

to be based upon an overbroad generalization about the role of women as a class in society, and the administrative convenience served could not justify it.¹⁸²³

Even when the negative “stereotype” that is evoked is that of a stereotypical male, the Court has evaluated this as potential gender discrimination. In *J. E. B. v. Alabama ex rel. T. B.*,¹⁸²⁴ the Court addressed a paternity suit where men had been intentionally excluded from a jury through peremptory strikes. The Court rejected as unfounded the argument that men, as a class, would be more sympathetic to the defendant, the putative father. The Court also determined that gender-based exclusion of jurors would undermine the litigants’ interest by tainting the proceedings, and in addition would harm the wrongfully excluded juror.

Assumptions about the relative positions of the sexes, however, are not without some basis in fact, and sex may sometimes be a reliable proxy for the characteristic, such as need, with which it is the legislature’s actual intention to deal. But heightened scrutiny requires evidence of the existence of the distinguishing fact and its close correspondence with the condition for which sex stands as proxy. Thus, in the case that first expressly announced the intermediate scrutiny standard, the Court struck down a state statute that prohibited the sale of “non-intoxicating” 3.2 beer to males under 21 and to females under 18.¹⁸²⁵ Accepting the argument that traffic safety was an important governmental objective, the Court emphasized that sex is an often inaccurate proxy for other, more germane classifications. Taking the statistics offered by the state as of value, while cautioning that statistical analysis is a “dubious” business that is in tension with the “normative philosophy that underlies the Equal Protection Clause,” the Court thought the correlation between males and females arrested for drunk driving showed an unduly tenuous fit to allow the use of sex as a distinction.¹⁸²⁶

Invalidating an Alabama law imposing alimony obligations upon males but not upon females, the Court in *Orr v. Orr* acknowledged that assisting needy spouses was a legitimate and important governmental objective. Ordinarily, therefore, the Court would have considered whether sex was a sufficiently accurate proxy for dependency, and, if it found that it was, then it would have concluded

¹⁸²³ *Taylor v. Louisiana*, 419 U.S. 522 (1975). The precise basis of the decision was the Sixth Amendment right to a representative cross section of the community, but the Court dealt with and disapproved the reasoning in *Hoyt v. Florida*, 368 U.S. 57 (1961), in which a similar jury selection process was upheld against due process and equal protection challenge.

¹⁸²⁴ 511 U.S. 127 (1994).

¹⁸²⁵ *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁸²⁶ 429 U.S. at 198, 199–200, 201–04.