPLICATION

I. Heightened Scrutiny, Peremptory Challenges, and a Fair and Impartial Jury

Prior to *J.E.B.*, *Batson's* holding, forbidding prosecutors to use peremptory challenges against potential jurors solely on account of their race, had already been extended by subsequent cases to apply to civil litigants[5] and criminal defendants.[6] In addition, in *Powers v. Ohio*,[7] the Court found that criminal defendants suffer real injury, and thus have standing to raise their interests, when prosecutors exclude jurors at their trials on account of race, even if the defendants are not members of the excluded group.[8] Against this background, the Court granted certiorari to *J.E.B.*[9] in order to resolve a question that had created a conflict of authority - whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race.[10]

Unlike classifications based on race, which are inherently suspect, gender-based classifications are subject to the less exacting standard of heightened equal protection scrutiny.[11] The *J.E.B.* Court did not consider whether classifications based on gender are inherently suspect. The Court, however, noted that under equal protection jurisprudence, gender-based classifications require an "exceedingly persuasive justification" in order to survive.[12]

The State claimed that "an exceedingly persuasive justification" for respondent's gender-based pe-

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[1] 476 U.S. 79 (1986).

[2] *J.E.B. v. Alabama*, 606 So. 2d 156 (Ala. Civ. App. 1992).

[3] *J.E.B. v. Alabama*, No. 1911717 (Ala. 1992).

[4] 476 U.S. at 79.

[5] *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

[6] *Georgia v. McCollum*, 112 S.Ct. 2348 (1992).

[7] 499 U.S. 400 (1991).

[8] *Id.* at 400.

[9] *J.E.B. v. T.B.*, 113 S. Ct. 2330 (1993).

[10] *J.E.B. v. Alabama*, 114 S.Ct. 1419, 1422 (1994).

[11] *Id.* at 1424.

[12] *Id.* at 1425 (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)).

remptory challenges was shown by the state's assertion of a historically justified perception that in a paternity action, men would be more sympathetic to the arguments of a man while women would be more receptive to the arguments of the mother.[13] The Court held that the State's rationale was "reminiscent of the arguments advanced to justify the total exclusion of women from juries."[14] The State repeated "the very stereotypes the law condemns,"[15] and were unacceptable even if some statistical support could be provided for such generalizations.[16] In addition, the Court pointed out that both African-Americans and women have shared a history of total exclusion from jury service.[17] Far from being distinct, as the State claimed, victims of racial discrimination and sex discrimination have had profoundly similar negative experiences in voting and jury service.[18]

Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.[19] Furthermore, discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender.[20] Individual jurors, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.[21]

The matter in dispute, the Court asserted, is not the balancing of the value of peremptory challenges with the commitment to eradicate invidious discrimination from the courtroom.[22] Rather, the issue is whether, given the heightened equal protection scrutiny afforded gender-based classifications, the State's legitimate interest in achieving a fair and impartial jury can survive.[23]

Although Justice Blackmun stated that peremptory challenges are not constitutionally protected rights,[24] and that the sole purpose of peremptory challenges is to assist the government in the selection of an impartial trier of fact,[25] he made it clear that the demise of peremptory challenges was not a necessary result of the Court's holding and that barring gender-based strikes does not conflict with the State's legitimate interest in using peremptory challenges to secure a fair and impartial jury.[26] Parties may exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to rational basis review.[27] Further, strikes based on characteristics that are disproportionately associated with one gender could even be appropriate, absent a showing of pretext.[28]

Justice Kennedy, concurring in the judgment, noted that an individual denied jury service because of a gender-based peremptory challenge is no less injured than an individual denied jury service because of a law banning members of her sex from serving as jurors.[29] Justice Kennedy claimed that the neutrality of the Equal Protection Clause's guarantee to "any person" is extended in the instant case to the finding of a constitutional wrong where men are excluded from jury service because of their gender; the Equal Protection Clause is based on the theory that the individual possesses rights which are protected against lawless action by the government.[30]

Justice O'Connor, also writing concurrently, urged the view that the limitations to peremptories should apply only to state actors.[31] Justice O'Connor noted that the Equal Protection Clause prohibits discrimination by state actors; she maintained that neither private litigants nor criminal defendants are state actors.[32] Recognizing the peremptory challenge as one of the most important rights secured by the accused,[33] and claiming that gender can make a difference as a matter of fact, Justice O'Connor argued against limiting the criminal defendant's or the civil litigant's use of the peremptory. She asserted that extending *Batson* to gender diminishes the

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[13] *Id.* at 1426 (quoting Brief for Respondent, at 10).
[14] *Id.*
[15] *Id.* (citing *Powers*, 499 U.S. at 410).
[16] *Id.* at 1427.
[17] *Id.* at 1425.
[18] *Id.*
[19] *Id.* at 1427.
[20] *Id.*
[21] *Id.* at 1428.
[22] *Id.* at 1425-1426.
[23] *Id.* at 1425.
[24] *Id.* at 1426, n.7 (citing *Georgia v. McCollum*, 112 S.Ct. 2348, 2358 (1992)).
[25] *Id.* at 1426, n. 8 (citing *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991)).
[26] *Id.* at 1428.
[27] *Id.* at 1429.
[28] *Id.* at 1429, n 16.
[29] *Id.* at 1434.
[30] *Id.* at 1433-1434.
[31] *Id.* at 1432.
[32] *Id.*
[33] *Id.*

ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes.[34]

In his dissent, Chief Justice Rehnquist argued that the primary issue at stake, contrary to Justice Blackmun's characterization, was a balancing of the dictates of equal protection and the historical practice of peremptory challenges. In this balancing, the significant differences between racial and sex discrimination justify a ruling favoring peremptory challenges over equal protection when gender-based challenges are at issue.[35] Chief Justice Rehnquist asserted that the less searching standard of heightened scrutiny for gender-based classifications, as compared to that of strict scrutiny for classifications based on race, does not justify tilting the balance in favor of equal protection when sex, not race, is the issue.[36]

Justice Scalia, also dissenting, distinguished between past objectionable exclusion of women from juries because of doubt that they were competent, and situations in which women, like any other group, are subject to be stricken from juries by peremptory challenges because of doubt that they are well disposed to the striking party's case.[37] He claimed that in the totality of the practice of the peremptory challenge, no group is denied equal protection where each side's desire to get a jury favorably disposed to its case is given full play, so long as both sides do not systematically strike individuals of one group.[38] He opined that it is unrealistic to focus on individual exercises of the challenge and ignore the totality of the practice.[39] Justice Scalia saw the Court's decision as placing all peremptory strikes based on any group characteristic at risk, since they can all be denominated "stereotypes."[40] Even if *Batson* is limited to race, sex, and perhaps other classifications subject to heightened scrutiny, Justice Scalia argued that the peremptory challenge system has been damaged when reasons for strikes must be given, and that the loss of true peremptories will be felt most keenly by criminal defendants.[41] He noted also that while demographic reality places limit on cases in which race-based challenges will be an issue, every case contains a potential sex-based claim.[42]

II. The Likelihood of Further Limitations on Peremptory Challenges

Justice Blackmun pointed out that where peremptory challenges are made on the basis of group characteristics other than race or gender, they do not reinforce the same stereotypes about the group's competence or predisposition that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life.[43] A weak case could be made on the basis of this dicta that no further expansion of *Batson* is necessary to protect groups who have been discriminated against in exercising their rights to vote and to serve as jurors. If this line of reasoning is taken, it seems unlikely that *Batson* would be extended to reach any other group, and the alleged erosion of the peremptory challenge would be halted.

However, in line with the heightened scrutiny portion of the Court's argument, it would seem logical to continue extending *Batson* to other group classifications afforded heightened scrutiny, such as age. Multiple "modified peremptories" as Barbara Allen Babcock terms them in *A Place in the Palladium: Women's Rights And Jury Service,*[44] would limit the scope of the pure peremptory more and more as the number of *Batson*-type groups increased.

III. The Process of Responding to *Batson*-type Claims

Justices O'Connor and Scalia alluded to possible problems in putting this particular extension of *Batson* into practice. Justice Blackmun, however, claimed that jurisdictions which already disallow gender-based discrimination show that they are capable of complying with a rule barring strikes based on gender.[45] Just as in a *Batson* claim, the alleging party must make a prima facie showing of intentional discrimination. Only after a prima facie showing has been made does the burden shift to the other party to come forward with a neutral explanation for challenging female jurors. When an explanation is required, it need not rise to the level of a "for cause" challenge; rather, it merely must be based on

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[34] *Id.* at 1432-1433.

[35] *Id.* at 1435.

[36] *Id.*

[37] *Id.* at 1436-1437 (citing *Powers v. Ohio*, 499 U.S. at 424).

[38] *Id.* at 1437.

[39] *Id.*

[40] *Id.* at 1438.

[41] *Id.*

[42] *Id.* at 1439; *See also, Raphael and Ungvarsky, Excuses, Excuses: Neutral Explanations Under Batson v, Kentucky*, 27 U. Mich. J.L. Ref. 229 (1993).

[43] *J.E.B.*, 114 S.Ct. at 1428, n. 14.

[44] *Babcock*, 61 U. Cin. L. Rev. 1139, 1179 (1993).

[45] *J.E.B.*, 114 S. Ct. at 1429.

a juror characteristic other than gender or race, and the explanation may not be pretextual.[46] Thus, the process is manageable, just as it has been manageable under *Batson*.

In practice, the process seems to stray from what the *Batson* court intended and foreshadows what practical effect *J.E.B.* will have. Although the process appears to present no particular difficulty for most counsel to handle, it is debatable whether the availability of the *Batson* claim is making jury selection less discriminatory.

In their article *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky,*[47] Michael J. Raphael and Edward J. Ungvarsky report research in criminal cases in which an African-American defendant challenges a prosecutor's strikes of African-American jurors; the research has shown that prosecutors wishing to rebut the prima facie case do not face a significant challenge.[48] Only small percentages of the neutral explanations for peremptory strikes were rejected.[49] Furthermore, in almost any situation, a prosecutor can craft an acceptable neutral explanation to justify striking African-American jurors who were stricken because of their race.[50]

There is no reason to suppose that producing a neutral explanation in the face of a prima facie showing of gender-based discrimination will be any more difficult, unless the striking party finds an insurmountable hurdle in producing an explanation which is both race-neutral and gender-neutral. [51] Even under these circumstances, the education of those faced with the challenge of offering an explanation which is both race-neutral and gender-neutral can be expected to reach the same heights (or depths) as that of those offering race-neutral explanations. Despite the greater potential number of gender-based claims, if they are quickly dispatched, no greater burden is placed on the system than now exists. Although manageable, little good is done in the way of actually ensuring equal protection if discriminatory strikes are simply phrased in neutral language, and thus allowed.

CONCLUSION

After *J.E.B.*, if a prima facie case is made for gender-based discrimination in the state's exercise of a peremptory strike, a gender-neutral explanation must be offered. Without a gender-neutral explanation, the strike will not stand up to scrutiny unless an exceedingly persuasive justification can be shown for the gender-based challenge, a task with little chance of success given the requirement that "stereotypes the law condemns" may not be used. Following *Batson's* lead, *J.E.B.* will likely be extended to private civil litigants and criminal defendants. Possible future extension of *Batson* to other group classifications subject to heightened scrutiny will depend on additional case law. Arguments can be made on the basis of *J.E.B.* both for and against further expansion of *Batson* beyond race and gender.

The Court has taken a firm stand against racial and gender-based discrimination toward individuals in any aspect of the jury selection process; counsel must modify practices to conform with racial and gender-blind policies in exercising peremptory strikes, and be prepared for more *Batson*-type claims in the wake of *J.E.B.*

Summary and Analysis Prepared by:
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[46] *Id.* at 1430.

[47] *Raphael,* 27 U. Mich. J.L. Ref. 229 (Fall 1993).

[48] *Id.* at 235.

[49] *Id.* at 235.

[50] *Id.*

[51] *J.E.B.*, 114 S.Ct. at 1430. As Justice Blackmun notes, because they are overlapping, gender could have been used as a pretext for racial discrimination before *J.E.B.*