SUPREME COURT OF THE UNITED STATES

No. 92-1239

J. E. B., PETITIONER *v.* ALABAMA EX REL. T. B.
ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA
[April 19, 1994]

JUSTICE O'CONNOR, concurring.

I agree with the Court that the Equal Protection Clause prohibits the government from excluding a person from jury service on account of that person's gender. *Ante*, at 8–10. The State's proffered justifications for its gender-based peremptory challenges are far from the "`exceedingly persuasive'" showing required to sustain a gender-based classification. *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724 (1982); *ante*, at 11–13. I therefore join the Court's opinion in this case. But today's important blow against gender discrimination is not costless. I write separately to discuss some of these costs, and to express my belief that today's holding should be limited to the *government's* use of gender-based peremptory strikes.

Batson v. *Kentucky*, 476 U. S. 79 (1986), itself was a significant intrusion into the jury selection process. *Batson* mini-hearings are now routine in state and federal trial courts, and *Batson* appeals have proliferated as well. Demographics indicate that today's holding may have an even greater impact than did *Batson* itself. In further constitutionalizing jury selection procedures, the Court increases the number of cases in which jury selection—once a sideshow—will become part of the main event.

For this same reason, today's decision further erodes the role of the peremptory challenge. The peremptory challenge is "a practice of ancient origin" and is "part of our common law heritage." *Edmonson* v. *Leesville Concrete Co.,* 500 U. S. 614, 639 (1991)

(O'CONNOR, J., dissenting). The principal value of the peremptory is that it helps produce fair and impartial juries. *Swain* v. *Alabama*, 380 U. S. 202, 218–219 (1965); Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545, 549–558 (1975). "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury." *Holland* v. *Illinois*, 493 U. S. 474, 484 (1990) (internal quotation marks and citations omitted). The peremptory's importance is confirmed by its persistence: it was well established at the time of Blackstone and continues to endure in all the States. *Id.*, at 481. Moreover, "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U. S., at 220. Indeed, often a reason for it cannot be stated, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's "`bare looks and gestures.'" *Ibid.* That a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous. Cf. V. Starr & M. McCormick, Jury Selection 522 (1993) (nonverbal cues can be better than verbal responses at revealing a juror's disposition). Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge. But, as 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. We also increase the possibility that biased jurors will be allowed onto the jury, because sometimes a lawyer will be unable to provide an acceptable gender-neutral explanation even though the lawyer is in fact correct that the juror is unsympathetic. Similarly, in jurisdictions where lawyers exercise their strikes in open court, lawyers may be deterred from using their peremptories, out of the fear that if they are unable to justify the strike the court will seat a juror who knows that the striking party thought him unfit. Because I believe the peremptory remains an important litigator's tool and a fundamental part of the process of selecting impartial juries, our increasing limitation of it gives me pause.

Nor is the value of the peremptory challenge to the litigant diminished when the peremptory is exercised in a gender-based manner. We know that like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. See R. Hastie, S. Penrod, & N. Pennington, Inside the Jury 140–141 (1983) (collecting and summarizing empirical studies). Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case. "`Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them.'" *Beck* v. *Alabama*, 447 U. S. 625, 642 (1980). Individuals are not expected to ignore as jurors what they know as men—or women.

Today's decision severely limits a litigant's ability to act on this intuition, for the import of our holding is that any correlation between a juror's gender and

attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact. I previously have said with regard to *Batson:* "That the Court will not 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." *Brown* v. *North Carolina*, 479 U. S. 940, 941–942 (1986) (O'CONNOR, J., concurring in denial of certiorari). Today's decision is a statement that, in an effort to eliminate the potential discriminatory use of the peremptory, see *Batson*, 476 U. S., at 102 (Marshall, J., concurring), 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 *Batson* to gender we have added an additional burden to the state and federal trial process, taken a step closer to eliminating the peremptory challenge, and diminished the ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes.

These concerns reinforce my conviction that today's decision should be limited to a prohibition on the government's use of gender-based peremptory challenges. The Equal Protection Clause prohibits only discrimination by state actors. In *Edmonson*, *supra*, we made the mistake of concluding that private civil litigants were state actors when they exercised peremptory challenges; in *Georgia* v. *McCollum*, 505 U. S. ___, ___ (1992), we compounded the mistake by holding that criminal defendants were also state actors. Our commitment to eliminating discrimination from the legal process should not allow us to forget that not all that occurs in the courtroom is state action. Private civil litigants are just that—*private* litigants. "The government erects the

platform; it does not thereby become responsible for all that occurs upon it." *Edmonson*, 500 U. S., at 632 (O'CONNOR, J., dissenting).

Clearly, criminal defendants are not state actors. "From arrest, to trial, to possible sentencing and punishment, the antagonistic relationship between government and the accused is clear for all to see . . . . [T]he unique relationship between criminal defendants and the State precludes attributing defendants' actions to the State . . . ." *McCollum*, *supra*, at ___ (O'CONNOR, J., dissenting) (slip op., at 6). The peremptory challenge is "`one of the most important of the rights secured to the *accused*.'" *Swain*, 380 U. S., at 219 (emphasis added); Goldwasser, Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 Harv. L. Rev. 808, 826–833 (1989). Limiting the accused's use of the peremptory is "a serious misordering of our priorities," for it means "we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death." *McCollum*, *supra*, at ___ (THOMAS, J., concurring in judgment) (slip op., at 3).

Accordingly, I adhere to my position that the Equal Protection Clause does not limit the exercise of peremptory challenges by private civil litigants and criminal defendants. This case itself presents no state action dilemma, for here the State of Alabama itself filed the paternity suit on behalf of petitioner. But what of the next case? 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.