J.E.B. v. Alabama ex rel. T.B.: the Supreme Court Moves Closer to Elimination of the Peremptory Challenge

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Note

J.E.B. v. ALABAMA ex rel. T.B.: THE SUPREME COURT MOVES CLOSER TO ELIMINATION OF THE PEREMPTORY CHALLENGE

INTRODUCTION

In J.E.B. v. Alabama ex rel. T.B., the United States Supreme Court held that the exercise of peremptory challenges to exclude jurors solely on the basis of gender constitutes sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. In reaching this conclusion, the Court analogized race-based and gender-based discrimination and held that the principles articulated in its 1986 decision in Batson v. Kentucky must be applied in cases where venirepersons are struck solely on the basis of their gender. The J.E.B. Court declared that peremptory challenges exercised on the basis of sex cannot withstand "heightened scrutiny."

While applying a heightened scrutiny formula to reach this result, the Court focused, in dicta, on the history of discrimination against women in the judicial process. The resulting opinion, although ostensibly grounded in equal protection principles that apply with equal force to both sexes, seems to place the possible injury to struck female venirepersons above other concerns, including the interest of the striking litigant in obtaining a fair and impartial jury.

2. Id. at 1422. See also U.S. CONST. amend. XIV, § 1. Section 1 reads in pertinent part, "[n]o state . . . shall deny to any person within its jurisdiction the equal protection of the laws." Id.
5. Id. at 1425; see also Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981). Justice Blackmun observed that the critical inquiry for the Court is whether discrimination on the basis of gender in jury selection substantially furthers the state's legitimate interest in achieving a fair and impartial trial. J.E.B., 114 S. Ct. at 1425.
6. J.E.B., 114 S. Ct. at 1425. "[G]ender-based classifications require 'an exceedingly persuasive justification' in order to survive constitutional scrutiny. . . . Thus, the only question is whether discrimination on the basis of gender in jury selection substantially furthers the state's legitimate interest in achieving a fair and impartial trial." Id. (quoting Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 273 (1979)).
7. Id. at 1423.
8. See infra notes 67-72 and accompanying text.
The underlying reasoning of *J.E.B.* contrasts sharply with that of previous caselaw articulating a litigant’s right to a jury drawn from a “fair cross-section” of the community. The fair cross-section cases had held the systematic exclusion of women from the venire unconstitutional, precisely because the absence of the unique perspective of women may well render a jury insufficiently representative of a fair cross-section of the community as required by the Sixth Amendment. *J.E.B.*, however, declared it unconstitutional for the litigant to acknowledge and act upon the reality that different life experiences of men and women may lead to correspondingly different viewpoints.

The effect of the differing viewpoints of men and women would be particularly important in cases that involve gender-sensitive issues, such as rape, sexual harassment, and paternity. The majority in *J.E.B.* carefully characterized its new rule as a prohibition merely against using gender “as a proxy for bias.” This statement, however, ignores human nature and the possibility that, in some cases, bias may be unavoidably related to gender.

This Note argues that the Court’s extension of *Batson* principles to gender-based peremptory challenges has compromised the peremptory challenge to such a degree that it is no longer an effective

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9. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 537-38 (1975) (holding that the exclusion of women from jury venires deprives a criminal defendant of the Sixth Amendment right to trial by an impartial jury drawn from a fair cross-section of the community). *See also infra* notes 70-72 and accompanying text.

10. In Taylor, the Court noted,

“The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables... The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.”

*Id.* at 531-32 (quoting Ballard v. United States, 329 U.S. 187, 193-94 (1946)).


12. In 1991, the U.S. Court of Appeals for the Ninth Circuit recognized this reality in a sexual harassment case when it chose to “analyze harassment from the victim’s perspective.” Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991). The court stated:

A complete understanding of the victim’s view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women... We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior.

*Id.* at 878-79.


14. As Justice O’Connor noted in her concurrence, “[T]o 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.” *J.E.B.*, 114 S. Ct. at 1432 (O’Connor, J., concurring).
litigation tool. The challenge, "arbitrary and capricious" by design,\textsuperscript{15} historically has provided litigants with a method for factoring non-quantifiable elements of "human nature" into the jury selection process.\textsuperscript{16} After \textit{J.E.B.}, the litigant's freedom to act on intuition or the knowledge of differing male and female perspectives is severely hampered.\textsuperscript{17} While the Court has allowed the challenge to survive in a technical sense,\textsuperscript{18} \textit{J.E.B.} has imposed such a sweeping restraint upon the exercise of the peremptory challenge that its demise appears inevitable.

\textbf{15.} "The right of peremptory challenge 'is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.'" \textit{J.E.B.}, 114 S. Ct. at 1438 (Scalia, J., dissenting) (quoting Lamb v. State, 36 Wis. 424, 427 (1874)).

\textbf{16.} Former Chief Justice Burger observed:

The peremptory [challenge], made without giving any reason, avoids trafficking in the core of truth in most common stereotypes.... Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases.... "[W]e have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not."

\textit{Batson}, 476 U.S. at 121 (Burger, C.J., dissenting) (quoting Barbara A. Babcock, \textit{Voir Dire: Preserving Its Wonderful Power}, 27 STAN. L. REV. 545, 554 (1975)). The peremptory challenge, Burger noted, has "long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic." \textit{Id.} at 125. \textit{See also} Deborah L. Forman, \textit{What Difference Does It Make: Gender and Jury Selection}, 2 UCLA WOMEN'S L.J. 35, 67 (1992). Professor Forman notes that "[t]he peremptory challenge gives litigants the opportunity to remove jurors whom they believe are likely to be biased, without meeting the stringent requirements of challenges for cause." \textit{Id.}

\textbf{17.} The peremptory challenge, in its original form, has been said to serve a variety of objectives. Blackstone stated that the challenge served a dual purpose: to ensure a "defendant had a 'good opinion' of his jury and to protect the defendant from trial by 'anyone he intuitively disliked.'" \textit{See Forman, supra} note 16, at 67 (quoting \textit{2 William Blackstone, 4 Commentaries on the Laws of England} 346-47 (Katz ed. 1979)).

\textbf{18.} Justice Blackmun asserted that, "[o]ur conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. Neither does it conflict with a State's legitimate interest in using such challenges in its effort to secure a fair and impartial jury." \textit{J.E.B.}, 114 S. Ct. at 1429. Here, Justice Blackmun defends the holding against what he clearly recognized as inevitable criticisms. He calls attention to the dual concerns that \textit{J.E.B.} will: (1) lead to the elimination of the peremptory challenge; and (2) interfere with the state's interest in using the challenge—which is at least "legitimate" and may in fact be "substantial"—to secure a fair and impartial jury. \textit{Id. See Batson}, 476 U.S. at 125 (Burger, C.J., dissenting) (noting that "the state interest involved here has historically been regarded by this Court as substantial, if not compelling")). Justice Blackmun's own recognition of these concerns, albeit in the context of a denial of their validity, demonstrates that they are, at a minimum, implicated by the ruling in \textit{J.E.B. J.E.B.}, 114 S. Ct. at 1429.
I. THE CASE

In 1991, the State of Alabama, on behalf of T.B., the mother of a minor child, filed a complaint for paternity and child support against petitioner J.E.B. in the District Court of Jackson County, Alabama.19 The district court adjudicated paternity, and J.E.B. appealed to the state circuit court where the case was tried on October 21, 1991.20 A venire consisting of thirty-six potential jurors—twelve males and twenty-four females—was assembled. From this pool of thirty-six potential jurors, a jury was selected by the “struck jury” method pursuant to the Alabama Rules of Civil Procedure.21 Two men and one woman were excused from the venire for cause, leaving ten male jurors among the remaining thirty-three.22 An all-female jury was selected after the State used nine of its ten peremptory strikes to remove men, and J.E.B. used all but one of his strikes against women.23

Before the jury was empaneled, J.E.B. objected to the State’s peremptory challenges, contending that they were exercised against male jurors solely on the basis of gender in violation of the Equal Protection Clause.24 J.E.B. urged that the principles of Batson, which prohibited peremptory strikes exercised solely on the basis of race, similarly forbid intentional discrimination on the basis of gender.25 The circuit court, however, refused to apply Batson principles and empaneled the all-female jury.26 This jury found J.E.B. to be the father of the child.27 On a post-judgment motion, the circuit court reaffirmed its ruling that Batson principles did not apply to gender.28

Relying on Alabama precedent, the Alabama Court of Civil Appeals affirmed.29 The appellate court rejected J.E.B.’s contention that the trial court had erred in overruling his objection to the State’s use of peremptory strikes to eliminate men.30 The Supreme Court of Ala-

19. Id. at 1421.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
30. Id. at 157 (citing Ex parte Murphy, 596 So. 2d 45 (Ala. 1992)).
bama denied certiorari.\textsuperscript{31} The United States Supreme Court granted certiorari\textsuperscript{32} to resolve a conflict among the circuits as to whether the Equal Protection Clause forbids peremptory challenges on the basis of gender.\textsuperscript{33}

II. SUMMARY OF THE COURT’S REASONING

The \textit{J.E.B.} Court held that a litigant’s use of peremptory challenges to exclude persons from a petit jury on the basis of gender is prohibited by the Equal Protection Clause of the Constitution.\textsuperscript{34} In so ruling, the Court drew heavily on the history of discrimination against women in the United States, particularly as manifested in the judicial process.\textsuperscript{35} The Court pointed to an atmosphere of “‘romantic paternalism’” that had once placed women “‘not on a pedestal, but in a cage’”\textsuperscript{36} and decried the antique notion that women must be protected from the “polluted courtroom atmosphere.”\textsuperscript{37} Finally, the Court noted the persistence of the judicial system’s failure to “translate its appreciation for the value of women’s contribution to civic life into an enforceable right to equal treatment under state laws governing jury service.”\textsuperscript{38}

Writing for the majority, Justice Blackmun explained that a heightened scrutiny analysis\textsuperscript{39} mandates the ruling that gender-based

\textsuperscript{34} \textit{J.E.B.}, 114 S. Ct. at 1421.
\textsuperscript{35} \textit{Id.} at 1422-23.
\textsuperscript{36} \textit{Id.} at 1423 (quoting \textit{Frontiero} v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion)).
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.} at 1424 (citing \textit{Hoyt v. Florida}, 368 U.S. 57, 61 (1961)).
\textsuperscript{39} \textit{J.E.B.}, 114 S. Ct. at 1424. Justice Blackmun noted that since Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court “has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of ‘archaic and overbroad’ generalizations about gender. . . .” \textit{Id.}

\textit{See} Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). In \textit{Hogan}, the Court explained the test applied in a “heightened scrutiny” analysis. \textit{Id.} at 724-26. First, the state’s objective must be “legitimate and important.” \textit{Id.} Second, there must be a “direct, substantial relationship” between the objective and the means used to achieve it. \textit{Id.} \textit{See infra} notes 76, 77 and accompanying text.
peremptory challenges, exercised by state actors, violate the Equal Protection Clause. The J.E.B. Court grounded its reasoning in the premise that discriminatory practices on the basis of race and gender are, to a large extent, analogous. The Court noted that, "with respect to jury service, African-Americans and women share a history of total exclusion." Any attempt to use peremptory challenges to exclude jurors on the basis of gender stereotypes is, therefore, unconstitutional unless the striking litigant establishes that "discrimination on the basis of gender substantially furthers the State's legitimate interest in achieving a fair and impartial trial." The Court, however, declined to weigh the value of the peremptory challenge against its stated policy goal of eradicating discrimination.

The Court flatly rejected the respondent's argument that gender may be a barometer of the attitudes of male or female jurors. The Court stated that gender-based peremptory challenges cannot be justified in light of the harm to the community, litigants, and individual

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40. See infra notes 90-95 and accompanying text. The term "state actor" has been interpreted broadly in post-Batson caselaw to include virtually all parties who enter the courthouse—including criminal defendants and civil litigants.  
42. Id. at 1425.  
43. Id.  
44. Id. at 1425 & n.6; accord Hogan, 458 U.S. at 725-26. See supra note 39 and accompanying text; see also infra notes 76, 77 and accompanying text.  
45. J.E.B., 114 S. Ct. at 1425. "[W]e do not weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious discrimination from the courtroom. Instead, we consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury." Id. at 1425-26. The Court took care to point out that while peremptory challenges are regarded as valuable tools in jury trials, they are not "constitutionally protected fundamental rights." Id. at 1426 n.7 (quoting Georgia v. McCollum, 112 S. Ct. 2348, 2358 (1992)).  
46. Id. at 1426-27. The respondent argued that its decision to strike males from the jury may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child. Id. at 1426 & n.9 (quoting Respondent's Brief on the Merits at 10, J.E.B., 114 S. Ct. 1419 (1994) (No. 92-1239)).

The Court asserted that "the majority of studies suggest that gender plays no identifiable role in jurors' attitudes." Id. at 1426 n.9 (citing VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 76 (1986)). The Court refused to accept as a defense to gender-based peremptory challenges "the very stereotype the law condemns." Id. at 1426 & n.9 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)).
jurers that results from sex discrimination.\textsuperscript{47} In dicta, the majority denied that its ruling implies "the elimination of all peremptory challenges,"\textsuperscript{48} or that the holding impairs the state's legitimate interest in using peremptories to secure a fair and impartial jury.\textsuperscript{49} "Parties still may remove jurors whom they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias."\textsuperscript{50}

Justice O'Connor concurred with the majority, but wrote separately to urge that the holding be limited to the government's use of gender-based peremptory strikes.\textsuperscript{51} This position echoed her dissent in previous case law that had extended the reach of \textit{Batson}.\textsuperscript{52} Justice O'Connor feared an adverse impact on litigants if \textit{Batson} were so sweepingly extended.\textsuperscript{53} In Justice O'Connor's view, the Court's decision not to "tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact."\textsuperscript{54} According to Justice O'Connor, this rule, if extended beyond those narrow boundaries to all other litigants, will impinge on "the ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes."\textsuperscript{55}

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47. \textit{J.E.B.}, 114 S. Ct. at 1427.
48. \textit{Id.} at 1429.
49. \textit{Id.}
50. \textit{Id.} \textit{See also supra} note 13 and accompanying text.
51. \textit{Id.} at 1431 (O'Connor, J., concurring). Justice O'Connor noted unease with the Court's holding and commented that it "further erodes the role of the peremptory challenge." \textit{Id.} Her concurrence points to the fundamental change brought about by the \textit{Batson} line of cases: "[A]s we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable. In so doing, we make the peremptory challenge less discretionary and more like a challenge for cause." \textit{Id.}
53. \textit{J.E.B.}, 114 S. Ct. at 1433. Justice O'Connor observed that the majority, in its efforts to protect female venirepersons, may have dealt a blow to female litigants:

Will we, in the name of fighting gender discrimination, hold that the battered wife—on trial for wounding her abusive husband—is a state actor? Will we preclude her from using her peremptory challenges to ensure that the jury of her peers contains as many women members as possible? I assume we will, but I hope we will not.

\textit{Id.}
55. \textit{Id.}
Justice Kennedy concurred in the judgment, but put forth a different view of the "perceived effect" of the decision. He expressed a broader concern with courtroom discrimination, emphasizing that the prohibition on racial and gender bias in jury selection extends to deliberations. The juror, he stated, sits as an individual and not as a representative of a racial or sexual group.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented, criticizing the majority opinion as being irrelevant to the case at hand. The dissenters were troubled by the conflict between J.E.B. and earlier Sixth Amendment "fair cross-section" cases. Essentially applying a "harmless error" analysis, the dissenters stated that if jurors are viewed as "fungible," the petitioner in J.E.B. suffered no injury. The dissenters argued that by focusing unrealistically upon individual exercises of the challenge, and ignoring the "totality of the practice," the Court had misapplied its equal protection analysis. Because all groups are subject to the peremptory challenge, "it is hard to see how any group is denied equal protection." The dissenters argued, moreover, that the Court's holding invites invalidation of all peremptory strikes based on any group characteris-
Finally, the dissenters asserted that the extension of Batson to sex, "and almost certainly beyond," will provide the basis for extensive "collateral" litigation.66

III. LEGAL CONTEXT

A. A "Cross-Section" of the Community

In the United States, the tradition of trial by jury in both criminal and civil proceedings "contemplates an impartial jury drawn from a cross-section of the community."67 The requirement that the venire represent a "fair cross-section" was deemed fundamental by the Supreme Court in Taylor v. Louisiana.68 The Taylor Court held that state laws resulting in the systematic exclusion of women from jury service violated the fair cross-section requirement.69 In Taylor, and later in Duren v. Missouri,70 the Court repudiated the notion that women could be exempted from jury duty based solely on their sex. Taylor and Duren recognized that women are a "distinctive" group in the community71 and that the systematic exclusion of them from jury pools fundamentally alters the venire by eliminating the natural dynamic that occurs within heterogeneous groups.72

Taylor and Duren were decided against a backdrop of Supreme Court precedent holding gender-based statutory classifications uncon-
stitutional. Two cases, Reed v. Reed\textsuperscript{73} and Frontiero v. Richardson,\textsuperscript{74} already had struck significant blows against sex discrimination by declaring that statutes affording different treatment to similarly situated men and women violated the Equal Protection Clause.\textsuperscript{75} Subsequently, the Court held in Mississippi University for Women v. Hogan\textsuperscript{76} that a gender-based statutory classification must be supported by an "exceedingly persuasive justification."\textsuperscript{77} Hogan's landmark holding established an intermediate, or "heightened" level of scrutiny for gender-based classifications that was invoked by the Court in J.E.B.\textsuperscript{78}

B. Equal Protection Applied to Jury Selection

Long before the Court had begun to consider the issue of sex discrimination, equal protection principles had been applied to racial discrimination in jury selection. In 1880, the Supreme Court, in Strauder v. West Virginia,\textsuperscript{79} struck down a state statute that permitted

\begin{itemize}
  \item 73. 404 U.S. 71 (1971) (holding an Idaho statute that gave preferential treatment to men over women when persons of the same entitlement class apply for appointment as administrator of a decedent's estate is violative of the Equal Protection Clause).
  \item 74. 411 U.S. 677 (1973) (holding a federal statute that classified a spouse of a male member of the armed forces as a dependent but a spouse of a female member as not dependent unless he was dependent on his wife for over one half of his support amounts to a violation of the Due Process Clause of the Fifth Amendment).
  \item 75. While both Frontiero and Reed struck down gender-based classifications, the cases appear to differ as to the standard applied. Reed is viewed as the first in a series of cases establishing "heightened scrutiny" as the standard to be applied to gender classifications. J.E.B., 114 S. Ct. at 1424-25. This is so notwithstanding the fact that the language that the Reed Court used relied upon the less rigorous "rational basis" test. Reed, 404 U.S. at 76. See supra note 39. The question thus framed in Reed was, "whether a difference in the sex of competing applicants for letters of administration [bore] a rational relationship" to the state objective that the particular classification seeks to advance. Id. By contrast, in Frontiero, a plurality of the Court went much further and concluded "that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." Frontiero, 411 U.S. at 688.
  \item 76. 458 U.S. 718 (1982) (holding a state-supported university's limitation of enrollment to women and denial of admission to qualified male applicants violates the Equal Protection Clause). See supra note 39 and accompanying text.
  \item 77. Hogan, 458 U.S. at 724; Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 273 (1979)). The Hogan Court stated that the burden can be met only by showing that "the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Id. (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).
  \item 78. J.E.B., 114 S. Ct. at 1424.
  \item 79. 100 U.S. 303, 307-08 (1880). Because Strauder involved a state defendant, an Equal Protection analysis was undertaken pursuant to the Fourteenth Amendment. Id. at 305-06. While the principles are the same, the analysis for cases involving federal defendants is derived from the Due Process Clause of the Fifth Amendment. See, e.g., United States v. DeGross, 960 F.2d 1433, 1438 n.5 (9th Cir. 1992) (en banc). See generally U.S. Const. amend. V & amend. XIV, § 1.
\end{itemize}
only white males to serve as jurors. *Strauder* remained the defining precedent on racial discrimination in jury selection until *Swain v. Alabama*.\(^8\) Although *Swain* invalidated the systematic use of peremptory challenges against African-Americans, the Court required the defendant to show a pattern of discrimination against jurors of a particular race.\(^81\)

Twenty-one years later, in *Batson*, the Court condemned this "crippling burden of proof" and overruled *Swain*’s principal holding.\(^82\) Under *Batson*, a defendant may establish a prima facie case of purposeful racial discrimination in the selection of the petit jury based on the facts of the case alone.\(^83\)

In *Batson*, the Court shifted from a Sixth Amendment, "fair cross-section," argument to a purely equal protection analysis.\(^84\) The petitioner, in fact, brought his appeal under the Sixth Amendment and "expressly declined to raise" an equal protection argument.\(^85\) But by

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\(^80\) 380 U.S. 202, 226 (1965) (holding complainants bear the burden of proving the alleged discriminatory use of peremptory challenges).

\(^81\) Id. at 227. The *Swain* Court declined to scrutinize the actions of a prosecutor in a particular case, finding that "the presumption in any particular case must be that the prosecutor is using the state challenges to obtain a fair and impartial jury." *Id.* at 221-22. Under the holding in *Swain*, a defendant could not make a prima facie showing of purposeful racial discrimination by relying solely on the facts of the case alone. *Batson*, 476 U.S. at 92.

\(^82\) *Batson*, 476 U.S. at 92-93.

\(^83\) To establish a prima facie case in a *Batson* analysis, the [aggrieved party] first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury on account of their race. . . . This combination of factors in the empaneling of a petit jury raises . . . the necessary inference of purposeful discrimination.

*Batson*, 476 U.S. at 96 (citations omitted). See also *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991) (plurality opinion) (noting proof of racially discriminatory intent or purpose underlying the use of peremptory challenges is required in order to show a violation of the Equal Protection Clause).

\(^84\) *Batson*, 476 U.S. at 85 n.4. The Court observed:

[T]he State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider *Swain* to find a constitutional violation on this record. We agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments.

*Id.*

\(^85\) *Id.* at 112 (Burger, C.J., dissenting). There was disagreement among the Justices as to whether the Court had authority to undertake such an analysis in view of the petitioner's failure to raise the equal protection argument. *Id.* at 115. Chief Justice Burger rejected
taking the latter approach, the *Batson* Court pitted the litigant's rights to a fair and impartial jury, paramount under the Sixth Amendment, against the rights of the excluded venireperson and the community's interest in eradicating discrimination. As Professor Barbara A. Babcock has observed, "[t]he goal of protecting those summoned to serve, once a background feature, . . . moved to the center of the analysis." With its application of equal protection rather than Sixth Amendment principles, the Court demonstrated a heightened interest in the rights of the excluded jurors themselves. As this concern moved to the forefront, the usefulness of the peremptory challenge in securing a fair and impartial jury receded in importance.

Since 1986, the Court has extended *Batson*'s reach. In *Powers v. Ohio*, it held that a criminal defendant may object to a prosecutor's race-based exclusion of persons from a petit jury regardless of whether the defendant and the excluded jurors are of the same race. In *Edmonson v. Leesville Concrete Co.*, *Batson* was extended to civil litigants. Finally, in *Georgia v. McCollum*, the Court concluded that for purposes of exercising peremptory challenges a criminal defendant is a state actor and, thus, is prohibited from discriminating on the basis of race.

Justice Stevens' view that the issue was properly before the Court because the state "'has explicitly rested on the issue in question as a controlling basis for affirmance.'" *Id.* at 116 (quoting Stevens, J., concurring, at 109).


87. *Id.* at 1142.

88. *Id.* ("[A]lthough the *Batson* cases originated in concern for the rights of the black defendant, they have, from the beginning, also dealt with harm inflicted on the excluded jurors."). See also *Powers v. Ohio*, 499 U.S. 400 (1991). The *Powers* Court devoted a major portion of its analysis to whether a defendant in a criminal trial, regardless of his race, has third-party standing to raise the equal protection claims of jurors excluded by the prosecution because of their race. *Id.* at 410-16. Answering in the affirmative, the Court noted that barring the 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.

89. See supra notes 86-88 and accompanying text.


91. *Id.* at 409-16.


93. *Id.* at 620-28. *Edmonson* held that civil litigants are "state actors" for purposes of exercising peremptory challenges. *Id.*


95. *Id.* at 2359. Justice O'Connor, uneasy with the Court's willingness to expand *Batson*, dissented. *Id.* at 2361 (O'Connor, J., dissenting). She deemed it a "remarkable" conclusion that "criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges." *Id.* Justice Scalia, using stronger language, called it "terminally absurd" to hold that a criminal defendant, defending him-
Although confined to the issue of race, *Batson* and its progeny spawned considerable uncertainty with respect to gender. Litigants, sensing opportunity, began to attack gender-based challenges, while commentators argued for the application of *Batson* to gender. The result was a confusing and conflicting sequence of federal and state court decisions on the extension of *Batson* to gender-based peremptory challenges.

### IV. Analysis

#### A. The Juror’s Right to be Included

In *J.E.B.*, the Court held that intentional, gender-based discrimination by state actors in the use of peremptory challenges violates the Equal Protection Clause, particularly where it perpetuates stereotypes about the respective abilities of males and females. All persons, when granted the opportunity to serve on a jury, “have the right not to be excluded summarily because of discriminatory and stereotypical

self against the state, is also acting on behalf of the state. *Id.* at 2364 (Scalia, J., dissenting). Even allowing for the proposition that *McCollum*’s holding follows logically from *Edmonson,* Justice Scalia suggested that “a bad decision should not be followed logically to its illogical conclusion.” *Id.* at 2365.

96. The issue of whether *Batson* principles should apply to gender-based strikes had centered largely around the question of whether gender- and race-based peremptories are qualitatively the same. See supra note 59. Opponents of extending *Batson* to gender have argued that gender-based strikes are fundamentally different from those exercised on the basis of race. See, e.g., *J.E.B.*, 114 S. Ct. at 1434-35. Chief Justice Rehnquist argued in his dissent in *J.E.B.* that assuming *Batson* was “correctly decided, there are sufficient differences between race and gender discrimination such that the principles of *Batson* should not be extended to peremptory challenges to potential jurors on the basis of sex.” *Id.* (Rehnquist, C.J., dissenting).

97. See generally Babcock, supra note 86, at 1151-74 (arguing for an extension of *Batson* to gender-based peremptory challenges and discussing the shift in analysis of the *Batson* line of cases from the Sixth Amendment’s “fair cross-section” requirement to equal protection).


presumptions that reflect and reinforce patterns of historical discrimination."\textsuperscript{100}

While striving to eliminate this discrimination, the Court may have dealt a fatal blow to the peremptory challenge, despite its pro- testations to the contrary.\textsuperscript{101} The Court has articulated a laudable goal of public policy: eradicating sex discrimination.\textsuperscript{102} Yet, somewhat dis- ingenuously, it refused to acknowledge what it sacrificed in order to achieve that purpose.\textsuperscript{103} Justice Blackmun insisted that the majority did not "weigh the value of peremptory challenges."\textsuperscript{104} But, as evidenced by its own language, this is exactly what the Court did. The Court stated that a policy that permits litigants to consider potentially different "male" or "female" attitudes in their selection of a petit jury is unjustifiable in light of the harm that discrimination causes to the community, litigants, and individual jurors.\textsuperscript{105} Notwithstanding such a disclaimer, this is a weighing.\textsuperscript{106} The \textit{J.E.B.} majority simply decided that the objective of eliminating discrimination outweighs the importance of the peremptory challenge.\textsuperscript{107} Having made this choice, the majority was unwilling to acknowledge the ramifications: the peremptory challenge essentially has collapsed into a challenge for cause.\textsuperscript{108} That the peremptory challenge cannot survive in the wake of \textit{J.E.B.} is readily apparent.\textsuperscript{109} "[T]he essential nature of the peremp-

\textsuperscript{100} \textit{Id.} at 1428. The Court noted that "the right to nondiscriminatory jury selection procedures belongs to the potential jurors as well as to the litigants. . . . The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." \textit{Id.} n.13.

\textsuperscript{101} \textit{Id.} at 1438 (Scalia, J., dissenting).

\textsuperscript{102} \textit{Id.} at 1428.

\textsuperscript{103} Justice O'Connor, in her concurrence, made exactly this point: Today's decision is a statement that, in an effort to eliminate the potential discriminatory use of the peremptory, gender is now governed by the special rule of relevance formerly reserved for race. Though we gain much from this statement, we cannot ignore what we lose. In extending \textit{Batson} to gender we have added an additional burden to the state and federal trial process, [and] taken a step closer to eliminating the peremptory challenge. \textit{J.E.B.}, 114 S. Ct. at 1432 (O'Connor, J., concurring) (citations omitted).

\textsuperscript{104} \textit{Id.} at 1425. \textit{See supra} note 45 and accompanying text.

\textsuperscript{105} \textit{Id.} at 1427.

\textsuperscript{106} \textit{See supra} note 45 and accompanying text.

\textsuperscript{107} The Court specifically noted that while peremptory challenges are valuable tools in jury trials, they are not constitutionally protected rights. \textit{J.E.B.}, 114 S. Ct. at 1426 n.7. Clearly, the Court is comparing the relative importance of the challenge, which is not subject to any constitutional protection, with the constitutionally guaranteed right to equal protection of the laws. \textit{Id.} at 1426.

\textsuperscript{108} \textit{Id.} at 1431 (O'Connor, J., concurring).

\textsuperscript{109} It has been argued that the peremptory was doomed from the moment \textit{Batson} was decided. Justice Scalia, dissenting in \textit{Powers}, commented that peremptories based on "sex, religion, age, economic status, and any other personal characteristic unrelated to the ca-
tory challenge is that it is one exercised without a reason stated, with-
out inquiry and without being subject to the court's control."'110 The
Court consistently has affirmed that the peremptory occupies "an im-
portant position in our trial procedures."'111 That interest now will be
frustrated by extending Batson to gender, since one inevitable result of
J.E.B. is the fact that every venireperson now may claim status as a
member of a protected "group," merely by virtue of being male or
female.112 Hence, counsel may be required to provide "an explana-
tion for every strike."113

In light of this severe limitation on the usage of the peremptory,
its evisceration seems certain.114 Justice Scalia, dissenting in Powers v.
Ohio, explained why this outcome is undesirable: "The peremptory
challenge system has endured so long because it has unquestionable
advantages."'115 Those advantages include that the challenge is a criti-
cal "means of winnowing out possible (though not demonstrable)
sympathies and antagonisms on both sides, to the end that the jury
will be the fairest possible."'116 This winnowing process is particularly
important within the context of the criminal law system where a single
biased juror can prevent either conviction or acquittal.117 The advan-
tages of the peremptory challenge were previously set forth in Swain v.
Alabama in which the Court discussed the "essential nature" of the
challenge and the advantages thereof: "While challenges for cause

pacity for reasonable jury service . . . are arguably within the logic" of Batson. Powers v.

Moreover, as Justice O'Connor pointed out in her concurrence to J.E.B., a "special
rule of relevance" traditionally has been reserved for race, setting it apart from gender.
J.E.B., 114 S. Ct. at 1432 (O'Connor, J., concurring). See supra notes 54-55 and accompa-
nying text. See also United States v. Broussard, 987 F.2d 215, 220 (5th Cir. 1993) ("Batson is a
prophylactic device reached for in response to demonstrated need.").

110. J.E.B., 114 S. Ct. at 1431 (O'Connor, J., concurring) (quoting Swain v. Alabama,
380 U.S. 202, 220 (1964)).
111. Batson, 476 U.S. at 98.
112. J.E.B., 114 S. Ct. at 1439 (Scalia, J., dissenting).
113. Broussard, 987 F.2d at 219. See also Thomas v. State, No. 1921804, 1994 Ala. LEXIS
446, at *21-22 (Ala. Sept. 2, 1994) (Houston, J., concurring). Judge Houston stated:
In spite of the weak attempt by the majority in J.E.B. to assure that J.E.B. does not
eliminate all peremptory challenges, I read J.E.B. as requiring a nongender,
nonrace reason for striking any juror that is struck, and as requiring no prima
facie showing of gender (sex) or racial discrimination before a disclosure of rea-
son is required. Therefore, there is no more peremptory challenge.

Id.
114. See supra note 109.
116. Id. Justice Scalia stated that the peremptory challenge frequently serves the pur-
pose of enabling a litigant to strike a potentially undesirable juror on the basis of personal
characteristics that would not provide a basis for exercising a challenge for cause. Id.
117. Id.
permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable."118

B. Conflict With Precedent

That J.E.B. apparently has dealt a lethal blow to the time-honored peremptory challenge is troubling.119 It is all the more discomforting because the Court employed reasoning that cannot be reconciled with previous case law articulating the unique characteristics of the genders and the resultant need to include both in the venire.120 As the J.E.B. dissenters pointed out, the majority's analysis "seems to place the Court in opposition to its earlier 'fair cross-section' cases."121 The logic of J.E.B. dictates that men and women must be viewed as indistinguishable; no acknowledgement may be made of their potentially different perspectives.122

In its zeal to purge the judicial system of discrimination, the J.E.B. Court has failed to account for human nature. It summarily rejected the respondent's argument, grounded in common sense and experience, that males and females may think and react differently in response to gender-sensitive issues.123 Incongruously, the Court cited to language in Taylor that recognizes that a "distinct quality" is lost if either sex is excluded from the venire.124 Justice Blackmun invoked

118. Swain, 380 U.S. at 220. The Swain Court further observed that the peremptory challenge often is "exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' upon a juror's 'habits and associations,' or upon the feeling that 'the bare questioning [of a juror's] indifference may sometimes provoke a resentment." Id. (quoting Lewis v. United States, 146 U.S. 370, 376 (1892)); Hayes v. Missouri, 120 U.S. 68, 70 (1887). It should be noted that while the Batson Court overruled Swain to the extent that Swain imposed upon the petitioner the burden of proving the systematic discriminatory use of peremptory challenges, the Batson Court did not take issue with Swain's characterization of the advantages of the challenge. Batson, 476 U.S. at 91.
119. See supra notes 109-113 and accompanying text.
120. See supra notes 9-10, 68-69, 71-72 and accompanying text.
122. Id.
123. The Court tersely paraphrased Powers: "We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'" Id. at 1426 (quoting Powers, 499 U.S. at 410). This response ignores reality and fails to refute the respondent's position.
124. Justice Blackmun, recounting the evolution of judicial attitudes toward women, cited Ballard v. United States, 329 U.S. 187 (1946), as the case that "first questioned the fundamental fairness of denying women the right to serve on juries." J.E.B., 114 S. Ct. at
the fair cross-section cases\textsuperscript{125} when he asserted that the jury's "diverse and representative character . . . must be maintained,"\textsuperscript{126} but he failed to acknowledge why that cross-section must include women in order to be fair. None of the cases relied upon by the majority stand for the proposition that all potential jurors can, or should, be regarded as identical—quite the contrary is true. Taylor and Duren both dealt with systematic, institutionalized exclusion of women from jury service, and both cases stressed that a fair cross-section is impossible to achieve if women are excluded, precisely because women are a "distinct" group within the community.\textsuperscript{127} "[W]omen bring to juries their own perspectives and values that influence both jury deliberation and result."\textsuperscript{128}

C. Application of J.E.B.

In the brief period since the Court's decision in J.E.B., its ruling has been cited frequently in lower state and federal courts.\textsuperscript{129} Perhaps the most intriguing treatment of J.E.B. occurred in the Court's denial of certiorari in Davis v. Minnesota.\textsuperscript{130} Petitioner Davis, an African-American, argued after his conviction for aggravated robbery that the prosecutor's "race-neutral" reason for striking a black juror—the juror and Davis were both Jehovah's Witnesses—violated equal protection principles under Batson.\textsuperscript{131} While the Court did not articulate a reason for its denial of certiorari, Justice Thomas, joined by Justice Scalia, dissented, arguing that the Supreme Court of Minnesota's affirmance of the conviction should have been vacated, and the case remanded to the trial court in light of J.E.B.\textsuperscript{132} The dissenters noted that the Minnesota court affirmed Davis prior to J.E.B. and relied on the notion that Batson principles applied exclusively to racially discriminatory peremptory strikes.\textsuperscript{133} Justice Thomas suggested that the Supreme Court's decision in J.E.B. was based on the mistaken belief that women lack unique perspectives and values. He argued that the decision was inconsistent with the Court's previous decisions recognizing the importance of diverse jury compositions.

\textsuperscript{124} Yet Justice Blackmun also recognized that the Ballard Court rejected the notion that "women have no superior or unique perspective." Id.


\textsuperscript{126} J.E.B., 114 S. Ct. at 1424.

\textsuperscript{127} Duren, 439 U.S. at 364.

\textsuperscript{128} Taylor, 419 U.S. at 532 n.12 (citations omitted).

\textsuperscript{129} A computer-assisted search revealed at least 62 citations to J.E.B. only four months after the case was decided.

\textsuperscript{130} 114 S. Ct. 2120 (1994).

\textsuperscript{131} Id. at 2121.

\textsuperscript{132} Id. (Thomas, J., dissenting).

\textsuperscript{133} Id. Justice Thomas found it difficult to understand the Supreme Court's unwillingness to remand, in light of J.E.B., which, he said, "shatters the Supreme Court of Minne-
Court, in "breaking the barrier" between classifications that merit strict equal protection scrutiny and those that merit heightened scrutiny, has "extended Batson's equal protection analysis to all strikes based on the latter category of classifications—a category which, presumably, would include classifications based on religion." Justice Thomas concluded that the Court's denial of certiorari "stems from an unwillingness to confront forthrightly the ramifications of the decision in J.E.B." As of the date of this writing, post-J.E.B. lower court decisions have not shed light on the "ramifications" referred to by Justice Thomas. Lower courts have yet to rule on whether Batson principles must now extend to other "protected" classifications, such as religion. To the extent the lower courts have applied J.E.B., they have done so in a straightforward manner, engaging in little analysis of the long-term impact of its holding. The breadth and unequivocal sweep of the Supreme Court's holding in J.E.B. recently was acknowledged by the Appellate Court of Connecticut, which noted that the language of the J.E.B. majority leaves little doubt that its principles will be applied to the parties in a civil action in which the government is not involved.

sota's understanding that Batson's equal protection analysis applies solely to racially based peremptory strikes." In Larson v. Valente, 456 U.S. 228 (1982), the Court held that a state statute granting preferences to certain religious denominations should be regarded as "suspect" and treated with strict scrutiny. Id. at 245-46. Justice Thomas's argument suggests that heightened scrutiny should be the minimum standard that will be applied to classifications based on a person's religion, thus bringing peremptory challenges based on religion well within the ambit of J.E.B. Davis, 114 S. Ct. at 2121. Justice Thomas further asserted, Once the scope of the logic in J.E.B. is honestly acknowledged, it cannot be glibly asserted that the decision has no implications for peremptory strikes based on classifications other than sex, or that it does not imply further restrictions on the exercise of the peremptory strike outside the context of race and sex. Id.

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136. See, e.g., Abshire v. State, No. 81,326, 1994 Fla. LEXIS 997, at *5 (Fla. June 30, 1994). The Supreme Court of Florida remanded Abshire in light of J.E.B. and observed [The] Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. As with race, the "core guarantee of equal protection, ensuring citizens that their State will not discriminate . . . , would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the juror's [gender]." Id. (citing J.E.B., 114 S. Ct. at 1430). See also Tennessee v. Turner, 879 S.W.2d 819 (Tenn. 1994) (affirming, in light of J.E.B., trial court's refusal to allow criminal defendant to use peremptory strikes to remove females from venire and emphasizing individual juror's right to nondiscriminatory jury selection procedures); In re Codey, No. 93-0083, 1994 Wis. App. LEXIS 902, at *9 (Wis. Ct. App. July 27, 1994) (remanding matter to trial court on the basis of J.E.B. and noting "J.E.B. extends Batson to peremptory strikes based on gender.").
Individual jurors have the right to nondiscriminatory jury selection procedures. Because discrimination based on gender is prohibited and potential jurors as well as litigants must receive the protection of that right, the right must logically remain unmodified and intact regardless of the identity of the litigants. We, therefore, conclude that J.E.B. applies to cases such as this one, in which the government is not a litigant.\textsuperscript{137}

**CONCLUSION**

J.E.B. resolved the debate over the constitutionality of gender-based peremptory challenges, declaring such challenges invalid. The case highlights, however, the tension that Batson and its progeny have created between two competing concerns. The first is the right of the litigant to attain an impartial jury.\textsuperscript{138} The second concern rests upon the state's obligation to shield the juror from racial and gender discrimination.\textsuperscript{139} While it is not difficult to reconcile the peremptory challenge with the first goal, the Court has decided that the challenge squarely conflicts with the second. In J.E.B., the Court decided that the challenge—and quite possibly future litigants—must lose.

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\textsuperscript{137} Martins v. Connecticut Light & Power Co., 645 A.2d 557, 566 (Conn. App. Ct.), cert. denied, 231 Conn. 915 (1994). In Martins, the court further observed that J.E.B. limits a litigant’s right, enumerated specifically in the Connecticut constitution, to peremptorily challenge potential jurors. Id. at 565.

Thus, while Connecticut litigants still have a state constitutional right to use peremptory challenges, the extent of that use is now limited by the Equal Protection Clause of the federal Constitution as enunciated in the J.E.B. decision, as potential jurors may no longer be peremptorily challenged on the basis of gender.

\textsuperscript{138} See generally J.E.B., 114 S. Ct. at 1425 (discussing the state’s "legitimate interest in achieving a fair and impartial trial"). See also Powers v. Ohio, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting).

\textsuperscript{139} J.E.B., 114 S. Ct. at 1428 ("All persons, 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."). See also Babcock, supra notes 86-88 and accompanying text.