

The Unconstitutionality of Gender Based Peremptory Challenges: *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994)

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NOTE

THE UNCONSTITUTIONALITY OF GENDER BASED PEREMPTORY CHALLENGES The United States Supreme Court's Review of *J.E.B. v. Alabama ex rel. T.B.*¹

I. INTRODUCTION

Peremptory challenges by definition² permit both the plaintiff and the defendant to strike a limited number of potential jury members without stating a reason. These challenges, which allow the striking party to remain silent on the reasons behind the strike, provide a potential platform for unconstitutional discrimination in the jury selection process. This potential for discrimination has resulted in limitations being placed on peremptory challenges exercised for purely racial reasons. On April 19, 1994, the United States Supreme Court delivered an opinion holding that the Equal Protection Clause of the Fourteenth Amendment also prohibits discrimination on the basis of gender in jury selection through the use of the peremptory challenge in *J.E.B. v. Alabama ex rel. T.B.*³ Concentrating on the similarities between the plight of women and racial minorities in the history of the United States, the Court extended the previous limitations on peremptory challenges from race to gender.⁴

This decision analysis will first provide a synopsis of the facts and procedural holdings of *J.E.B.* The analysis will then focus on a number of related opinions which form the groundwork upon which the holding in this case is based. Finally, an evaluation of the case will be presented, which will include the potential problems the decision will create in future jury trials.

1. 114 S. Ct. 1419 (1994).

2. Peremptory challenge is defined as:

The right to challenge a juror without assigning, or being required to assign, a reason for the challenge. In most jurisdictions each party to an action, both civil and criminal, has a specified number of such challenges and after using all his peremptory challenges he is required to furnish a reason for subsequent challenges.

BLACK'S LAW DICTIONARY 1136 (6th ed. 1990).

3. *J.E.B.*, 114 S. Ct. at 1430.

4. *Id.* at 1421. The Court held that "gender, like race, is not a constitutional indication of juror competence." *Id.* More information and background on the race-based limitation on the exercise of peremptory challenges will be provided later in this decision analysis.

II. STATEMENT OF THE CASE

On behalf of T.B., the mother of a minor child, the State of Alabama filed a complaint in the District Court of Jackson County, Alabama for paternity and child support against the petitioner J.E.B.⁵ In October 1991, the case was called for trial and a panel of thirty-six potential jurors, consisting of twelve males and twenty-four females, was assembled.⁶ The court excused three of these jurors for cause, leaving only ten males among the thirty-three possible jury members.⁷ The State, acting on behalf of the mother, then used nine of its ten peremptory strikes to remove male jurors, while at the same time the petitioner used all but one of his strikes to remove female jurors.⁸ As a result of these peremptory strikes, all of the selected jurors were female.

Before the jury was empaneled, the petitioner objected to the peremptory challenges made by the State on the ground that they were exercised against the male jurors solely on the basis of gender, and therefore were in violation of the Equal Protection Clause of the Fourteenth Amendment.⁹ The court, however, rejected the claim of the petitioner, and the empaneled all-female jury found the petitioner to be the child's father.¹⁰

Subsequently, the Alabama Court of Civil Appeals affirmed the decision of the District Court.¹¹ The Supreme Court of Alabama denied certiorari in October of 1992.¹² The United States Supreme Court granted certiorari to resolve the question of whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race, a question which had created a conflict of authority among the lower courts.¹³ Upon review, the Court determined that intentional

5. *Id.*

6. *Id.* at 1421-22.

7. *Id.* at 1422.

8. *Id.* It is important to note that both the respondent and the petitioner used peremptory strikes to remove jurors on an apparent gender basis.

9. The petitioner argued that the reasoning and logic of *Batson v. Kentucky*, 476 U.S. 79 (1986), similarly forbids intentional discrimination on the basis of gender. *J.E.B.*, 114 S. Ct. at 1422.

10. Not only did the jury find the petitioner to be the father of the child, but the court also entered an order directing the petitioner to pay child support to the respondent. On post-judgment motion, the court again ruled that *Batson* did not extend to gender-based peremptory challenges. *J.E.B.*, 114 S. Ct. at 1422.

11. *J.E.B. v. Alabama*, 606 So. 2d 156 (Ala. Civ. App. 1992). The Court of Civil Appeals relied on Alabama precedent to reach this decision. *See, e.g., Murphy v. State*, 596 So. 2d 42 (Ala. Crim. App. 1991), *cert. denied*, 60 U.S.L.W. 3881 (Oct. 5 1992).

12. *J.E.B.*, 114 S. Ct. at 1422 (citing No. 1911717 (Ala. Oct. 23, 1992)).

13. *Id.* at 1422, n.1.

discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where the discrimination concerns stereotypes which categorize the relative abilities of men and women.¹⁴

III. BACKGROUND OF THE LAW

While the Constitution does not expressly confer a right to peremptory challenges, those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury.¹⁵ In its analysis, the *J.E.B.* Court identified a number of prior related decisions which helped determine the constitutional limitations to which peremptory challenges should be subjected. These previous cases illustrate the difficulties that arise in balancing the desire for an unbiased jury provided by peremptory challenges against the discrimination an individual defendant or juror may be subjected to by these unchallenged exclusions.

A majority of cases leading up to the Court's broad decision concerning gender-based strikes in *J.E.B.* dealt with racial discrimination through the use of the peremptory challenge. Historically, the types of discrimination suffered by racial minorities and women have differed. In the context surrounding peremptory challenges, however, the similarities between the discrimination experienced by racial minorities and women overpower any differences.¹⁶

The Supreme Court's 1986 decision in *Batson v. Kentucky*¹⁷ was the first in a string of cases that provided the basis for the holding in *J.E.B.* In *Batson*, which was a trial of a black criminal defendant, the prosecutor used his peremptory challenges to strike all four black persons on the venire, leaving a jury composed entirely of white persons.¹⁸ The defense counsel unsuccessfully moved to discharge the jury on the ground that the removal of the black veniremen violated the petitioner's rights under the Sixth and Fourteenth Amendments.¹⁹ In its reversal of the trial court, the Supreme Court followed the holding of a one hundred year-

14. *Id.* The court limited the holding to discrimination by state actors. Note that the discrimination in this particular case was directed against male jurors and not female jurors.

15. *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965) and *Stilson v. United States*, 250 U.S. 583, 586 (1912)).

16. Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992).

17. 476 U.S. 79 (1986).

18. *Id.* at 82-83.

19. *Id.* at 83. The defense counsel's arguments were based on both the right to a jury drawn from a cross section of the community under the Sixth and Fourteenth Amendments and for equal protection under the law under the Fourteenth Amendment. The trial judge

old case,²⁰ while overruling another more recent case,²¹ to hold that the Equal Protection Clause forbids the prosecutor²² from challenging potential jurors either solely because of their race or on the assumption that black jurors will be unable to be impartial.²³

Following the decision in *Batson*, the Supreme Court delivered five more opinions dealing with the use of peremptory challenges, with the immediate goal of making it more difficult to engineer all-white juries.²⁴ In *Edmonson v. Leesville Concrete Co.*,²⁵ the Court extended the limitations on the peremptory challenge to private litigants in a civil case.²⁶ In deciding whether or not to make this extension, the Court first recognized that the "Constitution's protection of individual liberty and equal protection apply in general only to actions by the government."²⁷ Based on the application of the test set forth in *Lugar v. Edmondson Oil Co.*,²⁸ the peremptory challenges made by the defendant in the District Court

observed that the parties were entitled to use the peremptory challenges to strike anybody they wanted to, and denied the motion on this basis. *Id.*

20. See *Strauder v. West Virginia*, 100 U.S. 303 (1880). In this case, the Court held that racial discrimination in the jury selection procedure offended the Equal Protection Clause, while at the same time recognizing that the defendant had no right to a jury composed in whole or in part of persons of his own race. *Batson*, 476 U.S. at 85.

21. *Batson*, 476 U.S. at 92-93. The Court rejected the high burden of proof that was required by a previous holding in *Swain v. Alabama*, 380 U.S. 202 (1965). In *Swain*, the prosecutor used the State's peremptory challenges to strike the six black persons on the petit jury venire. The Court recognized that the Equal Protection Clause placed some limits on the exercise of peremptory challenges, but required the defendant to show the prosecutor's systematic discriminatory use of the peremptory challenges against Negroes over a period of time. *Swain*, 380 U.S. at 227.

22. This opinion was limited to the peremptory challenges made by the prosecution. The Court stated that it expressed no view on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel. *Batson*, 476 U.S. at 89 n.12.

23. *Batson*, 476 U.S. at 89. Chief Justice Burger, in dissent, pointed out that the holding in *Batson* was so extraordinary because it was based on a constitutional argument, equal protection, that the petitioner expressly declined to raise. *Id.* at 112 (Burger, C.J., dissenting).

24. Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CN. L. REV. 1139, 1141 (1993). See *Holland v. Illinois*, 493 U.S. 474 (1990); *Powers v. Ohio*, 111 S. Ct. 1364 (1991); *Hernandez v. New York*, 111 S. Ct. 1859 (1991); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991); *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

25. 111 S. Ct. 2077 (1991).

26. *Id.* at 2080.

27. *Id.* at 2082 (citing *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988)).

28. 457 U.S. 922. This test was used to determine whether a private litigant can be considered a government actor. The first part of the test is whether the constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority. The second part of the test centers around whether the litigant in all fairness must be deemed a government actor. *Id.* at 937.

were determined to be state actions.²⁹ Further, the civil litigants were given standing to raise the excluded juror's equal protection rights.³⁰

Next in the string of cases decided after *Batson* was the Court's 1992 decision in *Georgia v. McCollum*.³¹ This case extended the limitations already placed on the peremptory challenges to "prohibit a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges."³² The Court, in coming to this conclusion, identified and answered four questions to determine the constitutional limitations on the peremptory challenge.³³ Upon answering these questions, the Court powerfully stated that regardless of who invokes the discriminatory challenge, the harm is the same—the juror is subjected to unconstitutional open and public discrimination.³⁴ In an emotional and poignant dissent, Justice Scalia stated his belief that it was absurd to classify a criminal defendant as someone acting on behalf of the state.³⁵

Although the Supreme Court has been very active in extending the racial limitations placed on peremptory challenges in the eight years since *Batson*, other courts have been unwilling to extend the peremptory challenge in ways other than race. The Third Circuit would not extend protection against peremptory challenges to the use of strikes based on

29. *Edmonson*, 111 S. Ct. at 2083. In dissent, Justice O'Connor stated that not everything that happens in a courtroom is a state action and that peremptory challenges by private litigants are fundamentally a matter of private choice. *Id.* at 2089 (O'Connor, J., dissenting).

30. *Id.* at 2087. Normally, a litigant would not be able to raise the third party interest of another. Because of the close relationship between the juror and the litigant and the inability of the juror to protect his or her own rights, the Court allowed the litigant to raise these rights. *Id.*

31. 112 S. Ct. 2348 (1992).

32. *Id.* at 2359.

33. *Id.* at 2353. In deciding whether the Constitution prohibits criminal defendants from exercising discriminatory peremptory challenges, the Court identified four questions that need answering:

First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case.

Id.

34. *Id.*

35. *Id.* at 2364 (Scalia, J., dissenting). Justice Scalia believed that the decision in *McCollum* was using the Constitution to destroy the right of the criminal defendant to secure a fair jury through the use of the peremptory challenge. *Id.* at 2365.

the language the jurors spoke,³⁶ while the Minnesota Supreme Court refused to expand the reasoning in *Batson* to challenges based on religion.³⁷

The Court's views on gender-based classifications can best be summarized by a review of its holding in *Mississippi University for Women v. Hogan*.³⁸ Although this case does not directly relate to peremptory challenges, it clearly states that for a gender-based classification to be valid, there must be a showing of an "'exceedingly persuasive justification' for the classification."³⁹ The classification must also serve important government objectives, and the discriminatory means employed must be "substantially related to the achievement of those objectives."⁴⁰

IV. EVALUATION OF THE CASE

The United States Supreme Court granted certiorari to hear *J.E.B. v. Alabama* with the intent of answering the question which had created a conflict of authority: whether or not the Equal Protection Clause forbids peremptory challenges on the basis of gender.⁴¹ In holding that such peremptory challenges do violate the Equal Protection Clause, the Court expanded the limitations it had previously imposed on peremptory challenges made for racial reasons.

Justice Blackmun's analysis began with a recognition of where the Court currently stands with regard to peremptory challenges by discussing *Batson*⁴² and the string of cases which followed. In doing so, Blackmun stated that the Court has repeatedly recognized that "whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from

36. See *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir. 1994). Five jurors were dismissed in this case because of their ability to speak Spanish. An argument was made that the jurors were being challenged because they were Latinos. The court determined the peremptory challenges were made for trial-based reasons and refused to extend *Batson* to challenges based on the language the jurors spoke. *Id.* at 871.

37. See *State v. Davis*, 504 N.W.2d 767 (Minn. 1993). Here, the state used a peremptory challenge to strike a black male member of the Jehovah's Witness religion. The court refused to extend *Batson* to strikes made on the basis of religion, saying it would complicate and erode the peremptory challenge unnecessarily. *Id.* at 771.

38. 102 S. Ct. 3331 (1982). In this case, a male student was denied admission to an all-female nursing school because of his sex. The male student filed an action claiming his rights were violated under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 3334.

39. *Id.* at 3336 (quoting *Kirchberg v. Fienstra*, 450 U.S. 455, 461 (1981)).

40. *Id.* (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

41. *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1421 (1994).

42. *Batson v. Kentucky*, 476 U.S. 79 (1986).

state-sponsored group stereotypes"⁴³ Based on this, the Court held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."⁴⁴

To reach this final holding, the Court first examined the history of women jurors in the United States. The Court noted that until 1946, the fundamental fairness of denying women the right to serve on a jury was never questioned by the Court. In that year, the Court recognized that men and women were not fungible and that the exclusion of either sex would change the quality of the community.⁴⁵ The Court then identified a decision from 1975, which explained that restricting from jury service groups "playing major roles in the community cannot be squared with the constitutional concept of a jury trial."⁴⁶

After detailing the extent of discrimination that women have faced regarding jury service, the Court flatly rejected the respondent's argument that because gender discrimination has never reached the same level as discrimination against African-Americans, gender discrimination, unlike racial discrimination, is tolerable in the courtroom.⁴⁷ In striking this argument, the Court determined that it did not need to decide whether women or racial minorities had suffered more, rather, it only needed to acknowledge the long, unfortunate history of sex discrimination "which warrants the heightened scrutiny afforded to all gender-based classifications today."⁴⁸

Central to the decision in *J.E.B.* was the need to determine whether discrimination based on gender in the jury selection process "substantially furthers the State's legitimate interest in achieving a fair and impartial trial."⁴⁹ The Court rejected the argument that the decision to strike all the males from the jury was made because they may have been more sympathetic to the man in a paternity suit,⁵⁰ since this argument is

43. *J.E.B.*, 114 S. Ct. at 1421. Justice Blackmun listed the series of cases which were decided after *Batson* that extended the limitations on peremptory challenges. *Id.*

44. *Id.*

45. *Id.* at 1424 (quoting *Ballard v. United States*, 329 U.S. 187 (1946)).

46. *Id.* (quoting *Taylor v. Louisiana*, 419 U.S. 522 (1975)).

47. *Id.* at 1425.

48. *Id.* The Court also expanded on this to recognize that "gender-based classifications require 'an exceedingly persuasive justification' in order to survive constitutional scrutiny." *Id.* (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) and *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)).

49. *Id.*

50. *Id.* The respondent argued that there was a special State interest in establishing the paternity of the child that justified the gender-based peremptory challenges in this case. The Court made it clear that the only legitimate interest in the exercise of peremptory challenges was securing a fair and impartial jury. *Id.* at 1426 n.8.

based on "the very stereotype the law condemns."⁵¹ According to the Court, the respondent incorrectly assumed that gross generalizations, which would be impermissible if race-based, would somehow be permissible when made on the basis of gender.⁵²

Peremptory challenges, whether based on race or gender, cause harm to not only the litigant, but also the community and the particular juror who is wrongfully excluded.⁵³ The Court focused on the individual jurors, stating that jurors "have a right to nondiscriminatory jury selection procedures,"⁵⁴ which contrary to the contention of the respondent, extends to both men and women.⁵⁵ Accordingly, the Court made a broad and sweeping statement that "[a]ll 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."⁵⁶

The decision in *J.E.B.* does not imply, however, the elimination of all peremptory challenges or conflict with the legitimate interest of a state in securing a fair and impartial jury.⁵⁷ When a party wants to remove a juror, the party can still use a peremptory challenge; however, "gender simply may not serve as a proxy for the bias."⁵⁸ *J.E.B.* requires that a party alleging gender discrimination make a *prima facie* showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike.⁵⁹ This explanation need not rise to the level of a "for cause" challenge,⁶⁰ but need only be based on a characteristic other than gender.⁶¹

V. ANALYSIS

The decision in *J.E.B. v. Alabama*, although supported by prior decisions of the Court, should not be followed. Regardless of the fact that

51. *Id.* at 1421 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

52. *Id.* at 1427.

53. *Id.*

54. *Id.*

55. *Id.* at 1428 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982)).

56. *Id.*

57. *Id.*

58. *Id.* at 1419.

59. *Id.* at 1429.

60. "Typically, attorneys can use challenges for cause if (1) the juror is related to a party; (2) the juror has a unique interest in the subject matter; (3) the juror has served in a related case; or (4) the juror has a 'state of mind' that will prevent him from acting with impartiality and without prejudice toward either party." *Beyond Batson*, *supra* note 16, at 1934 n. 117.

61. *J.E.B.*, 114 S. Ct. at 1430. The Court requires the same procedure as it did with race-based strikes in *Batson*. *Id.*

the Court was able to identify similarities between the discrimination based on gender and race, this case only serves to extend previous questionable holdings. The decision adds further limits to the peremptory challenge, which by definition,⁶² should be exercised by either party without having to give any justification.

Critical to the Court's analysis were the comparisons between the discrimination felt by blacks and women in the history of the United States.⁶³ Accepting *Batson* as being correctly decided, Chief Justice Rehnquist, in dissent, argues that because "racial groups comprise numerical minorities in our society," they warrant "a greater need for protection in some situations, whereas the population is equally divided among men and women."⁶⁴ In this case, to say that male jurors were singled out for discrimination, while at the same time the petitioner was striking females, is a preposterous notion.⁶⁵ The use of the peremptory challenge in this manner was not gender discrimination on either the male or female jurors, but rather the efficient operation of the peremptory challenge to provide a fair and impartial jury.

Perhaps the most questionable reasoning in the case was the continued emphasis on the rights jurors have to nondiscriminatory jury selection procedures.⁶⁶ The Court argued that "[t]he exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system."⁶⁷ Once only a background consideration, the goal of protecting those summoned to serve "has now moved to the center of the analysis."⁶⁸ Giving the stricken jury members such a broad constitutional right often times comes at the expense of the accused.⁶⁹ The peremptory challenge, although not a constitutionally

62. *See supra* note 2.

63. *J.E.B.*, 114 S. Ct. at 1425.

64. *Id.* at 1434-35 (Rehnquist, C.J., dissenting).

65. *Id.* at 1437 (Scalia, J., dissenting). Justice Scalia further noted that the situation would have been different if both sides systematically struck individuals of one group so as to eliminate them from the pool of potential jury members. *Id.*

66. *Id.* at 1427-28.

67. *Id.* at 1428 n.13.

68. Babcock, *supra* note 24, at 1142.

69. Justice Thomas, in a concurring opinion in *McCullum*, emphasized this point by stating:

Our departure from *Strauder* has two negative consequences. First, it produces a serious misordering of our priorities. In *Strauder*, we put the rights of defendants foremost. Today's decision, while protecting jurors, leaves defendants with less means of protecting themselves. . . . In effect, 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.

conferred right,⁷⁰ is one of the most important rights secured to the accused.⁷¹ By adding yet another limitation on the exercise of the peremptory challenge, the Court is further restricting the defendant's powerful tool for use in the selection of an impartial jury.

The opinion in *J.E.B.* by Justice Blackmun was clearly written to provide the framework for subsequent limitations on the peremptory challenge for reasons other than gender. Opening the door for future litigation, the Court stated that the juror has "the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."⁷² Future cases will likely increase the limitations on the peremptory challenge to discrimination based on classifications such as religion and sexual orientation, as well as other possible categories yet unthought of.

The Court, which was not yet ready to eliminate a century old doctrine, stated that the conclusion in *J.E.B.* does not eliminate all peremptory challenges.⁷³ It does go a long way, however, toward that end. Since any correlation between a juror's gender and his or her attitudes in the courtroom was determined to be irrelevant,⁷⁴ it is hard to imagine any peremptory challenges that can stand up to questioning from the opposing party. Although the party making the peremptory challenge may still be able to remove the juror, the questioning alone changes the peremptory challenge into something entirely different than its intended purpose, which is a strike from the jury without a given reason.

If this case is to be followed, which seems likely based on the recent trends of the Court, the decision should be limited to a prohibition only on the government's use of gender-based peremptory challenges, since the Equal Protection Clause prohibits discrimination only by state actors.⁷⁵ In the string of cases following *Batson*, the Court extended the race-based limitation to civil litigants⁷⁶ and defendants in a criminal

Georgia v. McCollum, 112 S. Ct. 2348, 2360 (Thomas, J., concurring).

70. See *supra* note 15 and accompanying text.

71. *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring) (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965)).

72. *Id.* at 1428. It is interesting to note that the Court made this statement in a case in which males were being discriminated against. The Court seemed to be contradicting itself from the start, since there is hardly a historical pattern of discrimination against males. *Id.* at 1436 (Scalia, J., dissenting).

73. *Id.* at 1429.

74. *Id.* at 1432 (O'Connor, J., concurring).

75. *Id.*

76. See *supra* note 25 and accompanying text.

trial.⁷⁷ Since civil litigants and criminal defendants are clearly not state actors, this mistake should not be extended to gender-based limitations as well.⁷⁸

The *J.E.B.* case is likely to have a profound impact on the number of future appeals stemming from criminal and civil jury trials. Since every person excluded from a jury is either male or female, there is a possibility for arguing discrimination in every peremptory challenge that is made. Justice O'Connor recognized this, stating that by "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."⁷⁹

VI. CONCLUSION

The peremptory challenge, which can be used to exclude someone from a jury without giving a reason, is the breeding ground for many types of unconstitutional discrimination. The United States Supreme Court recognized this potential for discrimination and limited the use of peremptory challenges when based on race alone. In *J.E.B. v. Alabama*, the Court places further limitations on the peremptory challenge, stating that these previously unchallenged strikes of potential jury members cannot be based solely on gender. The Court's broad holding achieved this objective by focusing on the Equal Protection Clause and the similarity between discrimination based on gender and race. By providing yet another limitation on the peremptory challenge, the Court took one more step toward the total elimination of this challenge as it is currently known.

JOSEPH D. KUBORN

77. See *supra* note 31 and accompanying text.

78. *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring).

79. *Id.* at 1431 (O'Connor, J., concurring).

