

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

CAPTION: J.E.B., Petitioner v. T.B.  
CASE NO: 92-1239  
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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 92-1239, J.E.B. v. T.B.

5 Mr. Porter.

6 ORAL ARGUMENT OF JOHN F. PORTER, III

7 ON BEHALF OF THE PETITIONER

8 MR. PORTER: Mr. Chief Justice, and may it  
9 please the Court:

10 A ruling which the petitioner requests in this  
11 case is a determination that gender-based peremptory jury  
12 challenges are prohibited under the heightened scrutiny of  
13 the Fourteenth Amendment such that the procedures  
14 established in Batson v. Kentucky would apply in that  
15 context also.

16 The facts which are relevant to the review of  
17 this case reveal that from a panel of 33 potential jurors,  
18 the State of Alabama in this cause struck 9 -- used 9 of  
19 its strikes to strike men from the jury and used 1 of its  
20 strikes to strike a female. The petitioner used a  
21 peremptory strike to strike a male from the jury,  
22 resulting in an all-female panel to try this case, which  
23 resulted in a determination in favor of the state of  
24 paternity in this action.

25 The position of the petitioner in this case is



1 based upon three factors. The first is that the same  
2 principle which prohibits gender-based exclusion from the  
3 jury venire also excludes gender-based elimination or  
4 peremptory strikes in the formation of a petit jury.

5 Secondly, under the heightened scrutiny of the  
6 Equal Protection Clause applicable to gender  
7 discrimination, the State's interest in limiting further  
8 restrictions on the exercise of peremptory challenges is  
9 not significant enough to overcome the invidious harm  
10 caused by gender-based peremptory challenges.

11 And finally, the harm to the petitioner, the  
12 excluded jurors, and society as a whole is substantially  
13 similar in the use of gender-based peremptory challenges  
14 as that we find from race-based peremptory challenges.

15 The fact that this panel ended up being all  
16 female simply highlights the injury to the entire  
17 community when a group, such as males or females, were  
18 eliminated from the jury panel because of group bias or  
19 unwarranted stereotyping, and when those -- that  
20 stereotyping becomes the basis for the exclusion of  
21 otherwise qualified jurors from the judicial process.

22 QUESTION: Well, do you think that men at large  
23 in this particular community really felt bad because male  
24 jurors had been stricken from this panel?

25 MR. PORTER: Mr. Chief Justice, I think at the

1 time, obviously, the community as a whole was not  
2 cognizant of the problem. The excluded jurors certainly  
3 felt excluded, because there were only 10 of them to start  
4 with.

5 QUESTION: Well, supposing that the local  
6 newspaper had run a story saying that these male jurors  
7 had been excluded, do you think the community at large or  
8 the community of men would have felt very badly about it?

9 MR. PORTER: Mr. Chief Justice, I believe that  
10 there would have been a perception that this was not fair,  
11 for a panel of all one gender, whether it be female or  
12 male, to try any particular case. I think that would have  
13 been the perception in the community, not necessarily that  
14 men would have felt bad, but the community would have felt  
15 that the system was not necessarily fair.

16 QUESTION: So the community would have felt  
17 differently than men would have felt about it, is that  
18 your answer?

19 MR. PORTER: I think men -- I would agree that  
20 men would have felt excluded in this particular case. And  
21 I think in any particular case, if they were excluded  
22 simply because they were males.

23 QUESTION: But men, as a class, historically  
24 have not been excluded from jury service, so why should an  
25 equal protection plea on behalf of men succeed?

1 MR. PORTER: Justice Ginsburg, men have not -- I  
2 agree that men have not been excluded from jury service.  
3 But men have become -- under the Equal Protection Clause,  
4 have been a classification which have received protection  
5 from gender-based discrimination. So our position is that  
6 the same principle which applies to gender-based  
7 discrimination in general should apply to males, and to  
8 females, in this particular context.

9 QUESTION: Well, why couldn't this be regarded  
10 as a kind of affirmative action for women to make up for  
11 all the years when Alabama totally excluded them from jury  
12 service?

13 MR. PORTER: I'm not saying that that at some --  
14 for some reason could not be. But in this context, it is  
15 certainly not an affirmative action because it would also  
16 apply to females. It is a -- in this case men were  
17 excluded. The same invidious harm would have occurred if  
18 women had been excluded from the jury panel. So therefore  
19 it is not an affirmative action type of process which is  
20 allowed by the State of Alabama.

21 QUESTION: Mr. Porter, you speak of unwarranted  
22 stereotyping.

23 MR. PORTER: Yes, sir.

24 QUESTION: I take that to mean that there is  
25 nothing to the notion that you're -- if you're a defendant

1 in a rape case, you're likely to be worse off with an  
2 all-female jury and you're -- if you're a defendant in a  
3 paternity case, you're not likely to be worse off with an  
4 all-female jury? You don't -- is that warranted  
5 stereotyping or unwarranted stereotyping, or is it simply  
6 not true?

7 MR. PORTER: Justice Scalia, I would say that it  
8 is unwarranted because that while men and women are not  
9 the same, obviously, and do not have necessarily the same  
10 outlooks, but they do have the same ability to be  
11 unbiased, to become unbiased jurors in a particular case.

12 QUESTION: The same ability -- they can both  
13 fight against it to the same degree, as every human being  
14 has to, but they begin from different standing points on  
15 certain issues such as those two, don't you think? Are  
16 you telling me that a defense counsel is unreasonable in  
17 attempting to strike women in cases of those type, in  
18 thinking that his client would be better off with a male  
19 juror?

20 MR. PORTER: Justice Scalia, my response is  
21 that, and our position is that simply because -- a woman  
22 is excluded from a jury because of her gender should be  
23 unwarranted and unreasonable. Now, if it goes further  
24 than that --

25 QUESTION: Now, I don't understand. Say it



1 again?

2 MR. PORTER: Our position is that the --

3 QUESTION: Are you saying that there's nothing  
4 to the fact that a woman juror and a man juror, at least  
5 in certain type of cases, may have a different outlook and  
6 hence be more likely to tend towards the defense or the  
7 prosecution side? You -- are you saying there is nothing  
8 to that?

9 MR. PORTER: Justice Scalia, I'm not saying  
10 there's nothing to that. However, the --

11 QUESTION: You're saying there is something to  
12 it, but counsel shouldn't be able to take that into  
13 account in their peremptories?

14 MR. PORTER: I think that you can consider that.  
15 I don't think that -- our position is that you should not  
16 be able to exclude a male or a female simply because of  
17 their gender. There are studies that goes both ways, that  
18 females are --

19 QUESTION: Mr. Porter, isn't it clear that  
20 there's something to most stereotypes, that most  
21 stereotypes are, indeed, accurate for a good part of the  
22 class?

23 MR. PORTER: Justice Ginsburg, stereotypes are  
24 stereotypes, and they may, in fact, be applicable to a  
25 certain percentage of a particular group, such as 60

1 percent of the women may feel one way about a subject.  
2 But there are 40 percent that do not feel the same way,  
3 and if you allow gender-based peremptory challenges, that  
4 40 percent may be excluded simply because of the overall  
5 perception that women feel a certain way.

6 QUESTION: But that's what peremptory challenges  
7 are all about. It's a playing of the odds. It's always a  
8 playing of the odds. No counsel who exercises a  
9 peremptory challenge thinks that every woman or every male  
10 man or every person of whatever classification that he  
11 eliminates is going to have a certain view, but he's  
12 playing the odds. Isn't that what peremptory challenges  
13 are about?

14 MR. PORTER: Peremptory challenges traditionally  
15 have been allowed and become a part of our judicial system  
16 because of counsel. Trial counsel decides at the moment,  
17 during the trial, that a certain juror may or may not be  
18 biased in this particular case, and says -- therefore  
19 peremptories are allowed. It is our position that it is  
20 the preconceived notion, the preconceived stereotyping  
21 that all women feel a certain way and so therefore they  
22 should be excluded because all women feel a certain way  
23 from a jury.

24 QUESTION: Isn't your argument that certain  
25 stereotyping, whatever its historical basis in fact may

1 be, simply should not be recognized as tolerable under the  
2 Equal Protection Clause? Don't you have a principle  
3 argument as opposed to a merely fact argument?

4 MR. PORTER: Yes, sir, Justice Souter, we do.  
5 And that is in its -- probably its finest form, or the  
6 simplest form, our argument; that stereotyping for the  
7 exclusion of jurors should not be allowed.

8 QUESTION: Your argument is that you want a  
9 precedent that applies to race to be extended to sex. How  
10 far do you carry it? What other groups? And if -- you're  
11 saying if race, then sex. Well, how about age, religion,  
12 national origin?

13 MR. PORTER: Justice Ginsburg, in this  
14 particular case I think the Court need only go as far as  
15 gender. However, I think it would be rational to apply  
16 the same principles to heightened scrutiny under the  
17 Fourteenth Amendment, which would apply, then, to  
18 religion, national origin, and illegitimacy. The examples  
19 you gave of age and maybe other classifications which have  
20 not risen --

21 QUESTION: But does one inquire of each juror  
22 about the legitimacy of the juror's birth?

23 MR. PORTER: Practically not. I have never seen  
24 -- in 15 years of practice I've never seen anyone inquire  
25 of someone's legitimacy. However, if that were --

1 QUESTION: Or, indeed, national origin?

2 MR. PORTER: No, ma'am. I've never seen anybody  
3 inquire of national origin. However --

4 QUESTION: It is perhaps the difference that in  
5 race and sexes, you don't have to ask.

6 MR. PORTER: Correct. It is clear from looking  
7 at a person their race and their sex, and so therefore  
8 there is that connection, so that it is something that you  
9 can readily observe.

10 QUESTION: Counsel, suppose an attorney were  
11 faced with a jury of all one gender, all male or all  
12 female, could the attorney then strike in order to  
13 increase diversity?

14 MR. PORTER: Justice Kennedy, in the race arena  
15 where counsel have in the past stricken for that cause, it  
16 has not been allowed. It has been determined that that is  
17 a race-based peremptory challenge and has not been  
18 allowed. I would apply the same principle in this  
19 instance, so that in order -- that use of peremptory  
20 challenges to obtain a better mix, I suppose, of a jury  
21 should not be allowed in that case.

22 QUESTION: Mr. Porter --

23 QUESTION: So the stereotype applies to the  
24 challenge but not to the evaluation of the jury as it's  
25 composed?



1                   MR. PORTER: The -- I would agree that the --  
2 the objection would be to the individual challenge of the  
3 juror.

4                   QUESTION: But your -- isn't it your assumption,  
5 in answering Justice Kennedy's question, that there is no  
6 reason to infer that there was stereotyping or exclusion  
7 based on stereotyping in composing the panel from which  
8 his all-male jury or all-female jury was picked? Isn't  
9 that your assumption?

10                  MR. PORTER: Yes, sir. That would be a part of  
11 it, before you would ever get to --

12                  QUESTION: Which is, in fact, I presume, an  
13 unrealistic assumption.

14                  MR. PORTER: Yes, sir.

15                  QUESTION: Or would be in those cases.

16                  MR. PORTER: It would be, yes, sir. But before  
17 you would get to that point, you would have the  
18 opportunity to make the challenge.

19                  QUESTION: Mr. Porter, the male and female  
20 classes are roughly the same size, I guess.

21                  MR. PORTER: Yes.

22                  QUESTION: That's not always true in the racial  
23 or other contexts. Why isn't it an adequate protection if  
24 one side thinks the male is a more favorable juror and the  
25 other thinks the female, give them each the same number of

1 peremptories and they'll cancel each other out?

2 MR. PORTER: Justice Stevens, as to that panel,  
3 that -- or as to the group of the jurors and the ability  
4 of counsel to obtain the correct mix, that may be the  
5 right answer, the way to resolve it. But as to the  
6 individual juror who is excluded, or to the community as a  
7 whole, the allowance of gender-based peremptories damages,  
8 as the Court found in --

9 QUESTION: Yeah, but what's the damage if one  
10 side thinks they don't like men and the other side thinks  
11 they don't like women? Doesn't that cancel it out? I  
12 mean neither group is being treated less favorably than  
13 the other group under that hypothesis.

14 MR. PORTER: Justice Stevens, the entire group,  
15 I would agree, would not be --

16 QUESTION: Both men and women would be insulted  
17 because they're not of the opposite sex.

18 MR. PORTER: Right. And so it would be the  
19 insulting of that particular juror, or the exclusion,  
20 which would be objectionable.

21 QUESTION: Although you have standing because of  
22 the client that you represent, which you're asserting,  
23 then, is the equal protection right of the juror, not the  
24 party.

25 MR. PORTER: In part. I think under Batson and

1 the cases that followed, certainly my client would have  
2 the standing to raise the objection of the excluded  
3 jurors. I think that would be correct.

4 QUESTION: Well, isn't that the heart of your  
5 argument?

6 MR. PORTER: It is. I think that's the overall,  
7 the more broad argument. And the more important,  
8 probably, harm is the harm to the community and to society  
9 and to the excluded jurors who basically do not have the  
10 opportunity to raise the objection themselves.

11 QUESTION: Could I ask, Mr. Porter, what -- is  
12 that the total list of categories that you want this  
13 applied to? What is it, now, sex, religion, what else?

14 MR. PORTER: National origin and --

15 QUESTION: National origin.

16 MR. PORTER: Yes, sir.

17 QUESTION: Sexual preference?

18 MR. PORTER: No, sir.

19 QUESTION: Not -- no, not that. Why not?

20 MR. PORTER: Because sexual preference, like age  
21 and disability, have not been raised by this Court to the  
22 heightened level of scrutiny under the Fourteenth  
23 Amendment.

24 QUESTION: Oh. But we could do that, though.

25 MR. PORTER: If the Court chose to at some point

1 in time, then you could --

2 QUESTION: Sure.

3 (Laughter.)

4 MR. PORTER: You certainly could.

5 QUESTION: But Mr. Porter, are you going to, in  
6 your system where we have these groups, allow the  
7 preliminary questioning of the potential jurors. In the  
8 colloquy that we just had, you observed that there's  
9 something about race and sex that's not like any other  
10 class. You don't have to ask.

11 MR. PORTER: Correct.

12 QUESTION: But in the suggestions that you're  
13 now making, the notion that religion is not written on  
14 someone's forehead so we would first have to quiz the  
15 potential jurors about that.

16 MR. PORTER: Yes, ma'am.

17 QUESTION: Same thing with national origin.

18 MR. PORTER: Yes, ma'am.

19 QUESTION: Does that -- does not -- isn't that  
20 just a disturbing thought?

21 MR. PORTER: It is a somewhat invasion of their  
22 privacy. But trial counsel every day inquires of jurors  
23 on personal matters. It is important in some cases to  
24 make those inquiries. Go back, as far back as Lewis, the  
25 U.S. v. Lewis. The Court there explained how important



1 the use of the voir dire was.

2 QUESTION: So if you're the defendant in a  
3 drunken driving case, you can strike jurors for -- I  
4 guess, because you don't like the color of their hair, but  
5 you could not strike a juror because he's a Methodist and  
6 therefore a teetotaler. You would have to accept, if it  
7 turned out that way, a jury of 12 Methodists in a drunken  
8 driving case, right?

9 MR. PORTER: No, sir.

10 QUESTION: You would not.

11 MR. PORTER: Not necessarily. My point is that  
12 you could not strike him simply because he was a  
13 Methodist. If he was a --

14 QUESTION: Well, that's why I'm striking him.

15 MR. PORTER: I understand.

16 QUESTION: I think this fellow probably has very  
17 strong views against drinking, and is more likely to come  
18 down hard on someone who's accused of drunken driving than  
19 some other juror. That's precisely why I want to strike  
20 him.

21 MR. PORTER: It is --

22 QUESTION: And you're saying that's no good.

23 MR. PORTER: It is the probably that gives me a  
24 problem with that.

25 QUESTION: But all peremptories are based on

1 probably.

2 MR. PORTER: Our position would be that if that  
3 Methodist professed to be a teetotaler, and so therefore  
4 had an individual conviction against the consumption of  
5 alcohol, that would be a proper peremptory strike.

6 QUESTION: But a teetotaler is just a person who  
7 doesn't himself drink alcohol.

8 MR. PORTER: Correct.

9 QUESTION: He doesn't necessarily believe that  
10 it's morally wrong for himself and others to do it.

11 MR. PORTER: If --

12 QUESTION: But, anyway, you just would not let  
13 him -- not let him strike methodists, right? But what  
14 could he strike, people with blonde hair, postmen?

15 MR. PORTER: If a postman had -- there would be  
16 nothing wrong with striking postmen as a class.

17 QUESTION: He'll be happy to hear that.

18 MR. PORTER: Yes, sir.

19 (Laughter.)

20 QUESTION: Mr. Porter, as a litigator, do you  
21 believe in the peremptory challenge system?

22 MR. PORTER: Justice Blackmun, I believe, as a  
23 litigator, that the peremptory challenge system certainly  
24 has a place within our jury selection process. It is --  
25 but it must be bound by certain constitutional provisions,

1 and we think one of those is the Fourteenth Amendment.

2 QUESTION: Do you think Batson was wrong?

3 MR. PORTER: No, sir, I do not. I think it --  
4 it achieved the purpose for which it was rendered.

5 QUESTION: Well, Mr. Porter, since Batson, which  
6 I guess was 7 years ago.

7 MR. PORTER: Yes, sir.

8 QUESTION: We've seen a number of cases here in  
9 which Batson issues have been raised because of the  
10 peremptories directed at minorities, of blacks or  
11 hispanics. Under -- if your view prevails, a person  
12 making any sort of a peremptory challenge in a proceeding  
13 is just really running a great risk. Because the  
14 peremptory challenge is going to be even to a man or to a  
15 woman, and therefore arguable on appeal that this -- this  
16 violated the Equal Protection Clause.

17 MR. PORTER: Mr. Chief Justice, in any situation  
18 the first step the trial counsel is going to have to show  
19 is making out a prima facie case that the gender has been  
20 used intentionally to strike.

21 QUESTION: But if you're talking -- I mean, if  
22 you're talking about minority members of a jury panel.

23 MR. PORTER: Yes, sir.

24 QUESTION: I should think it would be much  
25 easier to make out a case like that because there are not

1 apt to be many of them on the panel. Whereas in the case  
2 of women or men members, they're probably going to be  
3 50/50.

4 MR. PORTER: By and large, there will be.  
5 However, there are many counties in Alabama, and probably  
6 in other counties across the Nation, in which the racial  
7 mix is 50/50, or 60/40, very close. So those -- the  
8 Batson still applies in those cases.

9 QUESTION: Even if we accepted your argument  
10 that sex should be treated like race, wouldn't it be  
11 appropriate in this case to follow another precedent that  
12 was set 27 years in Alabama, and that is not to make  
13 this -- this dramatic change retroactive. Do you remember  
14 the old case of White against Crook when the Alabama  
15 Legislature was given till the next session to put women  
16 on juries?

17 MR. PORTER: I think the problem with that  
18 approach would be that the harm in this case -- in this  
19 particular case, the harm, the men who were eliminated  
20 have already been damaged. And therefore other men with  
21 cases --

22 QUESTION: Well, that was certainly so in the  
23 days when the Alabama laws was -- that the jury role would  
24 include the names of all male citizens of the county.

25 MR. PORTER: Yes, ma'am.



1 QUESTION: And yet that was made prospective  
2 only. The relief was made prospective only. Why isn't  
3 that appropriate here?

4 MR. PORTER: Because the damage has occurred  
5 already and it needs to be remedied. And it will continue  
6 to cause damage until it is remedied.

7 QUESTION: Thank you, Mr. Porter.

8 MR. PORTER: Thank you, Mr. Chief Justice.

9 QUESTION: Mr. Dreeben, we'll hear from you.

10 ORAL ARGUMENT OF MICHAEL R. DREEBEN  
11 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE  
12 SUPPORTING THE PETITIONER

13 MR. DREEBEN: Thank you, Mr. Chief Justice, and  
14 may it please the Court:

15 For nearly 2 decades the Court has held that  
16 Government action taken on the basis of gender is subject  
17 to heightened constitutional scrutiny. In light of that  
18 heightened scrutiny, the discriminatory use of peremptory  
19 challenges to remove a juror on the basis of gender  
20 violates the Constitution.

21 The line of cases beginning with this Court's  
22 decision in Batson has made it clear that the use of  
23 peremptory challenges for racially invidious purposes is  
24 unconstitutional. Such challenges harm not only the  
25 parties, but also the excluded jurors and the community as

1 a whole.

2 The same is true with respect to gender-based  
3 strikes. The individual juror removed on the basis of  
4 gender is frequently the victim of an outmoded stereotype.  
5 Jury manuals, for example, have instructed litigants to  
6 remove women because of a belief that they are too  
7 sympathetic or are governed by emotion, and the case law  
8 reflects that this has happened.

9 QUESTION: And you know better, so you want to  
10 protect defense counsel from himself, right?

11 MR. DREEBEN: No. I believe, Justice Scalia,  
12 that --

13 QUESTION: It seems to me he has his client's  
14 interest more to heart than the Government does. And if  
15 he thinks that what you call unwarranted stereotypes are,  
16 indeed, warranted, why not let him take the chance?

17 MR. DREEBEN: Well, the same argument could be  
18 made --

19 QUESTION: And if it's unwarranted, it'll be its  
20 own punishment.

21 MR. DREEBEN: I think the same argument could be  
22 made about racially based stereotypes or ethnically based  
23 stereotypes, or stereotypes based on a person's religion  
24 and nothing more. Now, the reason --

25 QUESTION: There's a Thirteenth Amendment and a

1 Fourteenth Amendment that can account for our view of  
2 racially based stereotypes. We're not allowed to  
3 stereotype for that. There's no such -- no such amendment  
4 changing historical practices with respect to strikes on  
5 the basis of sex or on the basis of a lot of other  
6 characteristics.

7 MR. DREEBEN: Well, this Court has determined  
8 that the Equal Protection Clause not only applies to  
9 sex-based classifications, but that they are entitled to  
10 heightened scrutiny because there has been a history of  
11 discrimination and a history that reflects the misuse of  
12 gender-based stereotypes as a basis for Government action.  
13 And it's that Court's determination in the general  
14 mainstream of equal protection law that we rely on in  
15 urging the extension of Batson from race-based challenges  
16 to gender-based challenges.

17 QUESTION: Well, Mr. Dreeben, if you -- if you  
18 prevail here, if the petitioner prevails, and not only  
19 gender-based peremptory strikes but those based on ethnic  
20 origin, religion and so forth, are similarly barred,  
21 what's left of the peremptory challenge system, if  
22 anything?

23 MR. DREEBEN: I think what's left of it, Justice  
24 O'Connor --

25 QUESTION: Besides the postmen.

1 (Laughter.)

2 MR. DREEBEN: It is the important class of  
3 postmen, and in addition classes that are based similarly  
4 on occupation, and all classes that really have not been  
5 elevated --

6 QUESTION: Well --

7 MR. DREEBEN: To heightened review.

8 QUESTION: -- It strikes me that before you even  
9 get to that, you're going to be accused -- as a lawyer, a  
10 trial lawyer exercising peremptories which, of necessity,  
11 have to be exercised against either women or men -- of  
12 having made a sex-based peremptory strike. How do you  
13 think, as a practical matter, the trial judge should deal  
14 with it? Suppose the lawyer strikes -- has five  
15 peremptory strikes and uses three of them to strike women.  
16 Now, is that open to challenge and is the trial judge  
17 going to have to resolve that?

18 MR. DREEBEN: The trial judge will have the  
19 discretion to determine whether there's a prima facie  
20 case. The lower courts have held, in the context of  
21 Batson, that simply an argument from numbers alone does  
22 not necessarily establish a prime facie case. There may  
23 be other factors that give rise --

24 QUESTION: But it might.

25 MR. DREEBEN: It might. And if it does, the



1 litigant who has exercised the strikes will be called upon  
2 to give a gender-neutral explanation for the strikes, just  
3 as he or she has to give a race-neutral explanation. And  
4 this procedure, though it may have seemed cumbersome at  
5 the time that Batson was adopted to those who opposed the  
6 rule, has proved to be perfectly workable in the Federal  
7 system in terms of race. And in those jurisdictions --

8 QUESTION: Well, but, of course, what do you  
9 have there? You have a much smaller pool of minority  
10 jurors against which this can operate, so it strikes me  
11 that it's much easier to establish some kind of a misuse.  
12 But when you have equal numbers of men and women, it seems  
13 that it might be, as a practical matter, very difficult to  
14 administer this for the trial judge.

15 MR. DREEBEN: There may be some cases that call  
16 for difficult determinations at the margins. I don't  
17 think that, across the board, it has proven difficult.

18 QUESTION: Mr. Dreeben, are we talking entirely  
19 hypothetically? Is it not so that Batson is the rule with  
20 respect to sex in some Federal jurisdictions?

21 MR. DREEBEN: Yes, Justice Ginsburg. The Ninth  
22 Circuit has adopted a gender-based Batson rule, as have  
23 the States of New York and California and Massachusetts,  
24 and, as well, six other States. And those are large State  
25 systems, as well as the Ninth Circuit, which is a major

1 Federal system, and it has not proven to be  
2 administratively burdensome or difficult to implement.

3 QUESTION: Well, but --

4 QUESTION: Mr. Dreeben --

5 QUESTION: -- Unless you extend it to the other  
6 logical categories which it ought to be extend to, if it  
7 extends to -- if it extends to sex.

8 I guess there's nothing to worry about if you  
9 can find a postman who is neither male, female, has no  
10 religion, and no ethnic background. Then you would not  
11 have to worry about a challenge; you could go ahead and  
12 strike.

13 MR. DREEBEN: So long as the litigant relies on  
14 a basis for the challenge which is not in a category  
15 that's protected by heightened scrutiny, and in which we  
16 are particularly concerned about the invidious use of  
17 stereotypes, in which the jurors rights would be violated  
18 were he subject to exclusion.

19 QUESTION: Is it just the jurors' rights? Is  
20 the integrity of the fact-finding process, the accuracy of  
21 the jury's determination enhanced or retarded by your  
22 position, in your view?

23 MR. DREEBEN: I'm not sure that the actual  
24 accuracy of the fact-finding process is necessarily  
25 affected one way or the other, so long as impartial jurors

1 are actually seated. What is affected is the community's  
2 perception and confidence in the integrity of the process.

3 QUESTION: Well, do you think the stereotypes  
4 may, then, enhance the accuracy of the jury?

5 MR. DREEBEN: No, I don't think that the  
6 stereotypes would in any way enhance it. I think that  
7 once you have reduced the --

8 QUESTION: But you wouldn't go so far as to say  
9 they retard it?

10 MR. DREEBEN: Not necessarily. But I do think  
11 that the community itself loses confidence in the  
12 integrity of the process when biased selection procedures  
13 have been used to empanel the factfinder. And I don't  
14 believe that that's different depending on whether the  
15 bias that's used in the selection process is racial bias,  
16 ethnic bias, or gender bias.

17 QUESTION: Well, this goes back to Justice  
18 Souter's question to the previous counsel as to what the  
19 real evil is here. If stereotypes have some value for the  
20 trial practitioner in selecting the jury, then maybe we  
21 should draw the line here and allow those peremptory  
22 challenges.

23 MR. DREEBEN: I think the line should be drawn,  
24 Justice Kennedy, where this Court has drawn it in other  
25 equal protection contexts where stereotyping was used to

1     justify laws.  Where the stereotype is one based on gender  
2     such as to invoke heightened constitutional scrutiny  
3     because of suspicion about historical misuse, it's  
4     appropriate to ban that use of stereotyping from the  
5     courtroom.

6             Where there has been much less concern about the  
7     invidious use of stereotyping or grouped-based  
8     assumptions, such as strikes based on occupation,  
9     residence, age, or a variety of other factors that this  
10    Court has been quite deferential to --

11            QUESTION:  But isn't the purpose of abolishing  
12    the stereotype from the courtroom in order to confirm the  
13    duty of the individual juror to set aside his or her own  
14    preconceptions?

15            MR. DREEBEN:  That is certainly part of it, but  
16    there is a balancing going on here, and the peremptory  
17    challenge system has been thought to serve other purposes  
18    in the jury selection process.  And the States may have  
19    some leeway to make determinations that group-based  
20    exclusions are permissible where there is no particular  
21    reason to be suspicious about the nature of those  
22    exclusions.

23            But in this context, where gender-based  
24    stereotyping has been subject to heightened review because  
25    of suspicion about misuse, where the community is injured



1 and where the excluded juror also would find it to be  
2 insulting to be removed solely on the basis of a  
3 stereotyped assumption, then in those situations the Equal  
4 Protection Clause does mandate the eradication of this  
5 form of discrimination.

6 The ruling in this case, Justice Ginsburg,  
7 should be applied retroactively, just as this Court  
8 applied the rulings in Batson and the successor Batson  
9 cases retroactively. There is no reason to depart from  
10 the determination made in that line of cases that the  
11 ruling should apply both to the parties in the case --

12 QUESTION: But by retroactive you mean the cases  
13 pending?

14 MR. DREEBEN: -- to cases pending, that's  
15 precisely correct, Justice Stevens. I was going to add  
16 that point.

17 We do not believe, in answer to Justice  
18 Rehnquist -- Chief Justice Rehnquist's question, that the  
19 Court should make an exception to a gender-based rule that  
20 would permit strikes when a party is attempting to even up  
21 or balance the jury. First of all, we think that that  
22 rule would be susceptible to a great deal of misuse. It  
23 would become extremely --

24 Thank you.

25 QUESTION: Thank you, Mr. Dreeben.

1 Ms. Brasfield, we'll hear from you.

2 ORAL ARGUMENT OF LOIS N. BRASFIELD

3 ON BEHALF OF THE RESPONDENT

4 MS. BRASFIELD: Mr. Chief Justice, and may it  
5 please the Court:

6 The solution that the defendant -- the  
7 petitioner has offered in this case I think causes a great  
8 many more problems than it actually fixes. In this  
9 particular case there -- it was a very unusual venire.  
10 And under the circumstances, I do not think it can be said  
11 that either the defendant, the individual jurors, or the  
12 community at large was harmed.

13 Usually, you will have a fairly well divided  
14 venire, and in this particular case there were 23 women  
15 and 10 men for whom -- that had to be brought down to a  
16 12-person jury. The defendant had 11 strikes, the State  
17 had 10. The jury --

18 QUESTION: That's what Alabama allows in a  
19 criminal case, or is this a civil case?

20 MS. BRASFIELD: This is a civil case completely,  
21 Your Honor.

22 QUESTION: And you're allowed 10 or 11 strikes  
23 in a civil case?

24 MS. BRASFIELD: They use a struck jury method  
25 which is 24 -- a minimum of 24 are required from which to

1 start the striking down to the number of jurors that are  
2 going to be needed.

3 QUESTION: Well, if you start with 24 and one  
4 side has 10 and the other side has 11 --

5 MS. BRASFIELD: No, no, no. You have however  
6 many it takes to reduce the venire to the number of jurors  
7 who are actually needed for the trial. That will be --

8 QUESTION: And would that be 12 in this case?

9 MS. BRASFIELD: In this case it was 12. There  
10 were no alternates needed for this case. So it just  
11 happened that there were a large number of strikes to be  
12 used in this case.

13 The defendant used his first strike against a  
14 woman; the State used its first strike against a man.  
15 This --

16 QUESTION: Well, let me inquire once more into  
17 the mechanics. The venire was 33 people?

18 MS. BRASFIELD: Yes, sir. And --

19 QUESTION: And you -- where did the number 24  
20 come from?

21 MS. BRASFIELD: The statute requires that a  
22 minimum of 24 be available. Usually more than that are  
23 called because there -- there's never any way of knowing  
24 how many will be struck for cause prior to the striking of  
25 the actual jury.

1 QUESTION: Thank you.

2 MS. BRASFIELD: The State used its fourth strike  
3 to strike a woman, but the defendant continued to use his  
4 strikes -- I mean to strike a man, but the defendant  
5 continued to use her to strike women. The actual numbers  
6 struck were 11 women and 10 men.

7 Those jurors who were struck, those 11 women and  
8 10 men, did not leave the courtroom thinking that they had  
9 been excluded from the jury system or that they could  
10 never sit on a jury. Both men and women regularly sit on  
11 juries throughout this country. And part of that is the  
12 very fact that men and women are not minorities; they are  
13 both fairly equal in numbers.

14 So that if your panel is drawn randomly, usually  
15 you will have a jury panel that is fairly equal in  
16 numbers. If there is some reason why the litigants feel  
17 like it's to their advantage to strike one gender rather  
18 than the other one, then just in this case the other  
19 juror -- other litigant is probably going to be striking  
20 the other gender.

21 This was a rare but totally random drawing that  
22 produced an unbalanced venire. But in most cases this  
23 would not happen. In -- and the fact is that they could  
24 have just as well been two men to every woman. It just  
25 happened that it was two women to every man in this case.



1 In addition --

2 QUESTION: Are you suggesting that there was not  
3 proof that the elimination was, indeed, gender based?

4 MS. BRASFIELD: I'm not suggesting that there  
5 would not have been a prima facie case which would have  
6 caused a challenge if Batson had been applied to this  
7 case.

8 QUESTION: That's -- I thought that that was a  
9 given for us at this level.

10 MS. BRASFIELD: Yes. I think at this point the  
11 fact that there would be a prima facie case if either side  
12 had decided to challenge. The State had as much of a  
13 challenge against the defendant for having stricken 10  
14 women with his 11 strikes.

15 QUESTION: Ms. Brasle -- Brasfield, my question  
16 to you -- we've been talking about stereotyping and how  
17 they are often true for most people in the class, but it  
18 was my impression that the evil or mischief that has  
19 underlied every decision of this Court in the sex  
20 discrimination/equal protection field is just that  
21 stereotyping, the notion that women are this way and men  
22 are that way. Is that not so?

23 MS. BRASFIELD: In my position, I think that  
24 that is correct. That is what Batson was based on. But  
25 Batson has been held to be uniquely a result of the racial

1 situation that was existing in this country, where blacks  
2 were still being kept off of juries in case after case  
3 after case, and the Swain test that was in place was  
4 unworkable to prove that this was happening. It's our  
5 position that it's --

6 QUESTION: How long were women kept off juries  
7 in Alabama?

8 MS. BRASFIELD: Until 1966, they were. Under  
9 the statute, a jury was made up of all males. But at this  
10 point, they are not being kept off of juries. The venire  
11 lists are drawn from the driver's license registration  
12 lists, and are drawn at random.

13 QUESTION: But you're arguing that there's  
14 nothing wrong with a counsel that's continuing to exclude  
15 them solely on the basis of their gender?

16 MS. BRASFIELD: I'm not saying that that's right  
17 or wrong. I'm saying --

18 QUESTION: No. Yes, you are. You're saying  
19 it's perfectly constitutional.

20 MS. BRASFIELD: I'm saying -- I'm not -- well,  
21 that's what I mean. I think it is constitutional. I do  
22 not think that it is necessarily to either party's  
23 advantage. I think they may very well be wrong, just as  
24 they may be wrong in thinking that the postman is going to  
25 be less likely to decide on their case. But --

1 QUESTION: Are you asking that Batson be  
2 overruled?

3 MS. BRASFIELD: Not at all, sir. I think there  
4 was a very --

5 QUESTION: You accept -- you accept Batson?

6 MS. BRASFIELD: Yes. But I think that Batson is  
7 unique to race and the situation that was continuing to  
8 exist in that blacks were being kept out of the system,  
9 which is not happening to men in particular in this case,  
10 or women.

11 QUESTION: Well, Ms. Brasfield, I guess the  
12 Court has painted itself into a bit of a corner on this  
13 matter, because it has held that the Batson rule applies  
14 because of the right of the juror. That it is the juror's  
15 own rights that are at stake here, and that the attorney  
16 for the litigant can raise that challenge in the case.  
17 Now, if that's so, then how -- how would you not apply  
18 that rule to a gender-based strike?

19 MS. BRASFIELD: I don't think --

20 QUESTION: I think what's really at stake is the  
21 right of the juror. If the Court's theory had been  
22 different, your argument might be easier.

23 MS. BRASFIELD: Well --

24 QUESTION: But how can you make a reasonable  
25 argument in light of the Court's jurisprudence here?

1 MS. BRASFIELD: Well, I think that no particular  
2 juror has a right to sit on any particular case. And in  
3 this situation there were 12 women who sat on the jury,  
4 but there were 11 women who didn't. And they were  
5 struck -- as I said, there would have been a prima facie  
6 against that at the time too.

7 QUESTION: Yes, but a particular juror has a  
8 right to have the State not act to exclude them on the  
9 basis of their gender, right?

10 MS. BRASFIELD: That has not been said by this  
11 Court up until now. All of the applications of Batson, at  
12 this point, have been to race.

13 QUESTION: Yes. But based on the right of the  
14 juror?

15 MS. BRASFIELD: Then I think you would have to  
16 come also to the right of the postman and the right of  
17 anybody else not to be struck. And if we are going to  
18 reach this, I think this is one of the problems that  
19 extending Batson beyond the area of race would cause, and  
20 that --

21 QUESTION: It's not a right not to be a struck.  
22 It's a right not to be stricken according to your race or,  
23 in this case the argument is gender. No one's contending  
24 that you have a right not be subjected to a challenge.

25 MS. BRASFIELD: But is it --



1 QUESTION: It's the reason for the challenge  
2 that's the point of -- the point of the inquiry here.

3 MS. BRASFIELD: But I think that the same  
4 argument, if that is going to be used to extend Batson,  
5 would also apply to any other stereotypical reason for --

6 QUESTION: Ms. Brasfield, isn't it true that  
7 there's no other group in the history of this country that  
8 was excluded from jury service as long as women? Not even  
9 the racial classifications lasted into -- in fact, it was  
10 1967 in Alabama; the decision was '66, but the change was  
11 '67,

12 MS. BRASFIELD: Justice Ginsburg, it is true  
13 that only blacks and women have, been under the law,  
14 denied the right, and that actually black men were allowed  
15 to sit on juries prior to women in Alabama.

16 QUESTION: So wouldn't we be putting the  
17 peremptory challenge back where it was in the days when it  
18 was never exercised on the basis of either race or sex  
19 because there weren't any women or any minorities in the  
20 pool to begin with? So all this talk about how you're  
21 shrinking the peremptories, you're just putting it back  
22 the way it was in the bad old days.

23 MS. BRASFIELD: But they are there, and they are  
24 there in fairly equal numbers. And since we're in the  
25 position of applying it to both men and women, there is

1 always the chance that -- and particularly where you have  
2 a large black population too, the problem is extended and  
3 made more necessary, that you have a reason for every  
4 strike in the event that you inadvertently fall into a  
5 situation that makes you subject to a challenge.

6 QUESTION: Ms. Brasfield, I suppose that every  
7 citizen has a right not only not to be -- if we follow  
8 this logic, not only not to be stricken for that citizen's  
9 race, religion, sex, and whatever, but also has a right  
10 not to be stricken for any irrational reason, I suppose,  
11 if that logic is correct? Wouldn't that be so?

12 MS. BRASFIELD: I think that --

13 QUESTION: So I guess that every erroneous basis  
14 for exercising peremptories would be unconstitutional.  
15 Like if -- in fact, postmen are, surprisingly, no  
16 different from everybody else. Striking a postman because  
17 he's a postman would be unconstitutional, right?

18 MS. BRASFIELD: I think that that argument could  
19 be extended in that direction, yes.

20 QUESTION: Or just striking a juror because you  
21 don't like the look in his eye. That would be  
22 unconstitutional.

23 MS. BRASFIELD: I think that we would certainly  
24 be in a position where we couldn't use -- striking a jury  
25 because we don't like the look in his eye as our

1 nonracial, non-gender-based reason --

2 QUESTION: Well, you could --

3 MS. BRASFIELD: Because it would be considered a  
4 sham.

5 QUESTION: Well, you could draw the line short  
6 of that, surely, because the Court has held the Equal  
7 Protection Clause requires if not strict scrutiny, at  
8 least heightened scrutiny, intermediate scrutiny based on  
9 differences between men and women. And it has never said  
10 the same about people who had a certain look in their eye.

11 (Laughter.)

12 MS. BRASFIELD: That's correct, Your Honor.

13 But --

14 QUESTION: Or about letter carriers.

15 MS. BRASFIELD: That is also correct. And while  
16 in Alabama if you were having a Batson challenge and you  
17 were trying to justify your strike for a nonracial reason,  
18 or a non-gender-based reason, I think that saying, Your  
19 Honor, I didn't like the look in his eye would not pass  
20 muster. I think that you would have to show a better  
21 reason than that, or it would be considered a sham. You  
22 could say that about every person you had struck.

23 So I think that you would be required to extend  
24 your voir dire and spend much more time. Now, I think  
25 that the judicial system would be loaded up with time

1 spent questioning jurors to be sure that you'd be able to  
2 give a -- an acceptable reason if you were called upon to  
3 do so. I think --

4 QUESTION: Ms. Brasfield, is the question I  
5 asked earlier to Mr. Dreeben, I think -- Batson is in  
6 effect with respect to sex in the Ninth Circuit and in  
7 some States. Is there any evidence of -- you said you  
8 think -- do we -- is there any evidence that there has, in  
9 fact, been these intractable problems?

10 MS. BRASFIELD: I am not familiar with whether  
11 those problems have been found. The -- Mr. Dreeben has  
12 said that there is no evidence that there are problems.  
13 I'm not -- also not sure that there are not -- there are  
14 any studies showing there are not problems.

15 But, now, in Alabama, although Alabama has  
16 heartily endorsed -- all of its courts have endorsed  
17 Batson as it applies to race, and in each of its  
18 extensions to civil litigation and against defendants as  
19 well as plaintiffs. But at the same time, there were over  
20 40 appellate opinions issued by the Alabama Court of  
21 Criminal Appeals last year that had to address Batson  
22 issues that were raised on appeal.

23 QUESTION: Well, and I also think that the Ninth  
24 Circuit adopted its rule, as I understand it, only in  
25 1992, last year, so it might be too soon to decide whether



1     there've been any problems or not.

2             MS. BRASFIELD: Chief Justice Rehnquist, I agree  
3     with that. I also think that if Batson were extended to  
4     gender, there is a clear indication that it would cause  
5     problems in Alabama and in many States. I can't believe  
6     that Alabama is unique in struggling with the practical  
7     application of Batson even as it applies to race, as --  
8     and I think that having it to apply to gender also would  
9     increase the problems tremendously.

10            In paternity cases, for instance, which is what  
11    I see regularly, Alabama adjudicated 8,000 paternities  
12    last year. Most of these trials take no more than half a  
13    day, even when you're selecting a jury. They're quickly  
14    handled. They have -- usually they have some expert  
15    testimony and some HLA or DNA tests, and they are fairly  
16    rapidly decided.

17            You can -- it can be envisioned that you'd spend  
18    twice as long on the voir dire and jury selection as you  
19    would actually trying the cases. In addition, I think  
20    there would be a lot greater chance for an allegation of  
21    error in those cases, so that the appeals system would be  
22    overloaded as well with Batson issues.

23            QUESTION: Well, may I ask you, in the trial of  
24    those cases is the fact pattern that we've seen in this  
25    case characteristic of most of them?

1 MS. BRASFIELD: The fact pattern in this case --

2 QUESTION: I mean, defense counsel will strike  
3 all of one sex and the State's counsel strike all of the  
4 other sex?

5 MS. BRASFIELD: This is the first case that I  
6 have seen where that type of striking has been apparent.

7 QUESTION: So this isn't necessarily a problem  
8 here for --

9 MS. BRASFIELD: So this is not necessarily. It  
10 is certainly not something that has been advised by the  
11 State. It was apparently this particular litigator's --  
12 the two litigators' choices.

13 QUESTION: But that sort of undercuts the reason  
14 for your fear that if we -- if we decide in the  
15 petitioner's favor here, that your prosecution of these  
16 cases is going to be made unmanageable?

17 MS. BRASFIELD: The only thing that would make  
18 it unmanageable is that the -- if you reduced either side.  
19 It's not a question of whether there is all of one panel  
20 or all of another, or if all of the strikes are used,  
21 because this Court and the State's court -- State courts  
22 have held that if even one strike appears to be based on  
23 gender or can show a prima facie case --

24 QUESTION: If it appears to be. But, I mean,  
25 isn't that the -- doesn't that raise a question about the

1 nature of the prima facie case. As so members -- so many  
2 members of the Court have pointed out, you can't strike  
3 anybody without striking someone of one gender or another,  
4 and therefore you've got to have something more than that  
5 to make a prima facie case.

6 You had a prima facie case, we are all agreed, I  
7 guess, here, but it doesn't follow that one strike of one  
8 person is going to appear prima facie to be motivated by  
9 gender, does it?

10 MS. BRASFIELD: No, not that one strike of one  
11 person would. But if you have six or eight strikes, or  
12 five or nine strikes --

13 QUESTION: And they were all of the same gender.

14 MS. BRASFIELD: They are one --

15 QUESTION: Then you've got one.

16 MS. BRASFIELD: You know, at what point would  
17 you decide you've crossed the line? If you're using, say,  
18 two more strike against one gender than the other in  
19 Alabama, the State courts have held that if you reduce a  
20 racial ratio in the venire significantly when reaching the  
21 petit jury, that that, in itself, can be a prima facie  
22 case. So that you're really in a position where you might  
23 have to have a proportional jury in order to avoid a  
24 Batson challenge, or you would have to be prepared to give  
25 a reason for each one of your strikes if you didn't have a

1 proportional jury.

2 QUESTION: May I ask you a question about your  
3 procedure in Alabama, this alternate striking? Is it  
4 correct that -- I gather a lot of these are peremptory  
5 strikes, but is it also -- and it must be true also that  
6 you can have strikes for cause as you go down the line,  
7 and not have those counted against you, is that right?

8 MS. BRASFIELD: Yes, Justice Stevens. In this  
9 case there were 36 on the original panel; three of them  
10 were struck for cause by the court.

11 QUESTION: I see. And the person just doesn't  
12 lose -- and then he gets another strike if the judge  
13 agrees with him on the strike for cause.

14 MS. BRASFIELD: That's right. That doesn't  
15 enter into it. The actual peremptory strikes begin after  
16 the removal of the people who are struck for cause.

17 QUESTION: I see.

18 QUESTION: As -- would you describe again what  
19 test in Batson cases the Alabama courts are now using?  
20 Because, I mean, it seems to me that one of the  
21 consequences of adopting the rule that the petitioners  
22 want here, would be to compel Alabama to be less rigorous  
23 in its application of Batson. I'm not sure that we have  
24 required Alabama to apply such a rigorous rule. What is  
25 the rule they now use?



1 MS. BRASFIELD: The proportion of minorities to  
2 the majority race on the venire is considered as one of  
3 the elements. It's not the only one; in individual cases  
4 they might consider other matters.

5 But there have been cases in which the very fact  
6 that either more strikes were used against the minority  
7 than against the majority or that the result was that --  
8 for instance, if you had eight strikes and you used two of  
9 them against blacks, but there were only two blacks in the  
10 panel, and so -- or three blacks in the panel -- so that  
11 you reduced the proportion considerably, that would be one  
12 of the things they would look at in determining a prima  
13 facie case. That, in itself, could be considered a prima  
14 facie case.

15 QUESTION: And one could hardly afford to apply  
16 that rigorous a rule to another category of strikes, or at  
17 least another major one as sizeable as sex discrimination.

18 MS. BRASFIELD: I think that that is true. I  
19 think that there would have to be some other way to handle  
20 it, and I am not prepared to say what that could be as far  
21 as -- as applying Batson, how that could be done. Now,  
22 there are other situations that have been done.

23 One thing I want to mention is that as well as  
24 the community at large not being harmed, because men and  
25 women both sit on the juries, and because these particular

1 men and women did not feel excluded from the system  
2 because, they probably sat on another jury during the same  
3 term of court, and because they were actually struck in  
4 fairly equal numbers, the fact is that under the facts of  
5 this case and the overwhelming evidence that was there, it  
6 is very hard to see how the defendant could be harmed.

7 Because I don't think he was found to be the  
8 father of this child because of a biased all-female jury;  
9 I think he was found to be the father of this child  
10 because of the overwhelming evidence that he is.

11 QUESTION: Justice O'Connor explained that  
12 the -- one of the problems from your point of view is that  
13 the right is being asserted by the defendant, but the  
14 constitutional protection is afforded to the potential  
15 juror. So every time you're talking about, well, the  
16 defendant is or is not likely to be affected, it's the --  
17 it's the harm to the potential juror as a result of  
18 stereotyping because of one's birth status, that's the  
19 constitutional injury that's at stake here.

20 MS. BRASFIELD: Yes, Your Honor. I understand  
21 what you're saying, I think, but I feel that in this  
22 particular case, in the first place they are struck by  
23 number and the jurors don't know what their number is. If  
24 one side is striking men and the other side is striking  
25 women and then are reduced in equal numbers, then I do not

1 see how they can be harmed by that knowledge.

2 I think that part of our problem in Alabama may  
3 be contributed to by the fact that we use the struck jury  
4 method, which gives us this basically unlimited number of  
5 strikes, limited only by the number that's on the panel to  
6 begin with. The State of Alabama Bar Association has  
7 already recognized that Alabama is having problems and is  
8 having too many appeals on this issue, and they have  
9 appointed a panel of -- a committee of judges and lawyers  
10 to examine Alabama's jury system and see if going to a  
11 different or a revised peremptory strike method, such as  
12 is used in the Federal courts or some other court, might  
13 alleviate a lot of the problem.

14 I think that there are other States who don't  
15 seem to be having particular problems with Batson or with  
16 gender strikes, and have been able to work this out.

17 QUESTION: So if there is a constitutional  
18 injury and it's a problem of the mechanics of the State  
19 system that could be fixed, as seems to be your --

20 MS. BRASFIELD: Then I think Alabama deserves an  
21 opportunity to try to fix that, if that is what is  
22 happening.

23 QUESTION: Well, certainly, there would be an  
24 impetus to fix it if the Court said that Batson applies to  
25 gender.

1 (Laughter.)

2 MS. BRASFIELD: I think there would be an  
3 impetus to go to proportional juries or do away with the  
4 peremptory strike. I think it could come -- become so  
5 complicated that --

6 QUESTION: I'm sorry, I wasn't -- perhaps I  
7 didn't understand you correctly. You said in places that  
8 have -- don't have this struck jury system, like the  
9 Federal courts, they weren't having the problems with  
10 implementing Batson, either for sex or for race, the way  
11 Alabama is because it's got this unusual struck juror  
12 system.

13 MS. BRASFIELD: Uh --

14 QUESTION: So that if you -- if you fixed the  
15 way your -- you strike jurors, then you might not have any  
16 difficulty administering Batson for race or for sex.

17 MS. BRASFIELD: But I --

18 QUESTION: I thought that's what you had said.

19 MS. BRASFIELD: Yes, that is what I said, but I  
20 do think that because it is already the -- the problem of  
21 gender strikes in Alabama is not a pervasive problem, that  
22 the State should have the opportunity to try to correct it  
23 on its own.

24 And Mr. Dreeben seems to think that there is a  
25 problem in the Federal system, also. If that is true, I



1 think that this Court's supervisory powers could well  
2 allow this Court to cure that system without reaching the  
3 States in your level.

4 I think that applying Batson to gender in the  
5 situation that Alabama has at this point would cause great  
6 slowdown of the cases moving through the courts, and would  
7 raise more problems than it could possibly cure.

8 If there are no further questions.

9 CHIEF JUSTICE REHNQUIST: Thank you, Ms.  
10 Brasfield.

11 The case is submitted.

12 (Whereupon, at 11:02 p.m., the case in the  
13 above-entitled matter was submitted.)  
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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

J.E.B. V. T.B.

CASE 92-1239

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)

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